

4-24-01

MARI-

CULTURE

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ALASKA STATE LEGISLATURE

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Administrative Regulation Review Committee

AGENDA

Tuesday, April 24, 2001 2:45pm-4:00pm, State House Affairs, Room 102

- I. Review of new Mariculture Regulations
- II. Review of updated information from Department on Pioneer Homes
- III. Review of recent proposed and approved regulations

This hearing will be teleconferenced

Table of Contents

Chapter	Page
1. Alaska Department of Fish & Game e-mails	1
2. Memorandum from ADF&G Southeast Regional Supervisor of Commercial Fisheries Scott Marshall	20
3. ADF&G's Policy for the Utilization of Natural Occurring Stocks on Farm Sites	24
4. The Legal Basis for On-bottom Aquaculture In Alaska. By Steven White Assistant Attorney General, Alaska Department of Law	38
5. ADF&G Final Decisions and Conditions for Geoduck Aquatic Farm Permits	46
6. ADF&G Ethics Violation	51
7. Regulations and Signed Statement from All 2001 Filed Aquatic Farm Applicants Statewide.	61
8. Conditions Proposed by Alaska Trademark Shellfish To Address ADF&G's Concerns Over Natural Stocks.	72
9. Alaska State Constitution Article VIII. Section 15	77

Scott Kelley

From: Mecum, Doug
Sent: Wednesday, June 02, 1999 4:14 PM
To: Doherty, Phil; Davidson, Bill; Kelley, Scott; Larson, Robert; Marshall, Scott
Cc: Imamura, Ken; Duffy, Kevin; McGee, Steve
Subject: RE: geoducks and DNR

I personally have heartburn with geoduck clam farms because I feel they would disrupt established uses. I also feel granting aquatic stock acquisition permits would not be possible because the stocks are fully utilized. Of course I've been wrong before.

Anyway, right now we are only accepting applications for geoduck farms. Staff needs to comment on this. Ken Imamura can provide some clarity on the process

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

From: Doherty, Phil
Sent: Wednesday, June 02, 1999 3:46 PM
To: Mecum, Doug
Cc: Marshall, Scott; Imamura, Ken; Duffy, Kevin; Kelley, Scott; Larson, Robert
Subject: RE: geoducks and DNR

So while its not possible to say with 100% certainty that a mariculture permit for geoducks would be denied by the Commissioner and the BoF, its safe to say that there is a good possibility it would be denied, if the case was made that wild stock geoducks are being fully utilized and the mariculture of geoducks (on what scale?) would disrupt the existing uses.

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

From: Mecum, Doug
Sent: Wednesday, June 02, 1999 3:11 PM
To: Doherty, Phil
Cc: Marshall, Scott; Imamura, Ken; Duffy, Kevin; Kelley, Scott; Larson, Robert
Subject: RE: geoducks and DNR

You're still a troublemaker, that's for sure.....

This is obviously a tough one. Whether or not a farm permit is ultimately granted for geoducks in SEAK, these sites would still have to get a permit to obtain broodstock or farmstock. The Commissioner would probably not grant a permit to acquire stock if the granting of the permit would unreasonably disrupt established uses. In addition, if the stock is already fully utilized, and a case can be made for that for geoducks, the commissioner would deny the permit and would inform the board that they may need to make an allocation call. In the case of red king crab and scallops, the board found that the stocks were fully utilized and the farms should not be allocated wild stocks. Does that help???

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

From: Doherty, Phil
Sent: Wednesday, June 02, 1999 2:12 PM
To: Kelley, Scott; Pritchett, Marc; Larson, Robert; Marshall, Scott; Davidson, Bill
Cc: Mecum, Doug
Subject: geoducks and DNR

I've received two requests for information on DNR's plan to give permits out for mariculture sites, and in particular geoduck sites. Kyle Johansen (Rep. Bill Williams aid) and Clay Bezenek (Chair geoduck committee - SARDFA) are the two inquiring minds.

Their questions are 1) does ADFG know what DNR is doing? and 2) why are ADFG and SARDFA putting time and money into wild geoduck management/research/harvest if DNR will be allowing geoduck mariculture that may drive the wild harvest out of business?

Scott Kelley

From: Imamura, Ken
Sent: Thursday, August 05, 1999 4:46 PM
To: Kelley, Scott
Subject: RE: Mariculture Questions

I don't envy your getting hit with the proposal formulation task. I'm from the government, and I'd like to help. Kidding aside, I have had a few thoughts regarding acquisition permits and other aspects of the mariculture regulations and policies, so if you care to confer, I am more than willing.

To try to answer your questions. Hardening areas, generally requested in conjunction with suspended culture oyster and mussel operations, are racks or rocks in the intertidal area on which the shellfish intended for market are exposed to the tidal cycles. Some operators and some markets do not require their use. All hardening does is exercise the adductors so the oysters and mussels (which generally just leave their shells open and feed continuously in suspended culture) will have the necessary strength to keep their shells closed while they are waiting to be bought at your friendly neighborhood grocer.

FLUPSY is an acronym for Floating Upwelling System. It is a raft-like affair that uses the tidal current or a powered paddlewheel to move water upwards through screened tubs of post-settlement shellfish. It basically bridges the gap between the hatchery, where the wee bairns are hatched and first settle, and the growout beds, where they are placed to reach market size. The FLUPSY is an economical means of using naturally available plankton to feed small juvenile shellfish that would eat a hatchery out of feedstock in short order. As they grow, the small spat are also hardened to the ambient and prevalent natural conditions and prepared for planting into a growout facility, which represents the big, bad, world.

No available literature even remotely suggests that geoduck can be successfully and long-term cultured in lantern nets.

I am now receiving copies of the consolidated RFAIs. It is quite clear that I am the heavy in that process. I will try to remember to copy Carol, and you, when I finally get around to putting them together by region (they came dribbling in as DGC completed them).

I had intended to distribute a regional copy of responses to the RFAIs to each of the RRDBs (Carol, for R-1), for further copying and distribution to any interested staff. However, I know you are now the guy in charge, so will try to remember to make you your very own.

Once again, if you have an interest in meeting on proposal development, I'd be happy to do so. I have taken the liberty to put the RRDBs for the other regions on notice that a proposal process is in progress at R-1. Other regions have similar issues, though not necessarily for geoducks, and they are aware that any mariculture regulatory proposal has possible implications for them, also.

I hope I've answered your questions. We may have different perspectives on resource use, but I like to think that we both agree that whatever the use might be, it should be legal, fair, and responsible. On that happy note, I wish you a good day. Lisa and I are going fishing this afternoon, for big fish (a pink is a monster to an eleven-year old).

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

From: Kelley, Scott
Sent: Thursday, August 05, 1999 3:31 PM
To: Imamura, Ken
Subject: Mariculture Questions

Hi Ken,

I have a couple of questions for you in regard to these geoduck farm apps.

- What is a hardening area for?
- What is a Flupsy?
- Can you raise geoducks in lantern nets (as proposed by Lee Falk application)
- Do you have copies of the consolidated RFAI's that went to DGC?
- When you get applicant responses to RFAI's (August 13) can I get copies?

3

Scott Kelley

From: Carol Denton [carol_denton@adfg.state.ak.us]
Sent: Monday, August 30, 1999 2:49 PM
To: Scott Kelley
Subject: FW: Canoe Lagoon littlenecks

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

From: Denton, Carol
Sent: Tuesday, July 06, 1999 8:43 AM
To: Imamura, Ken
Subject: RE: Canoe Lagoon littlenecks

The only response I got was a phone call from Brian Lynch in Petersburg (6-10). He has no problem with this operation; they are basically doing what we allow (albeit usually WITH a permit) and have been cooperative with Dept. staff. He did note that the Development Plan page has a column heading, "Maximum Production/Seed Acquisition" and assumes there will be no seed acquisition.

Silence from the other reviewers (application was faxed to Woodby, Kelley, Holmes, Bentz, Chadwick, Bergmann) can be construed as "no objection".

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

From: Imamura, Ken
Sent: Sunday, July 04, 1999 2:20 PM
To: Denton, Carol
Subject: RE: Canoe Lagoon littlenecks

Hi Carol. I am assuming, in the absence of more recent mail from you regarding this amendment request, the rest of the staff does not have severe heartburn over this proposal. I am issuing the amendment on Tuesday, just before I go on leave for three weeks. Please get back to me, if you can, before noon on Tuesday. If you cannot, and have reservations or problems with this amendment, please let Steve McGee know so he can inform me. Hope you had a great Fourth. I got to watch the parade from the comfort of my office window. It was a good day, with a cooling breeze, overcast skies, and warm.

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

From: Denton, Carol
Sent: Thursday, June 10, 1999 2:30 PM
To: Imamura, Ken
Subject: RE: Canoe Lagoon littlenecks

cool. thanks. What?? The Dept. dropped the ball??? I'm SHOCKED!!!! Will solicit comments on Canoe Lagoon from R-1 Comm and Sport Fish

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

From: Imamura, Ken
Sent: Thursday, June 10, 1999 12:35 PM
To: Denton, Carol
Subject: RE: Canoe Lagoon littlenecks

As far as I am concerned (and I concede that I am only one of the reviewers), this is a permitting action after the fact. The cryptic notes I have in my files for this operation and your fax suggest to me that the department dropped the ball on this somewhere. Their sites are on their DNR leases, DEC has certified sites and product for years, there have been no public complaints, and their DFG annual reports clearly indicate sales of

4

littlenecks. The only thing missing in the picture is an amendment to their aquatic farm operation permit. Personally, I don't think we have major concerns, and even if we did, the overwhelming evidence suggests that the lack of formal permit amendments is our fault. I have a feeling that something was lost during the transition from Jim Cochran to Bob Piorkewski and it was nobody's premeditated negligence that precipitated this situation.

I will ask Janetta to send us both faxes of those pages from Mr. Powers' application, since I don't have them either.

At this point, my highest priorities are to review the new applications so I don't make a complete fool of myself during the teleconference and to finalize major amendments to the Seward shellfish hatchery permits. Other than those two pressing items, everything seems to be same old same old. This weekend promises to be a very busy one.

Take care. Let me know if you don't get those pages by midafternoon, tomorrow.

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

From: Denton, Carol
Sent: Thursday, June 10, 1999 11:11 AM
To: Imamura, Ken
Subject: Canoe Lagoon littlenecks

Where are we going with this one? Are you going ahead with the amendment, and therefore need comments? Or are they already legal?

Also (geez, I hate to be a pest), could you pls. fax pages 2, 4, and 6 from Richard Powers' app, #106565. Fax is 225-0599

If these requests are small salamanders compared to the large alligators you're wrestling today, tomorrow is fine.

Carol Denton
Southeast Regional Resource Development Biologist
Alaska Department of Fish and Game
2030 Sea Level Dr., Suite 205
Ketchikan, AK 99901
Voice: 225-9677 Fax: 225-0599
Carol_Denton@adfg.state.ak.us

5

Subject: Re: FW: Sale of wild clams from a farm

Date: Mon, 06 Sep 1999 14:31:47 -0800

From: Ken Imamura <Ken_imamura@fishgame.state.ak.us>

To: Carol Denton <carol_denton@adfg.state.ak.us>

CC: Steven G Mcgee <steve_mcgee@fishgame.state.ak.us>

Acquisition permits allow harvest and direct sale of wild stock, if that wild stock is within the boundaries of a permitted aquatic farm site. We have discussed the legality of this at length with the AG's office and within the mariculture program at HQ. Having established a precedent with three aquatic farm operators in Southeast, it would be difficult for the department to significantly change its permitting practices at this point in the permit review process. Simply put, the standing stock (pre-existing wild stock) on a leased and permitted aquatic farm site becomes the property of the aquatic farm site operator, to be disposed of in any legal manner. This includes commercial harvest and sale.

Precedents and current policies aside, the issue of pre-existing standing stock is knotty. Personally, I believe that the portions of the mariculture regulations addressing acquisition permits intended that wildstock, from both on and off the farm site, could be used for broodstock or for seedstock, not necessarily for harvest for commercial sale. I think that acquisition permits should allow collections of wildstock, either from the farmsite or public waters, for broodstock or seedstock, where that use does not conflict with established uses. Further, I strongly support legislative clarification of the intent of the acquisition permit sections in the statute, development of policies or regulations that clearly define the state's position regarding disposition of pre-existing standing stock on newly permitted farms, and adoption of stipulations for farm permits that will result in long-term conservation of the resource, while allowing farmers to use pre-existing standing stock to support project costs of their operations.

I have proposed meetings to discuss these issues, but have not received much interest or support. I think it would be a good idea for management representatives from the various divisions to get together to develop a comprehensive management plan and a set of operational policies, based on the statutes, regulations, and collective knowledge of our staff.

Carol Denton wrote:

> Has this been discussed & researched? Is there any other basis for allowing
> sale of wild stock that has a farm boundary drawn around it?

>

> -----Original Message-----

> From: Lynch, Brian

> Sent: Monday, August 30, 1999 2:43 PM

> To: Denton, Carol

> Subject: Sale of wild clams from a farm

>

> Has anyone ever asked the Dept. of Law if 16.40.140(e) actually allows the
> sale of clams from a farm that have not actually been grown or propagated
> that farm? I wasn't aware that that was the law that was being "used" to
> allow the wild stock harvest of littleneck clams under provisions of the
> mariculture permit system (ignorance is no excuse). I guess that when we
> quit issuing wildstock harvest permits I then ignored the situation. While I
> am no legal beagle I have my doubts that that is what the legislature
> intended when the statute was written. I would think that that was intended
> was to prevent the wildstock harvest and avoid the situation that we were
> talking about.

>

> What's the verdict?

>

P-3

6

Subject: Re: Aquatic farming regulations
Date: Wed, 15 Sep 1999 09:01:21 -0800
From: "Steve White" <Stephen_White@law.state.ak.us>
To: <Ken_imamura@fishgame.state.ak.us>

How soon do you need a response? I am up to my gills in preparations for the special

>>> Ken Imamura <Ken_imamura@fishgame.state.ak.us> 09/14 5:51 PM >>>
I am trying to convene a meeting, for some time later this month, to discuss what the department's authorities and options are regarding standing stock on sites being selected for new aquatic farm operations. The major issues are still standing stock and what the department can do to manage harvest of standing stock, acquire standing stock for research, cost-recovery, program support, and compelling successful applicants to not simply harvest and run. Although there are many issues connected with the whole process for turning over common property lands to private permit holders, the most contentious issue is the disposal of standing stock. Personally, I have struggled with this question and come up with some options that I would like to have legally reviewed before I broach them to staff.

Options run the gamut from outright refusal based on defects in the technical and economic feasibility of some of the applications, to unconditional issuance of permits. I don't believe the department would seriously consider outright refusal at this point, since I don't think it would withstand legal challenge. Unconditional issuance would allow unrestricted use of the site and standing stock for whatever purpose the applicant desires. If the department does this, it will invite legal challenge from the dive associations, which would see themselves as unfairly disenfranchised. While I don't know which way any legal decision would go, it would be preferable to avoid them, if possible.

I would like to discuss the legality of harvesting sites prior to turning them over to aquatic farming. There are a number of options regarding how to accomplish this and who gets the proceeds.

I would also like to determine if the department has the authority to condition harvest of wildstock to prevent unrestrained harvest under a stock acquisition permit, and what latitude we have in permit conditions in order to do this. For example, can be set an annual harvest limit, in numbers, pounds, or some kind of percentage keyed to standing stock on site, percentage of standing stock in the management area, etc.

Can be modify and constrain size, distribution, and number of permits we issue for any given area, such as bay, management district, registration area, etc. On a related issue, can be limit the number and total size of operations an individual or group can control, either directly or indirectly?

I guess I am looking for answers that state whether or not we currently have the authority to do certain things, and if not, what we need in order to be granted that authority. This comes at a late point in the day, and is somewhat rambling, so if it would help things out to just talk about some of these issues, please contact me. Many thanks.

P-1

7

Subject: Some draft language for consideration


Date: Thu, 16 Sep 1999 14:21:27 -1000

From: "Scott Marshall" <scott_marshall@adfg.state.ak.us>

To: "Ken Imamura" <ken_imamura@fishgame.state.ak.us> ,
"Denton, Carol" <SOUTHEAST/KETCHIKAN/CarolD>

CC: "Robert D Mecum" <doug_mecum@fishgame.state.ak.us>

In sites where significant numbers of geoduck clams exist, we need to craft some language for denying the permits...here is a shot at such language

 Aquatic farm permits for Geoducks - draft denial languaange.doc	<p>Name: Aquatic farm permits for Geoducks - draft denial languaange.doc</p> <p>Type: WINWORD File (application/msword)</p> <p>Encoding: base64</p>
---	---

8

Subject: Re: Aquatic farm permits

Date: Fri, 24 Sep 1999 14:46:38 -0800

From: Ken Imamura <Ken_imamura@fishgame.state.ak.us>

To: "Doug D. Mecum" <doug_mecum@fishgame.state.ak.us>,
Scott L Marshall <scott_marshall@fishgame.state.ak.us>,
Kevin C Duffy <kevin_duffy@fishgame.state.ak.us>

My understanding is that ACMP coordinates public and agency interactions at this point. The preliminary decisions from any and all agencies submitting findings will be available for public review and comment on October 4. Having submitted the department comments, I am reluctant to circumvent the process, regardless of whether the individual files are public or not at this point. I have requested that Jackie return my phone call to discuss this issue. She is on leave today, so I should have an answer to your questions on Monday.

"Doug D. Mecum" wrote:

> I'm not sure - Ken will have to tell us

>

> Scott Marshall wrote:

>

> > Doug, is the stuff Ken sent over to DGC public information...that is will
> > those documents go out to the public as is or will DGC collate and compile
> > them? If they are going out as is then maybe we could provide them to
> > people who inquired...If they are not final "draft" state comments, then
> > when will those final draft comments be available?

> >

> > -----Original Message-----

> > From: Doug D. Mecum [mailto:doug_mecum@fishgame.state.ak.us]

> > Sent: Friday, September 24, 1999 10:30 AM

> > To: Doug Woodby; Scott L Marshall

> > Subject: Re: Aquatic farm permits

> >

> > I think we need to be very careful about what we say until we come up with a
> > final department position on these issues. I did tell Dennis Watson that I
> > had

> > some real problems with the idea of selling standing stocks to finance
> > operations. We did allow it for Rodger Fainters littleneck clam operation
> > because we believed that you had to remove other clam species and get the
> > littleneck densities down to allow for good growing conditions. In
> > otherwords it

> > was done for the purposes of farming - not for cost recovery. We allowed
> > him to

> > sell the clams because it didn't make sense to waste them. That may have
> > been a

> > mistake but it's what we did.

> >

> > Doug Woodby wrote:

> >

> > > Gig Decker, on behalf of SARDF, would like to know where the department
> > > stands on the aquatic farm sites, and he would like to have any available
> > > printed information from us prior to his geoduck committee meeting next
> > > week.

> > > So far, I have seen three documents. One is the internal document
> > > referenced

> > > below, another is the summary of the site visits, and the third is the
> > > analysis by yourself. I don't think we are prepared to release any of
> > > these

> > > at this time.

> > >

P-9

9

Subject: Re: Aquatic Farm meetings
 Date: Wed, 13 Oct 1999 12:25:46 -0800
 From: Jackie Timothy <Jackie_Timothy@gov.state.ak.us>
 Organization: Alaska Office of the Governor
 To: Ken Imamura <Ken_imamura@fishgame.state.ak.us>

Am I invited to this meeting? I promise I'll sit in a corner and be VERY quiet!

Just curious. . .Jackie

Ken Imamura wrote:

> I can poll them, but I think it would be beneficial if it is possible at all
 > to defer these discussions until the department has resolved some
 > professional and legal differences in a meeting currently scheduled for the
 > morning of October 14. In truth, it might be a good idea for me to suggest
 > that someone in DGC attend. Would you or someone as informed as you with
 > the consistency review process and regulatory basis be willing to represent
 > DGC? If so, I can make the request of the commissioner's secretary, who is
 > setting it up.

>
 > Reason I ask for deferment is that staff of both divisions are almost
 > unanimously against on-bottom leases and transfer of standing stock to
 > permit applicants. I do not share this perspective, but am willing, on Oct
 > 14, to discuss the statutory and regulatory basis for their consistency
 > findings and for the limits of the department's permitting authority.

>
 > I am now in the middle of the start of a huge crossfire between industry and
 > the department, and to a certain extent, I do not feel the department has
 > done the consistency review process justice. Part of it is my fault for
 > assuming that people would be professional and impartial in their reviews
 > and supportive of discussion of the issues.

> Jackie Timothy wrote:

>
 > > Would you and other decisionmakers from habitat and CFMD be available to
 > > meet to discuss individual aquatic farm proposals and the conditions
 > > necessary to bring them into consistency with the ACMP on Oct. 7, 8, &
 > > 11, 8-3:30?

P-1

10

we
 tried to co-op with them on. No we've fenced off an existing "public"
 road
 that crossed our land. Great to be working with such a cooperative
 agency.
 Reminds me of my life on the other side. Also selling cows. Our steers
 were
 ready so we gathered them up Thursday. Had a real "rodeo", for some
 reason.
 They are as wild as deer. Have been running free all summer. Look good
 but
 unfortunately one of them jumped the divider in our stock trailer
 yesterday
 and got hung up. Didn't break a leg, but hate to hurt an animal and he
 was
 hanging by one leg - luckily cows are tough. He was barely limping when
 we
 unloaded so decided to sell him rather than bring him home to heal.
 Hopefully the buyers won't notice. Jaci got a bump on her head as a
 result.
 Not sure she likes this end of the ranching business. Oh well.

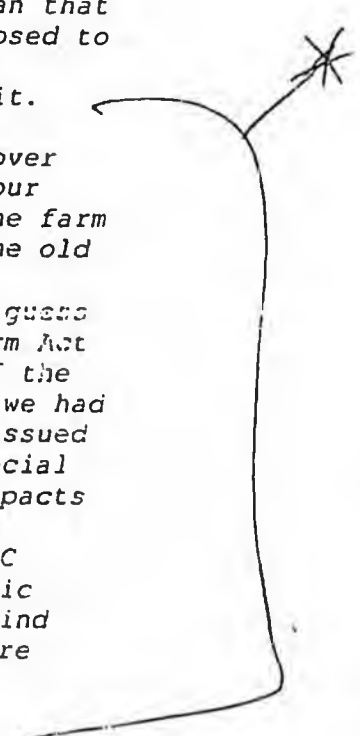
Hello to Bonnie. Got to run. One more load of steers to the sale today.

jim

 > From: Steve McGee <steve_mcgee@fishgame.state.ak.us>
 > To: Jim Cochran <cochran@montrose.net>
 > Subject: Old Business
 > Date: Thursday, October 21, 1999 11:03 AM
 >

> Hi Jim. Has winter set in on the ranch yet? I've seen Gunnison has had
 > the nation's high temperature a couple of times in the last week or so.
 > Maybe that means winter is still holding off for you, too. We've had
 > nothing but rain here for weeks on end. Fortunately, Bob Piorkowski and
 > I managed to sneak away for a moose hunt in mid-September up on the
 > upper Yukon, downstream from Eagle. We lined a canoe about 20 miles up
 > the 70 Mile River. We didn't have the place quite to ourselves, but it
 > was close. There was only one other guy and his dog who also lined a
 > canoe up above where we were. We had a great time and I even got to try
 > my 340 Weatherby out on a nice little spike-fork moose. Other than that
 > it's been nothing but rain, rain and more rain. Today, it's supposed to
 > be sideways rain with 60 knot winds. You and Jaci probably still
 > remember days like that! Oh well, not much anybody can do about it.
 >

> Here at work, Ken Imamura and I are in the middle of a big fight over
 > on-bottom clam farming. As you can imagine, Habitat and some of our
 > brethren in Com Fish are doing all they can to try and kill all the farm
 > applications we got for things like geducks and littlenecks. Same old
 > song and dance... they are still trying to say things like it's
 > unconstitutional because it privatizes the public's resources. I guess
 > they just don't accept that the legislature passed the Aquatic Farm Act
 > and the AG's Office says it's all legal and constitutional. One of the
 > things they were trying to tell the commissioner in a big meeting we had
 > last week was that the three permits that I think you originally issued
 > for littleneck farms were only experimental, and that they had special
 > requirements for reporting so that we could determine, based on impacts
 > on the wild resource, if the permits should be lifted. I know the
 > farmers started out as experimental commercial operations with CFEC
 > permits and fish tickets and all that, but I thought regular aquatic
 > farm permits were then issued for them. Ken and I can't seem to find
 > any special requirements or anything that says the farm permits were



> experimental. Piorkowski told me he thought there had been some
> discussion of special stipulations on the littleneck farm permits but
> that none were ever put on them. He said he thought Clasby had made the
> decision that because we didn't have the money to start up a commercial
> clam fishery in Southeast aquatic farming would be the vehicle to allow
> people access to harvesting and selling the clams. Do you remember
> anything about how this all went down? I guess I should have been
> paying better attention since it now seems to have fallen in my lap! Oh
> well.... hopefully I can survive for three more years!

12

Subject: [Fwd: Re: Old Business]

Date: Mon, 25 Oct 1999 08:39:20 -0800

From: Steve McGee <steve_mcgee@fishgame.state.ak.us> Internal

To: Ken Imamura <ken_imamura@fishgame.state.ak.us>

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

Subject: Re: Old Business

Date: Sat, 23 Oct 1999 06:07:36 -0600

From: "J. Cochran" <cochran@montrose.net>

To: "Steve McGee" <steve_mcgee@fishgame.state.ak.us>

Clam farming is fun, huh? Your new director was one of those most involved with Comm Fish so he should have all the skinny. It has been a while, but this is what I remember:

We only had one choice for a commercial aquatic farm -- an Aquatic Farm Operations Permit. The Sci-Ed wouldn't allow commercial use, so it was out.

Clasby did decide that we would use the aquatic farm permit to allow access

to the clam resource because they didn't have money to manage a full-blown

fishery and the farm permit review process would weed out most applicants

and keep it very limited. I wanted to make sure they were actually trying

to farm - long term, so I put in conditions on reporting and some activities that had to be accomplished. Tom Rutz did a density study and actually published the data. All this comes down to the fact that the permits were not "experimental". There was no such thing. Habitat and Comm

Fish may have viewed them as experimental in that some of the conditions required certain "farming" activities and reports on such, but they were still bonafide commercial farm permits. They've been using the

"privatizes public resource" argument for years. What does commercial fishing do? Steve

White wrote several memos - no official "opinion" that I remember - on the

subject. I always thought that they key was the act of "farming".

Unfortunately, when they want to farm clams, the best spots to go so are where clams already exist. Clasby agreed that the size of the farms/amount

of resource that would be lost to the "public" was miniscule, so let them

have the standing crop as part of the act of "farming", which could be as

little as "tilling" the beach and preparing it for better natural set.

Unfortunately, people like Rodger Painter saw this as an opportunity to harvest wild clams under the guise of farming. That was pretty transparent,

so as I said, I tried to make sure the permits were conditioned, within reason, to require them to do farming things.

Good luck. It won't be solved until your Commissioner leaves, I'm sure. He's one of those behind the drive to prevent on-bottom farming.

Clear and cold here at night, warm during the day. Dry and dusty. Have been road building as the result of BLM denying us winter access on one road

Subject: Re: PWS APPNS

Date: Mon, 10 Jan 2000 13:32:28 -0900

From: Ken Imamura <Ken_imamura@fishgame.state.ak.us>

To: don_mckay@fishgame.state.ak.us

That is the rationale that was used by DGC, but doesn't it also have the potential of denying the applicant due process? My understanding is that ACMP review should be independent of agency permitting intent, although agency input on the applicable standards is an integral part of DGC's review process. Conceivably, an application could be found consistent by ACMP standards but not meet aquatic farm permitting criteria. If suspension of ACMP review is due to permitting defects in the application, the applicant would not have an opportunity to resolve those defects through appeal to Commissioner Rue. It begs the question on whether the application could have been found to be consistent by DGC if the department's permitting intent was not a factor.

It may be unlikely, but as long as there is a possibility for DGC to find a proposal consistent while DFG would find it could not issue a permit., it seems the state should follow protocol to avoid a long-term headache.

Would you please e-mail me copies of the consistency findings you submitted to DGC? There is no great hurry, but I would like copies for the files. Thanks.

Don McKay wrote:

> If we already know that we are not going to issue the Aquatic Farm
> Operations Permit, it saves a number of agency staff a lot of time by
> notifying the appropriate parties that the permit will be denied and the
> ACMP review is suspended. It would reduce the number of administrative
> hearings of the same project.

> -----Original Message-----

> From: Ken Imamura [mailto:Ken_imamura@fishgame.state.ak.us]
> Sent: Monday, January 10, 2000 10:34 AM
> To: don_mckay@fishgame.state.ak.us
> Subject: Re: PWS APPNS

> Hi Don. Sorry I did not get back to you on Friday, at least not directly.
> I
> have not seen the department's findings yet. Perhaps later today in another
> mail message....

> It has been my working assumption that consistency is a determination that
> Habitat and Restoration makes for the department, based on the appropriate
> standards, independent of Commercial Fisheries (Mariculture) intention to
> approve or deny an aquatic farm operation permit.

> I feel that aquatic farm operation permits which would be denied can be
> generally separated into two classes. There are those that have defects of
> application, such as insufficient information provided by the applicant,
> proposed siting in areas which have been classified as unsuitable, or
> proposed

> use of species or stocks that the department could not approve. These are
> amenable to direct appeal to the commissioner for resolution of defects.

> Then

> there are those that DGC finds inconsistent with the applicable ACMP
> standards,

> which we would deny summarily because we would not issue a permit to a
> proposal

> found inconsistent with the ACMP standards.

>

P-3

14

Denton, Carol

From: Ken Imamura [Ken_imamura@fishgame.state.ak.us]
 Sent: Monday, November 08, 1999 1:14 PM
 To: Scott L Marshall; Peter J Probasco; James A Brady; Thomas M Kron
 Cc: Carol Denton; Ellen Simpson; Jim Mccullough; Russell R Holder
 Subject: Regulatory modifications and changes

Doug Mecum directed me to draft proposed changes to the Aquatic Farm regulations that will facilitate further evaluation of the current round of permit applications and provide a better basis for decisions in the future. Included in these will be proposed permitting criteria based on definitions of commercial density, total standing stock, and maximum size of site. I am considering also including language on definitions of aquatic farming, perhaps to the species level, since there are some species-specific considerations, and a separate section on appropriate use of standing stock.

Most of you are very much aware that some of our persistent problems during the current application permit have been equivocality of our aquatic farm regulations as well as disagreements within staff on how other regulations do or should affect the review process. I am confident that many of you have asked why there was no more guidance in statute or reg on some of the difficult questions that have plagued reviewers in the last few months. To the extent that you can, please forward suggested changes to me, either specific to an issue or more broadly based, that I should consider including in my proposals. If I can find a citation in statute to support the proposed regulation and it will clarify issues and tasks in the future, I will do my best to produce drafts for the public and agency review.

Kevin Duffy has asked for a very preliminary draft by Friday, so please forward me any input you might have before that time. Meanwhile, I will copy the RRDBs with interim drafts of proposals as I complete them. Many thanks.

cc: Scott Marshall? Dist? Soliciting input?

with letters etc attached - ?

THL - JCN

P-9

Subject: Request for consideration

Date: Wed, 23 Feb 2000 13:42:32 -0900

From: Ken Imamura <Ken_imamura@fishgame.state.ak.us>

To: Robert D Mecum <doug_mecum@fishgame.state.ak.us>

I realize that this is a sensitive issue. This should be one of my last attempts at trying to change anyone's mind about our position on geoducks, specifically, and on-bottom culture, in general.

I concede special area problems for Kachemak Bay clam permit applications.

However, on most of the rest, excepting those denied for insufficient information or direct, significant conflicts with existing use, I continue to feel that our best long-term course of action would be to issue aquatic farm operation permits, with stipulations and conditions we feel necessary to protect the resource. Further, I support issuance of acquisition permits for harvest of the permitted species on a permitted site on a sustainable yield basis, until the applicant can demonstrate that planting or enhancing production consistent with higher harvest rates is occurring. This should apply to all operations using wild standing stock, whether they are for littleneck clams, geoducks, or other species. I believe that permittees should be required to post a bond equivalent to the best estimate of the value of the standing stock on a permitted site, to be relinquished at termination of the permit and/or lease.

I think that if permitted, aquatic farms create a high level of opposition, the department will be taken to court by its detractors. However, I also believe that the department would have more success defending itself against such suits than those likely to be filed by applicants who have been denied aquatic farm operation permits. Moreover, if the courts find in favor of the department, the public will then have the option of pursuing legislative solutions. That will place the burden on some of those who most actively support unfettered development of the industry, and not on the department. Conversely, if aquatic farms gain acceptance over time or through the courts or legislature, then perhaps that will be proof enough that the program is legitimate in the eyes of the people of the state.

Thanks for your patience and letting me, once again, preach to the choir..

16

Subject: Speaking points re: R. Painter letter to Mecum on CIP

Date: Thu, 02 Mar 2000 14:30:24 -0900

From: Ken Imamura <Ken_imamura@fishgame.state.ak.us>

To: Geron Bruce <geron_bruce@fishgame.state.ak.us>

CC: Robert D Mecum <doug_mecum@fishgame.state.ak.us>, Kevin C Duffy <kevin_duffy@fishgame.state.ak.us>

Please convey that we can discuss the intent of the language in the CIP, rather than focusing on our interpretation or that of ASGA. This was done in a hurry, so please forgive the poor organization. I hope this is not too late.

Re: shortcoming with the language:

1. If we intend to establish standards as to what constitutes aquatic farming, including clauses that tie in renewals of permits to demonstration of farming, such as enhancement of productivity, we are going to need baselines of what is there before the farming starts. How we get the baselines, and check to see if productivity is being enhanced or other definitions and criteria for farming are being met is not really critical, as long as the data collected is valid. There is a wide range of options how this may be accomplished, but none of the acceptable options is likely to be free.

Site visits are also valuable, for both the department's understanding of the "gestalt" of individual sites, such as exposure, delineation of the production zones, noting of proximity to sensitive habitat types such as eelgrass, and a enough familiarity with individual sites to conduct a permit review and for the applicant. If Rodger is surprised by this, I can say, after visiting his proposed Jinhi Bay and El Cap sites that it is clear to me that starfish were not very abundant, eelgrass was control on the lower boundaries of his site and limited the extent of the productive clam beds, substrate was highly variable, there was little evidence of heavy otter predation or human use, and exposure to weather at the site was limited. The El Cap site was unique in that it was an isolated pocket beach with subangular gravel comprising the best clam habitat. It probably had excellent drainage and circulation characteristics to a depth deeper than is usually found on more typical littleneck clam beaches. What those site visits basically told me were that there were other beaches in Jinhi Bay that could be used by the public if that is an issue, that heavy public use is not evident on his proposed sites, and predator exclusion measures might not be necessary on some of his proposed sites to enhance recruitment, survival and growth. I would emphasize that site visits have multiple uses and some of them are very much in favor of an applicant's best interests. As such, in some cases, a statistically valid survey for abundance, size composition, and distribution might be secondary to gathering and integrating of other information.

3. I cannot speak to the future uses the department puts to stock assessments of sites proposed for farming geoduck and other species. However, I have long maintained that it is better to discuss possibly contentious issues on the basis of data, rather than conjecture. I like to think that we will be impartial and not conduct a survey of a proposed site for the express purpose of keeping it closed to aquatic farming. Perhaps I still harbor some level of naivete.

4. I agree with ASGA's position on regional plans. We discussed this at the ASTF meeting held late last year in Anchorage. I believe that a better alternative would be for the state to fund, and undertake, a comprehensive coastal inventory process of known surveys, data, land use patterns, ownership, jurisdictions, etc., in a GIS system so aquatic farm applicants can more easily or clearly determine what kinds of

75

17

> the
 >>>>> department could produce the summary report, based on commercial
 >> fishing
 >>>>> information and its survey data for the sites.
 >>>>>
 >>>>> Without this commitment, the department will not be able to
 enforce
 >>>>> compliance with Para 3, and the state may as well just turn the
 wild
 >>>>> stock over to Painter. Issuance of the final version of the
 > operation
 >>>>> permits to Painter, Henderson, and Klinkert depend on what the
 >>>>> department can and will do regarding the surveys of pre-existing
 > wild
 >>>>> stock, prior to the start of commercial fisheries in early July.

I
 > am
 >>>>> available to provide assistance in ways that I can.
 >>>>>
 >>>>> What do you think is realistic for the department to do at this
 > point?
 >>>>> If we decide not to force collection of good data, then I will be
 >>>>> redrafting the operation permit language to avoid present and
 future
 >>>>> embarrassment to the department.

>>>>> ----- Original Message -----
 >>>>> Date: Sun, 11 Jun 2000 08:21:36 AKDT
 >>>>> From: "Rodger Painter" <rodgerpainter@hotmail.com>
 >>>>> To: ken_imamura@fishgame.state.ak.us
 >>>>> CC: doug_mecum@fishgame.state.ak.us

>>>>> Get Your Private, Free E-mail from MSN Hotmail at
 >> <http://www.hotmail.com>

 >>>>> Name: rodger'spermitresponse.doc
 >>>>> rodger'spermitresponse.doc Type: Winword File
 >> (application/msword)
 >>>>> Encoding: base64

P-1

wd: [Fwd: RE: Questions raised by Painter's response]]

18

Subject: [Fwd: [Fwd: RE: Questions raised by Painter's response]]

Date: Tue, 20 Jun 2000 09:13:13 -0800

From: "Kevin C. Duffy" <kevin_duffy@fishgame.state.ak.us> Internal

To: Robert D Mecum <doug_mecum@fishgame.state.ak.us>

CC: Ken Imamura <ken_imamura@fishgame.state.ak.us>

Sounds like you may have to weigh in here regarding littlenecks and geoducks (if any are permitted).

Subject: [Fwd: RE: Questions raised by Painter's response]

Date: Tue, 20 Jun 2000 09:06:56 -0800

From: Ken Imamura <Ken_imamura@fishgame.state.ak.us>

To: Kevin C Duffy <kevin_duffy@fishgame.state.ak.us>,

Steven G Mcgee <steve_mcgee@fishgame.state.ak.us>

It appears that the division will not be playing a major role in the littleneck clam surveys, harvest oversight, or monitoring. Also, that the division will not be conducting geoduck pre-project surveys, unless we want to defer issuing permits until next year. As Woodby indicates, any changes to these expected schedules will require directives from HQ to change the region's survey priorities. While I would be amenable to telling Mr. Painter to do basically what he feels like, I think the geoduck permit applicants deserve better than being forced to wait until some time next year before we conduct their site surveys and issue their permits. Unless I am sorely mistaken, I don't think we want to issue operation permits to the geoduck applicants before we know, quantitatively, what is on their sites.

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

Subject: RE: Questions raised by Painter's response

Date: Mon, 19 Jun 2000 17:51:06 -0800

From: "Doug Woodby" <doug_woodby@fishgame.state.ak.us>

To: "'Ken Imamura'" <Ken_imamura@fishgame.state.ak.us>

CC: "Scott L Marshall" <scott_marshall@fishgame.state.ak.us>

Can't answer as yet about dates or our ability to do the clam sampling.

As for further geoduck sampling, probably not this season. We would have to redirect efforts from other work as our dive vessels and divers are fully scheduled through September. That will take a directive from on high. We have already delayed dive surveys from this year to next due to the full schedule.

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

From: Ken Imamura (mailto:Ken_imamura@fishgame.state.ak.us)

Sent: Monday, June 19, 2000 12:50 PM

To: Doug Woodby

Subject: Re: Questions raised by Painter's response

If the sampling can be done in a few days and a workable sampling design can be developed, I might be able to participate in the field work. I do not wish

P-1

> <steve_mcgee@fishgame.state.ak.us>,Geron Bruce
 > <geron_bruce@fishgame.state.ak.us>,Stephen M White
 > <stephen_white@law.state.ak.us>
 > References: <03a101c01921\$0bae95a0\$60fb3f92@mscottk.adfg.state.ak.us>

> All I know is that we have not issued Scott Thomas an aquatic farm
 > permit. He
 > may have some sort of DNR permit but I doubt it. Regardless, I don't
 > know of
 > any reason to close this area to commercial sea cucumber fishing. I'll
 > copy
 > Ken Imamura on this in case he knows who to contact in DNR to find out
 > if there
 > is a conflict with some sort of leasing provision.

> Scott Kelley wrote:

> > FYI
 > >

> > -----Original Message-----

> > From: Don House [mailto:don_house@adfg.state.ak.us]
 > > Sent: Thursday, September 07, 2000 3:12 PM
 > > To: Scott Kelley; Robert C Larson
 > > Cc: Philip S Doherty
 > > Subject: sea cucumber opening - 103-30

> > Robert - Scott Thomas indicated he contacted you concerning a possible
 > > conflict with a sea cucumber opening in 103-30 and his mariculture site
 > > on
 > > the west side of Long Island.

> > If we open 103-30 as planned, will the mariculture site be deleted from
 > > the
 > > NR?

> > I don't know what discussions you had with Scott Thomas. He happened to
 > > bring up the issue today when discussing another topic. I have no idea
 > > where he stands on his permits, but it sounds like he has a permit from
 > > DNR
 > > for the site. I don't know whether other species can be harvested from
 > > a
 > > mariculture site, if the species are not listed on the original permit.
 > >
 > > Don

20

MEMORANDUM

STATE OF ALASKA DEPARTMENT OF FISH AND GAME

TO: Ken Imamura
Mariculture Coordinator
Commercial Fisheries Division
Juneau

DATE: October 6, 1999

TELEPHONE NO:
FAX NO:

*Auto date field -
shows day of printing
e. file shows Sept 21 99*

THRU:

FROM: Scott Marshall
S.E. Region Supervisor
Commercial Fisheries Division

SUBJECT:

farm Permits

General Comments:

In general, I see no conflicts with permits to culture oysters or rock scallops by suspension.

I believe that existing statutes and regulations preclude the department from issuing permits for most of the new aquatic farm permit applications received for bivalve culture. The conflict occurs because applicants are requesting to establish aquatic farms in places where significant numbers of naturally occurring bivalves already exist (see Little-neck and Geoduck Clam Mariculture Site Evaluation Project: Cruise Report R/V Sundance September 8 through 15, 1999, which is attached and incorporated by reference). My analysis of the relevant issues follows.

5 AAC 41.250 requires the commissioner to include conditions to a mariculture permit that are necessary to protect natural fish and wildlife resources and their habitat. Because most of the sites being requested contain significant numbers of clams which are surely at the sites' natural carrying capacity, it is clear that to be suitable for aquatic farming the existing bivalves would have to be removed to make room for the farmed clams. In fact on some applications, there is clear intent to commercially harvest the standing stock. Removal is problematic because our authority is limited to authorize any such activity. The mariculture statutes (AS 16.40.199) provides authority for the commissioner to issue an aquatic stock acquisition permit for the purposes of supplying stock to an aquatic farm. AS 16.40.199 defines "stock" as *"live aquatic plants or shellfish acquired, collected, possessed, or intended for use by a hatchery or aquatic farm for the purpose further growth or propagation."* This statute allows an operator to obtain naturally occurring shellfish or plants for only one of two purposes. The first permitted activity is to secure wild "brood stock". Brood stock means a source of gametes to be used by a hatchery for reproduction in the same way we have allowed salmon hatchery operators to obtain eggs and sperm from wild fish to start their operations. Hence we would also allow aquatic farms to capture and hold wild clams to obtain the spawn needed to start an aquatic farm so long as the conditions in 16.40.120 (d) and (f) are satisfied. The second permitted activity is to obtain juvenile (or other early life history morphs) of a species from the wild in lieu of obtaining adult animals as a source of gametes. This would most commonly be done when technological problems exist [(f) (4)] and when conflicts with other uses do not exist [(f) (3)]. For example, we have allowed operators to collect scallop spat via collection strings

suspended in the water column. As can be seen however, nothing in AS 16.40.199 permits acquisition of wild stock for the purpose of making room for farmed clams or to conduct a commercial harvest of wild stock.

The department's only authority for commercial wild stock harvest of clams is found in 5 AAC 38.100. A permit issued under this regulation would have to be consistent with our constitutional mandates to assure sustained yield, to provide for common use and other applicable law. The sustained yield principle requires any such permit to be issued only for the number of clams that can be removed on an ongoing basis; it does not, for instance provide the authority to remove most or all the wild clams in order to make room for farmed clams. The common use clause requires that once an area is identified for commercial fishing that we must issue permits to anyone who applies and who is otherwise qualified under the commercial fishing regulations. If farming and common property commercial fishing occurs in the same area, the common use clause raises the inherent conflict between private ownership of farmed products at a site and the common property naturally occurring stock at the site especially when there is no practical way to differentiate wild and farmed clams. Neither the applicants nor department staff identified a way to differentiate a farmed clam belonging to a permit holder under the mariculture statutes from a wild clam that is a public resource. Without a way to differentiate between a wild and farmed clam the technological and operational feasibility required under AS 16.40.100 (4) can not be demonstrated and a permit can not be issued.

Even if these problems could be resolved, our ability to issue permits under 5 AAC 38.100 is further complicated by the requirements of 5 AAC 39.210 and department policy that the requirements of 5 AAC 39.210 be addressed in a proactive rather than a reactive manner. Considering the interest that has been expressed to develop aquatic farms throughout the region and the existing uses of both geoducks by the developing commercial fishery and by subsistence and personal use fishers for intertidal clam resources this regulation and our policies require that we develop a management plan for these species. While this is being done for geoducks we have neither the funding nor a schedule to develop a management plan for intertidal clams. Consistent with recent practices, additional funding would be needed before we started such a plan for intertidal clams. For geoducks, a plan has been drafted and will be reviewed by the board next year, however since this fishery is subject to limited entry we are restricted in our ability to issue permits.

Pursuant to AS 16.40.105 (1) through (3) I have found:

For sites that applicants propose to culture geoduck clams, the placement of densely spaced culture tubes in the substrate is impossible without adversely affecting the existing wild geoducks on the site that are of significant value. Thus the criteria in (1) can not be satisfied.

On sites where wild geoducks occur, proposed farms would require significant alteration in the expansion of the developing commercial fishery (by removing a harvestable surplus from the common property fishery) in Southeast Alaska that is subject to limited entry, because commercial fishing and farming on the same site are incompatible activities. Thus the criteria in (2) can not be satisfied.

On sites where wild geoducks occur, the proposed farms would significantly affect the development of the existing geoduck fishery by removing a large volume of biomass from calculation of the annual quota. The preliminary estimate of geoduck biomass at the proposed farm sites is 891,000

lbs. The estimated biomass in all other known geoduck beds in the region is only 9,190,00 lbs. Thus the criteria in (3) can not be satisfied.

In those sites proposed for geoduck or little neck farming where few naturally occurring geoducks exist, or where there may be the opportunity to segregate farming activities from the wild stocks because of zonal gradation in the occurrence of natural stocks, it may be possible to develop conditions that would protect the natural stocks. For instance, areas where naturally occurring geoducks occur within the sites could be roped off underwater and farming activities could be prohibited. Permit conditions could specify that prior to undertaking farming, that the operator must identify all such areas, stake and rope them off. An inspection of the site would be necessary prior to farming.

Overall, I feel the primary issue we are facing is one of siting. If the applicants had proposed farm sites in areas where significant numbers of wild stocks did not exist, then most of the concerns I have would not exist. When considering the siting issue, we should remain cognizant of the fact that we have required salmon hatchery operators to site facilities in locations where impacts on wild stocks are minimized. We should also remain cognizant, by analogy, of our historic approach to the incidental harvest of wild salmon stocks during hatchery cost recovery. In Southeast we have negotiated with both SSRAA and NSRAA to transfer the funds collected from the sale of incidentally caught wild fish during coast recovery operations to the department. We also require that the value of incidentally caught groundfish in excess of the permitted amount be turned over to the department. The point being that some harvest of naturally occurring stocks may be inevitable in hatchery, farming or even fishing operations but the department has not allowed the hatchery operator or fishermen to benefit from such incidental harvests.

Summary:

In areas where significant natural stocks of geoducks exist, I do not believe that farming is consistent with the statues or regulations and the permits must be denied. In those areas where few natural geoducks exist, I believe that permits can be issued so long as conditions can be crafted and attached to the permit that will protect the natural stock.

Because little neck and other species of clams exist in significant quantities in all areas requested for little neck farming, there is an inherent conflict between commercial fishing activities and farming. Had applications been received for mariculture sites without significant numbers of wild clams, and baring other complications, permits could probably be issued. However, because there is no existing commercial fishery for little neck (or other intertidal clams present) in the region, there are clearly commercial quantities of clams present, and significant interest in harvesting wild stocks, a basis exists to develop a fishery. The outstanding questions are: 1) how can we proceed to develop a littleneck clam fishery in the region and 2) can the inierent conflict between mariculture activity and commercial fishing at the same location be resolved, or does it even need to be resolved?

Comments provided herein reflect my interpretation of existing statutes, regulations and policy. Until department policy and interpretations are clarified, I am withholding site specific comments and recommendations.

Cc Doug Mecum
Kevin Duffy
Lana Shea Flanders
Rocky Holmes
Scott Kelley
Doug Woodby

Note:

Date 1999

24

Issues requiring legislative, regulatory, or policy resolution include:

1. Providing a fair return to the state from revenues generated from a) initial harvest of standing crop on leased parcels, b) use of wild stock for seed or broodstock, and c) use of public lands to raise crops for commercial sale.
 2. Access onto or across leased parcels for purposes other than harvest of permitted species.
 3. Siting criteria to concentrate maricultural activity in small areas within geographically or biologically distinct regions or to disperse sites as much as possible. Ceiling on total number, area occupied by aquatic farm sites. Guidelines on size of individual farmsites.
 4. Ownership provisions and limitations of number and kinds of farmsites. Related to these are development of measures to foster a) local control, b) operations that provide an appropriate economic benefit, c) do not conflict with established local uses or practices, and d) to the extent possible, complement these uses and practices.
 5. Overall general policies for siting as requests for culture of other species occur. In the foreseeable future, these include geoduck, sea urchins, and various scallop species.
-

ALASKA DEPARTMENT OF FISH AND GAME DRAFT MARICULTURE POLICY

Introduction

Aquatic Farming is a legislatively authorized activity in Alaska that satisfies Public Trust & Doctrine requirements. When properly conducted, aquatic farming results in ~~the~~ ~~use~~ of renewable natural resources, increases shellfish production and increases both environmental heterogeneity and marine biodiversity. AS 16.40.100- AS 16.40.210 and 5AAC 41.200-5AAC 41.400 provides an adequate legal framework for managing the mariculture industry. These statutes and regulations allow for both staff and public involvement in aquatic farm permit issuance decisions.

Constitutionality of aquatic farm leases (and concurrent, though unstated, establishment of a new type of extractor of a marine resource) has passed legal review. The Attorney

General's office has issued a statement supporting the concept of ownership of resources within the leased parcel by the leasee (Public Trust Doctrine in the Zaugg case).

However, questions remain about other forms of public access and uses of leased aquatic farm sites.

With few exceptions, the Aquatic Farm Act deliberately separated the operations and functions of mariculture permitting from the Board of Fisheries system. The exceptions include unavailability of fully developed and allocated resources for maricultural use. The Board of Fisheries will be more accepting of aquatic farming, if the department demonstrates a sound biological basis for reviewing applications and retains an appropriate level of sensitivity to the Board's concerns for allocation, management, and enforcement problems.

Aquatic farming permitting is the responsibility of the Commissioner of ADF&G. It is outside the purview of the Board of Fisheries as AS 16.05.251 specifically prohibits the Board from adopting regulations or taking action regarding the issuance, denial, or conditioning of an aquatic farm or hatchery permit or an aquatic stock acquisition permit.

Background

Aquatic farming was directly authorized by legislative mandate in 1988 (Aquatic Farming, AS 16.40.100 - 199). It arose as a direct result of prohibition of finfish aquaculture in Alaska in the late 1980s.

A departmental policy is needed to address questions of siting, sizing, allowable species, reporting, oversight, enforcement, etc. of aquatic farms. The major issues are ones concerning siting, access, and accountability. Tidelands leasing for the purposes of farming epibenthic and in-fauna is the main source of contention and concern.

Permit reviews will require a detailed overview of allowed use areas, since leases are not permitted in some areas at all, limited in other sensitive areas, and constrained by proximity to salmon streams, eagle nests, marine mammal haulout/rookery areas, etc. It would be very useful if fairly large scale maps of the most attractive areas for farm sites were available during the permit application and review processes

The department currently lacks a comprehensive policy regarding review of operational permits for sites leased to applicants by DNR. Because DNR is the lead agency and all other reviews hinge on whether DNR will issue a lease, the lack of policies on some major siting considerations is a major constraint on departmental permit reviews.

Known or suspected reasons for opposition to mariculture as an acceptable use of publicly-owned and state-managed lands and marine aquatic resources include:

1. Concerns for constitutionality of lease of public lands/resources and exclusive use of lands/resources by leasees. Establishment of a new user group and setting of precedents for an alternate avenue for commercial harvest and sale of marine resources. Exclusive access versus common property fisheries.
2. Unfamiliarity and distrust of a multi-agency, state/federal/local management regime for valuable or potentially valuable marine sites and resources that operates largely independently of the Board of Fisheries system. Reluctance by staff to engage in management of resources without oversight by the Board on allocative issues.
3. Lack of comprehensive review specifications for permits, concerns for potential proliferation of farmsites of indeterminate distribution, size, type, and number.
4. Ownership issues. Lack of established guidelines for limitations of amount, number, and kind of operations individuals or organizations could acquire and control.
5. Biological questions as to sustainable yield, habitat and environmental effects, impacts of interactions between wild stock and cultured stock.

6. Concern for introduction and transport of pathogens, parasites, and other undesirable non-native species via transfers of seed, broodstock, or market product over large distances, either within state or between states.
7. Lack of established guidelines for use of wild stock from areas outside leased parcels for seed or broodstock. Wild stock acquisition is allowed, but without any guidelines on where, how much, when, and how often. There are no guidelines for what constitutes seed and what constitutes brood, and whether any animals collected as either can be directly and immediately sold as farm stock, or for what period they must be held, or purposes to which they must be put before being legal for sale. This is a problem for seed, since the term is not clearly defined.
8. Harvest reporting and tracking for aquatic farm operators via an annual report system, which is different in some fundamental ways from reporting through fish tickets and on an individual delivery basis. Difficulty in distinguishing commercial, sport, personal use, subsistence harvest from mariculture production when multiple fisheries occur in close approximation of time and area. Possible conflicts between guiding management principles, such as size and season, applied to mariculture operations and other user groups. Enforcement concerns.
9. Conflict of interest questions relating to participants in maricultural activities and commercial fisheries, for the same or different species.

Policy Statements

A. Aquatic Farm Siting Criteria

1. If an aquatic farm application does not meet the criteria specified in AS 16.40.105, it will be rejected by the Commissioner, who has the sole authority and responsibility to decide following internal review and comment on aquatic farm applications. These criteria are: 1) the proposed farm must not require significant alterations in traditional fisheries or other existing uses of existing fish and wildlife resources, 2) the proposed farm or hatchery may

not significantly affect fisheries, wildlife or their habitats in an adverse manner, 3) the physical and biological characteristics of the site make it suitable for farming and 4) the proposed hatchery or farm plans must make it technically and operationally feasible.

2. All applications for aquatic farming, be they for raft or longline or intertidal or subtidal operations, will be considered on a case-by-case basis to determine if criteria required by statute can be met.

3. Aquatic farm permits will be conditioned as deemed necessary to protect vital state interests, especially in Critical Habitat Areas or where native stocks are determined to be fully allocated. If vital state interests cannot be protected, the Commissioner of ADF&G will deny the aquatic farm application.

4. While proposed hatchery or farm plans must demonstrate technical and operational feasibility, permitted farmers will be allowed to make annual seeding decisions based upon individual farm needs as long as Department of Natural Resources minimum production requirements are met.

5. Aquatic Stock Acquisition Permits will be issued upon finding that proposed harvests will neither impair sustained yield of the species nor unreasonably disrupt established resource uses. As identified by statute, animals and plants acquired under this permit immediately become the property of the permit holder and are no longer a public or common resource.

6. Aquatic Farm harvests are not to be confused with commercial fisheries harvests. As is reasonable with any land-based farming operation, aquatic farmers will make their own decisions on how to market their products independent of commercial fisheries regulation. For example, existing minimum size limits on harvests of wild clams are not applicable to farmed product whether that product has been grown from seed by the farmer or was obtained through an Aquatic Stock Acquisition Permits.

7. Diligent effort must be made to identify environmental, resource management and technical problems in aquatic farm applications. Departmental staff will operate in good faith to find solutions to problems so noted to the extent practical.

8. Farms must operate within the conditions of their lease while providing sufficient alternate harvest opportunities for other user groups, under sustained fisheries principles. At some point, the state will have to determine what percentage of productive habitat in a given area will be leased and what percent of available resource will pass into ownership of private individuals or corporations.

9. Concerns for environmental/water quality effects center on examples of significant or measurable degradation in habitat of native species in close association or proximity to intensive or large-scale aquatic farming activities. Concerns for direct interactions, such as increased presence of predators, pathogens, or parasites, increased intraspecific competition for food or space, and changes in genetic diversity need to be considered for locating and sizing appropriate farmsites.

10. Operationally, managers and enforcement personnel need to be able to clearly and unambiguously differentiate sport, personal use, subsistence, commercial, and aquatic farm products at all points between acquisition and consumption by the end user.

11. The department will continue working, at all levels, to increase the efficiency of the permitting process, for farm sites, operational permits, transport and acquisition permits, and requests for various kinds of information, while maintaining the basic integrity of the program.

12. Because the department currently does not have the resources to adequately assess the productivity potential of sites, prospective applicants will have to conduct their own assessments of the productivity of the most promising sites in an area of interest and will have to make sure they review any restrictions on obtaining lease parcels. The department will assume that an applicant has chosen the site through accommodating the state's siting criteria and balanced logistic, economic, and personal needs.

The Mariculture Program Manager will draft an annual report for the program in a format useful to both the Alaska Board of Fisheries and the a briefing for the Board needs of the mariculture program. The department will request time, most likely at one of the statewide shellfish meetings, for the Mariculture Program Manager to brief the Board on the mariculture program, summarize participation, distribution of effort, production summaries, and new developments.

13. Maintain a consistent and mutually acceptable level of communication between managers of traditional, Board-directed fisheries and the aquatic farm program. The mariculture staff does not have the resources to conduct reviews, site visits, or inspections, nor the local knowledge, of the department's field staff in the regional and area offices. There is a need, and mutual benefit, to maintaining an open dialogue between staff.

14. The department will stress biological considerations during review of site applications, to the extent possible, using siting criteria based on sound maricultural principles and biological considerations. For example, siting should be as unobtrusive as possible, both physically and visually. Farm sites should be sufficiently separated to minimize potential for cross-contamination of species being reared. In addition to existing siting constraints, there should be a limit on the number of sites per bay, inlet, statarea, or some other kind of limiting criteria that can be clearly understood by both the public and the resource managers.

B. Aquatic Stock Acquisition permits

1. The Commissioner has sole authority to issue Aquatic Stock Acquisition Permits to aquatic farm or hatchery permit holders who meet criteria defined by statute (AS 16.40.120). When these criteria are met, the Commissioner will issue said permit.

The criteria are: 1) wild stock is needed to meet the initial needs of the hatchery or farm, 2) propagation of species sought is technologically limited, 3) wild stock sought is not fully utilized by existing fisheries, 4) wild stock is needed to maintain the gene pool of a hatchery or aquatic farm.

2. The Commissioner must inform the Board of Fisheries on any action taken regarding Aquatic Stock Acquisition Permits. The Board of Fisheries authority regarding Aquatic Stock Acquisition Permits is limited to passing regulations for conservation, maintenance and management of species for which an acquisition permit is required.

3. Increasing concern related to importation of unintended or unwanted non-native species in shipments of seed or broodstock needs to be addressed. This may be via establishment of local hatcheries for species that do not reproduce in the wild within genetic or larval drift range of the farmsite, stringent controls on import of seed or brood, or adoption of a policy to permit only culture of locally available species. There are probably combinations of all three that would be acceptable, but culture of locally available species would be inherently the safest option.

4. Currently, acquisitions of wild stock for purposes of seeding or establishing brood stocks is permitted under authority of acquisition permits if there are no problems of sustainability or established uses. Concerns revolve on what distinguishes wild harvest for commercial sale from wild stock acquisition for seed or broodstock. It may not be possible, realistically, to differentiate one from the other, although clarification of how they differ in principle may be sufficient to provide the basis for management and enforcement.

5. The department and aquatic farmsite operators should make every effort to insure that operations of farmsites are not the cause for unintended introduction of undesirable plant or animal species, pathogens, or parasites into the state.

Definitions

A fully allocated stock is defined as one that is presently being harvested at the maximum sustainable rate. Such a determination requires scientifically sound and complete surveys. Areas outside of surveyed tracts are open to application for aquatic farm permits.

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

P.O. BOX 25526
JUNEAU, ALASKA 99802-5526
PHONE (907) 465-4100
FACSIMILE (907) 465-2332

March 15, 1999

Rodger Painter, Vice President
Alaska Shellfish Growers Association
P.O. Box 20704
Juneau, AK 99802

Dear Mr. Painter:

Your February 17 letter to Governor Tony Knowles included a number of issues concerning the mariculture industry in this state. The Governor asked that I respond to the specific issues you raised.

With your letter was an attachment titled, "Littleneck Clam Enhancement and Aquaculture Development." This attachment includes proposals for: (1) cooperative enhancement of a public beach in Kachemak Bay; and (2) clam farming studies in Kachemak Bay, Prince William Sound, and Southeast Alaska. You asked us to develop a general state policy regarding on-bottom aquatic farming. More specifically, you also asked about options the department might consider for clam farming within the critical habitat area boundaries of Kachemak Bay. Finally, you asked about the department's response to comments on aquatic farming included in the August 1998 draft of the Kenai Area Plan.

The above issues were among those raised in a letter from Representative Gail Phillips to Commissioner Frank Rue on January 19, and discussed before the House Resources Committee on February 17. Kevin C. Duffy, acting deputy director for the Commercial Fisheries Division, represented the department at that meeting and briefed the members of the committee. The following information will be included in my formal reply to Representative Phillips.

State Policy Development

The department continues work on policies for on-bottom farming of clams and other species. The department believes that property rights to "standing stocks" pass to the permittee with the lease, operations permit, and stock acquisition permit, although the state retains authority to ensure that aquatic farming activities are biologically and environmentally acceptable, both on

and off the site. Specific to littleneck clams, minimum legal size restrictions applicable to commercial harvests do not apply to farmed product. In all areas outside of designated critical habitat areas, the department will evaluate proposals for aquatic farming, including on-bottom culture operations, on a case-by-case basis, consistent with applicable statutes and regulations.

Proposed Kachemak Bay Clam Farming

The department will not accept any applications for on-bottom clam farming in the Kachemak Bay and Fox River Flats Critical Habitat Area (KBCHA) during the current aquatic farm open application period that concludes on April 30, 1999. It is my current view that the existing KBCHA Management general policies prohibit intertidal leases and on-bottom aquatic farming in Kachemak Bay, and that the KBCHA Management Plan will need to be amended and readopted as regulation under the Administrative Procedure Act (APA) prior to leasing and permitting of any on-bottom aquatic farms within the KBCHA. The plan does not specifically address many of the issues and concerns relevant to these activities. The Department of Law (DOL) is reviewing this issue.

In response to interest by the Alaska Shellfish Growers Association and some individual farmers, the department will draft a proposed amendment to the KBCHA Management Plan. This proposed amendment, if adopted, would authorize a limited number of fixed duration, limited-acreage experimental littleneck clam farming projects to be associated with the existing farms in Kachemak Bay (i.e., only a subset of those that were operational as of 1998). The department's proposal would include information about the likely locations and maximum number and acreage of experimental sites. It would also detail for the public: (1) the types of scientific information that the department would require a proposed experimental clam farming project to collect over the course of its existence (e.g., growth rates, productivity, farm economics, and social and environmental impacts); and (2) how that information would be used to evaluate compatibility or incompatibility of littleneck clam farming in a state critical habitat area.

Another concept to be discussed at the public meeting is the potential for restoration or enhancement of littleneck clams on one or more public beaches, as originally suggested by the Shellfish Growers Association.

As described above, the department would need to conduct a public process pursuant to the APA to determine if the KBCHA Management Plan should be amended to authorize and issue permits to these experimental projects. The plan amendment process would require publication of meeting notices in Anchorage, Homer, Seldovia, Halibut Cove and Red Mountain and public meetings in Anchorage and Homer. If, after the public meetings, an amendment to the Plan to allow limited experimental littleneck clam farming is determined to be in the public interest, the department would draft proposed new regulation language and initiate the required 30-day public review required under the APA. If the public generally accepts the proposed amendment, we expect that the entire amendment and regulations adoption process would take 90-120 days.

Board of Fisheries

The department will be coordinating with the Board of Fisheries and the DOL to determine if the board needs to deal with clam allocation issues in Kachemak Bay prior to permitting or leasing of on-bottom clam farms.

Kenai Area Plan

Draft comments forwarded to the Department of Natural Resources for inclusion in the August 1998 draft of the Kenai Area Plan have been revised in response to requests from the public and reconsideration by departmental staff. Based on discussion with me, Habitat Division Director Ken Taylor notified the Department of Natural Resources that previous comments restricting mariculture operations outside of the Kachemak Bay Critical Habitat Area should be amended to reflect our position that aquatic farm applications outside the critical habitat areas will be evaluated on a case-by-case basis, consistent with the aquatic farming statutes and regulations.

I hope this letter addresses the questions you have raised about the State of Alaska's policies relative to Kachemak Bay and Fox River Flats Critical Habitat Area, and about statewide intertidal clam farming issues. If you have any questions, please contact Ken Imamura, ADF&G Mariculture Coordinator at (907) 465-6150.

Sincerely,



Frank Rue
Commissioner

- cc: Senator John Torgerson
- Representative Gail Phillips
- Board of Fisheries
- Commercial Fisheries
- Habitat and Restoration
- Sport Fish

35

Subject: Re: FW: Sale of wild clams from a farm
Date: Mon, 06 Sep 1999 14:31:47 -0800
From: Ken Imamura <Ken_imamura@fishgame.state.ak.us>
To: Carol Denton <carol_denton@adfg.state.ak.us>
CC: Steven G Mcgee <steve_mcgee@fishgame.state.ak.us>

Acquisition permits allow harvest and direct sale of wild stock, if that wild stock is within the boundaries of a permitted aquatic farm site. We have discussed the legality of this at length with the AG's office and within the mariculture program at HQ. Having established a precedent with three aquatic farm operators in Southeast, it would be difficult for the department to significantly change its permitting practices at this point in the permit review process. Simply put, the standing stock (pre-existing wild stock) on a leased and permitted aquatic farm site becomes the property of the aquatic farm site operator, to be disposed of in any legal manner. This includes commercial harvest and sale.

Precedents and current policies aside, the issue of pre-existing standing stock is knotty. Personally, I believe that the portions of the mariculture regulations addressing acquisition permits intended that wildstock, from both on and off the farm site, could be used for broodstock or for seedstock, not necessarily for harvest for commercial sale. I think that acquisition permits should allow collections of wildstock, either from the farmsite or public waters, for broodstock or seedstock, where that use does not conflict with established uses. Further, I strongly support legislative clarification of the intent of the acquisition permit sections in the statute, development of policies or regulations that clearly define the state's position regarding disposition of pre-existing standing stock on newly permitted farms, and adoption of stipulations for farm permits that will result in long-term conservation of the resource, while allowing farmers to use pre-existing standing stock to support project costs of their operations.

I have proposed meetings to discuss these issues, but have not received much interest or support. I think it would be a good idea for management representatives from the various divisions to get together to develop a comprehensive management plan and a set of operational policies, based on the statutes, regulations, and collective knowledge of our staff.

Carol Denton wrote:

> Has this been discussed & researched? Is there any other basis for allowing
 > sale of wild stock that has a farm boundary drawn around it?

> -----Original Message-----

> From: Lynch, Brian
 > Sent: Monday, August 30, 1999 2:43 PM
 > To: Denton, Carol
 > Subject: Sale of wild clams from a farm

> Has anyone ever asked the Dept. of Law if 16.40.140(e) actually allows the
 > sale of clams from a farm that have not actually been grown or propogated
 > that farm? I wasn't aware that that was the law that was being "used" to
 > allow the wild stock harvest of littleneck clams under provisions of the
 > mariculture permit system (ignorance is no excuse). I guess that when we
 > quit issuing wildstock harvest pemits I then ignored the situation. While I
 > am no legal beagle I have my doubts that that is what the legislature
 > intended when the statute was written. I would think that what was intended
 > was to prevent the wildstock harvest and avoid the situation that we were
 > talking about.

> What's the verdict?

P-3

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 ..."

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or shellfish acquired, collected, possessed, or intended for use by a
farm for the purpose of further growth or propagation." [Emphasis
is means that the common property resource wild stocks can only be
"planting" other geoducks rather than being harvested and sold to
operating capital.

f the applicants, taking out the existing stock of geoducks is necessary
operation viable. They assert that farming technology requires that the

- I. Department responsibilities under the 1988 Aquatic Farm Act
 - A. Permit to operate (hatcheries and farms)
 - B. Permit to acquire seedstock/broodstock from wildstocks
(note that copies of the 1988 Act and corresponding regulations are available)

- II. Criteria for issuing permits to operate (overhead 001)

- A. Physical and biological suitability of the site for farming the species proposed
- B. Significant alterations in traditional fisheries or other existing uses of fish and wildlife
 - 1. subsistence
 - 2. personal use
 - 3. commercial use
- C. Significant adverse affects on fish, wildlife, or their habitats
- D. Farm plan and staffing plan must demonstrate technical and operational feasibility

- III. Aquatic stock acquisition permit (overhead 002)

- A. If anyone of the four criteria are true and
 - 1. the proposed harvest will not impair sustained yield of the species or will not unreasonably disrupt established uses of the species
 - 2. or the Board of Fisheries has not adopted a regulation for the conservation, maintenance and management of the species that would prevent issuance of an acquisition permit
 the Commissioner shall issue this permit

- B. This permit would allow a farmer to acquire the standing crop of the target species within permitted farm boundaries

Read this

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

(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.

(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) 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

(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)]

The Legal Basis for On-bottom Aquaculture in Alaska

Steven White, Assistant Attorney General, Alaska Department of Law

By way of introduction, I must say that I am personally an advocate of aquaculture. In my commercial fishing career about 10 years ago, when I was the director of the Prince William Sound Aquaculture Corporation, I wrote a graduate thesis titled, "The Public Policy Issues Relating to Net Pen Salmon Farming," thinking that it might be useful in Alaska if and when we start farming salmon. Obviously, we haven't yet, so that thesis by now is obsolete. In any event, it was a fun exercise. Since then I have joined the state of Alaska, and I have been working principally for the Department of Fish and Game on some aquaculture and other general fisheries issues.

My particular interest, on which I have done some writing, is the common-use and the other equal-access clauses of the Alaska Constitution which are implicated by on-bottom aquaculture. The scenario for on-bottom aquaculture follows the following pattern: the state issues permits and leases to a potential farmer applicant, the applicant obtains a stock acquisition permit from the Department of Fish and Game to acquire the on-site natural wild resource (in this case the clams), does some enhancement on the clam population; and then markets the final product. That is today's scenario.

There are a number of ways to approach this topic. I could give you a summary of the statutes and regulations about application procedures, qualifications, and issuance of permits, but those topics are readily available from the statutes and regulations. If you do not know the process and what is expected of you as a potential farmer, you will easily learn them by the end of the conference. Instead, I will spend twenty minutes talking about some of the more esoteric aspects of this industry, the legal aspects I anticipate will be challenged, and the approach my department will take to defend a lawsuit. The possible confrontations stem from constitutional issues including the public trust doctrine and other related areas.

Most of the questions I receive about this industry and the development of a clam farming component are, "What about common use? What about exclusive right of fisheries? What about the public trust doctrine?"

For the next fifteen minutes or so I will present a brief overview of the constitutional public trust doctrine issues. Approaching this topic I will refer to specific litigation dealing with aquatic farming in Kachemak Bay and then finish with some goals I would like to see this conference address. Some issue resolution at this conference may help us at the Department of Law to defend this program from legal challenge.⁴ There are two constitutional issues contained in two clauses under Article 8 of the Alaska Constitution. They are part of what is termed the equal-access clauses of our Constitution that are unique to Alaska. What these provisions do in a broad sense is guarantee that there is public access to natural resources; and, in particular, to fish and game. The first clause is called the common-use clause. It says "wherever occurring in their

⁴ See Appendix 3 for an outline of the legal arguments and Alaska Constitution clauses.

natural state (natural state is important) fish, wildlife, and waters are reserved to the people for common use."

The Supreme Court has been dealing with this clause actively during the last ten years and essentially believes that the drafters of that clause meant it to guarantee broad public access to natural resources, and to prohibit any monopoly of those resources, particularly with respect to fish, game, and water. In 1988, the Alaska Supreme Court struck down what was called the exclusive guide area system for professional hunting guides. You may ask, "Well, what does that have to do with clam farming?" It has a lot to do with aquatic farming, and I anticipate if clam farming is challenged under the equal-access clauses, the first thing that the challenger is going to try to do is to draw an analogy between the exclusive guide area systems that the professional guides had and the clam farming industry. The Supreme Court said the exclusive guide area systems essentially created a privatization of a public resource. How they did that was interesting. The Supreme Court said there are five problems with that guide system: exclusivity, seniority, duration, transferability, and compensation. If these problems are considered collectively, the guide area system failed to comply with the common-use clause. There are some similarities between the guide area systems and on-bottom aquaculture, but there are also some significant differences.

Exclusivity

In the exclusive guide area systems, the state of Alaska essentially carved up all of the lucrative guiding areas in Alaska and allocated them out to guides. A person may have had a guide license, but unless the person had an exclusive guide area system, basically, he or she could not practice in your profession. Each guide had one or more exclusive guide area systems, and they were exclusive because no one else could come in and guide in that area. There is a similarity because when aquatic farm permits and leases are issued, they are exclusive, and no one else can gain access to the site and harvest the resource. At least for exclusivity, the two programs are similar.

Seniority

One of the problems that the Supreme Court had with exclusive guide area systems was that, when a permit was transferred, the person that acquired it from the previous holder had an advantage if they had use, occupancy, and interest or investment already in the site. If you are an applicant and you had any activity in the area, you had priority over another person who might be interested in getting that guide area. Aquatic farming also has a seniority system. If you have a permit, and you intend to renew that permit, you have an advantage over someone else that might want to have that permit—you have a seniority right. If you want to convert that permit into a lease, there is a preference for people who already have the permit. With this seniority right, you have an advantage for progressing from permit to permit and eventually getting a lease. In that aspect, there is a troubling similarity between the two programs.

Duration

An exclusive guide area could be owned for the life of the guide. Not so with aquatic farm permits and leases. Permits are three years in duration; you can renew them up to three times. Eventually, you can apply for a ten-year lease; but, at each point the farmer's performance under

that permit or lease is examined. This provision allows the state to not renew a permit or lease . That frees the farm site for another applicant.

Transferability

The Supreme Court had a real problem with transferability of permits under the exclusive guide system. A person could not directly transfer his system to someone else. When the professional guide decided he wanted to retire from the guide system, his exclusive guide permit went back to the Guide Board. However, under the regulations, the guide could sell the improvements to an applicant who wanted that exclusive guide area system. Earlier, I mentioned the seniority or preference for people who had already invested in that exclusive guide area system. In the instance when a guide was leaving the system, he could, under regulations, recommend transfer to a person that had invested in the system. That recommendation held a lot of weight with the Guide Board. Here is a scenario of how the system worked. If I am going to leave the guide area system, and someone wants to take it over for me because it is a good guide area system, I could sell all of the improvements to that person for an inflated value. In actuality, the person is buying not just the improvements but also my recommendation. I make a pile of money off of selling the "improvements." I take my recommendation to the Guide Board. They see he is already invested and transfer the permit. The Supreme Court looked at it and said, "This is a sham." The retiring guide is selling a public resource, a public common property resource, to another person and the Guide Board is just acting as a conduit. In aquaculture we do not have that in this system. Fortunately, the permits cannot be transferred. Leases can be transferred or assigned but only with the approval of Department of Natural Resources (DNR). That is a significant distinction between the guide area systems and the aquatic farm system.

Finally, the Supreme Court was very troubled with the whole process of passing on guide area systems, since there was no compensation to the state for the value of the resource. We are developing a program for the state to receive compensation for the value of the resource that is passed along with the aquatic farm permits and leases.

The other clause under the Alaska Constitution that would be raised in challenging this system is called the "no-exclusive-right-of-fisheries clause." That says no exclusive right or special privilege of a fishery shall be created or authorized in the natural waters of the state with an exception for limited entry and commercial fisheries. How the Supreme Court has interpreted this clause is interesting. It requires us to think in terms of users and uses of the resource.

Users

The Supreme Court interprets this clause to mean that when the state determines eligibility for who can harvest a resource that decision is examined under this clause. A good example is the former subsistence system. The former law said only people who lived in rural areas could be subsistence users. That was the criteria for who qualifies to use the resource. The court examined closely the method for distinguishing who could become members of that group to see if the criteria fit the purpose of the program or the intent of the legislature. When the analysis was applied in the McDowell case, the Supreme Court threw out the rural preference for subsistence.

Uses

Under the constitution, the state can allocate harvest opportunities among various users. In other words, the Board of Fisheries can decide that this fish stock can only go to commercial fishermen, or this game stock can only go to subsistence users, or what have you. Allocating between groups is acceptable under the constitution, and it is only inside the group that illegibility and equal-access clauses are implicated. We are talking users—admission to user groups—versus uses. Allocation among uses is what the state may do. But we have constitutional problems when we say that this person is eligible for membership in a particular user group, but another person may not qualify.

The public trust doctrine

Public trust doctrine was an issue in the Kachemak Bay case. Kachemak Bay Watch versus NOAA is the only existing lawsuit, that I am aware of, currently dealing with aquatic farming in the state. That case arose a few years ago and involves Kachemak Bay Watch challenging some of the procedures followed by DNR when they first identified aquatic farm districts in Kachemak Bay; and secondly, when they issued three permits for farms in the bay. The challenges are all procedural things like, should DNR have taken action by regulation when they identified the districts, as opposed to just announcing it? Did the regulations which DNR adopted comply with the underlying which says, for example, that DNR has to adopt regulations which limit farm sites in a particular area? In its regulation, the DNR said that you cannot have more than one-third of the surface of the bay covered with aquatic farm sites. Did that really comply with the statute? Those are the kinds of procedural questions that were being raised before the Superior Court. The Superior Court found in favor of DNR on all those issues. The bad news, however, is that the case is being appealed to the Alaska Supreme Court on most of those procedural issues. The state's argument is being prepared right now. In its decision the Superior Court made an interesting finding relating to the public trust doctrine which is helpful to the clam farming industry. In fact, that determination is not being challenged. In the Superior Court, Judge Hopson said that when reading over the aquatic farming statutory scheme, it seemed to him that the legislature, in adopting the leasing process, decided that it was bypassing the public trust doctrine for this program. In other words, the Superior Court says that the state abandoned its public trust duty when it adopted this program. That is not an issue in the appeal.

I would like to conclude my presentation by being optimistic about this program, not only for what it does but also for its legal basis. I would like to identify what I think are some goals that can help us strengthen the program from legal attack. I have listed the goals at the bottom of my outline. If you will deal with those topics in the next couple of days and help answer some of those questions, we will be on much firmer ground if this program, once it is on its feet, gets challenged under some of the principles I have mentioned so far.

My optimism for the program (at least for its legal basis) stems from several factors. First of all, I think that we can distinguish the aquatic farm situation from the exclusive guide area system in three important ways: duration; transferability; and, particularly, the compensation to the state. The permits and leases issued by DNR are basically exempt from all these constitutional issues. That conclusion is based on an analysis by the Department of Law a few years ago. At that time

the issue was whether shore fishery leases issued by the state for setnet sites violated the exclusive right-of-fisheries clause. Our analysis concluded that lease sites have nothing to do with fisheries. The state is giving away land, a property right, for an opportunity to use real estate. We are not giving anyone an opportunity to catch fish and are not permitting an exclusive right to fish. The fish may or may not be there. All the state does is say that the leasee has an exclusive right to set up his or her operation on this beach.

I guess that is the good news. The bad news is. DNR is not only issuing these permits and leases. but Fish & Game is issuing the stock acquisition permits which actually allow the farmer to acquire that common property resource, do some enhancement, and then sell it. That raises the issue of exclusive rights. However, I see some features of stock acquisition permits that would be very helpful in a lawsuit. First, before one of those permits can be issued, the state is required to make a determination that protects access to the resource. They must consider other existing and potentially competing uses for that resource. In fact, a stock acquisition permit cannot be issued if it unreasonably disrupts an established use. There will not be a situation where a stock acquisition permit is issued for a beach that is heavily or predominately utilized by other persons. That feature protects public access to the resource. The basic purpose of the constitutional clauses is to maximize the use of the resource, and our farming program is actually going to be creating more use of the resource. The state would be filling in, or supplementing, any existing uses that might be there. Thus, broadening public access to the resource will help this program withstand legal challenge.

Two features, exclusivity and seniority, are problematic for aquatic farming. They cannot be prohibited because they are needed for a viable industry. Obviously, no one is going to invest in this industry if they do not have exclusive right to a particular site, that is if anybody else can take of the resource, particularly their enhanced product. Seniority is the advantage for succession. It gives a priority to past users in the permitting and leasing processes. Unless someone can expect that they are going to have a site for a reasonable length of time, he or she will not invest time or money into developing a farm. These two features, even though they are problematic, are critical to this industry and without them, this industry could not function.

The exclusive guide area system virtually covered the entire state; there was no lucrative guide area that was not already locked up by somebody. At least at this stage of the aquatic farming industry, I believe there will be many sites available to farmers. Essentially, we are not prohibiting new entrants into the industry.

Finally, aquatic farming can be distinguished from the use versus users issues using the McDowell situation. Here, the state has not placed any undue restriction on eligibility to become an aquatic farmer. The state is not saying that only rural people are eligible. It is not establishing some kind of requirement that is not specifically directed toward making this industry viable. The only requirement is an operational plan and several other operational necessities. In other words there are no personal qualifications or qualities for the aquatic farming program similar to those that have caused the state legal trouble in other user group situations.

I would like to see three things accomplished at this conference. If you address these issues, that will help us defending the program from legal challenge. The first is, how should the state resolve access and acquisition conflicts where there are existing or anticipated uses of the standing public resource at a proposed farm site? In other words, when ADF&G receives an application for a stock acquisition permit and inquires whether there are any existing uses of the resource at that site, how will it respond if the answer is "yes"? Are there ways to accommodate existing uses? Or will it mean that the site will never used for aquatic farming?

The second issue is, when does the standing public resource become "enhanced" so that it is no longer in its natural state? The common-use clause only talks about fish and game in the natural state. A true aquaculture product is not governed by common use because no one would invest in aquaculture if the public were entitled to harvest the product. Here a public natural resource, through enhancement, becomes an aquatic farmed resource. At what point does this happen? How can we distinguish a clam farming situation from commercially harvesting clams? I have heard many people say that clam farming is just a sham for commercial harvesting of clams, so it is necessary to define the distinction. What is legitimate enhancement? How much effort and investment is needed? What is a workable definition of farming that state regulators can use to distinguish it from commercial harvesting? We must address this issue, otherwise it will provoke a lot of controversy.

Finally, the third issue is, what is fair compensation to the public for the standing, common property resource? In other words when the potential farmer acquires that standing clam crop and starts to enhance it, what is the value of the original resource? How should the state capture that value and make it available to all its residents.

STATE OF ALASKA
DEPARTMENT OF FISH AND GAME

41

TO: Distribution

DATE: July 11, 1995

FROM: Robert Bosworth *RB*
Deputy Commissioner

SUBJECT: Clam Farming

On June 30, 1995 division representatives met with Commissioner Rue and me to discuss clam farming being proposed by a number of aquatic farm applicants. The purpose of the meeting was not to make any final decisions on the department's position on these activities, but was to discuss what appear to be the primary issues at hand and to formulate a plan to develop a departmental position on this potential use of our intertidal resources.

At Commissioner Rue's direction a departmental mariculture working group was formed to begin this process. The working group members are:

Rob Bentz	Sport Fish
Jim Cochran	CFMD
Paul Larson	CFMD
Al Kimker	CFMD
Don McKay	Habitat and Restoration

We will also ask the Attorney General's Office to participate as there were a number of legal issues presented. Wildlife Conservation asked that they review draft recommendations only.

I will take the lead for the Commissioner's Office and will participate as time permits. Jim Cochran will schedule meetings and insure that progress reports are submitted to me as the process evolves.

The ultimate goal of the workgroup is to develop a draft department policy on clam farming. The policy is to include recommendations for implementation of the policy, including interactions with the industry and other departments. The first task will be to articulate and analyze the several policy questions involved in this issue. Examples of questions that might be explored include:

- Under what circumstances would we oppose clam farms?
- When is a clam farm actually a wild harvest?
- Have we explored the technology involved (in littleneck harvesting) so that we know what is feasible?
- What are the potential conflicts with existing resources and uses, and how might they be mitigated?
- Does clam farming constitute an exclusive use of a resource?
- What regulatory alternatives are available?
- Do we have the capacity to manage shellfish farming?

MEMORANDUM

STATE OF ALASKA
DEPARTMENT OF FISH AND GAME

46

TO: Distribution

DATE: July 26, 1995

FILE NO:

TELEPHONE NO: 465-4160

FROM: James O. Cochran
Mariculture Coordinator
Commercial Fisheries Management
and Development Division -- Juneau

SUBJECT: ADF&G Mariculture Workgroup
July 20, 1995
Clam Farming Meeting
Summary

In attendance:	Geron Bruce (Chair for Rob Bosworth)	GB
	Bob Clasby	BC
	Steve White (Department of Law)	SW
	Paul Larson	PL
	Rob Bentz	RB
	James Brady	JB
	Don McKay	DM
	Tom Rutz	TR
	Jim Cochran	JC

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JUL 27 PM 12 20

Geron asked each person to articulate issues they wished to address concerning farming of clams directly (no enclosures) in the intertidal zone. Twenty issues of concern were identified. They are listed below without annotation. Following the listing are summary notes of the discussion that followed. If you find errors, or have a different interpretation of what occurred in a discussion please let me know. I believe it is important to keep in mind that these are issues of concern to one or more workgroup members and not necessarily statements of fact even though the wording may indicate otherwise.

To help workgroup members identify the originator of an issue and pursue clarification if they wish, I have assigned initials to each (see attendance list).

ISSUES

- 1) Is it legal to grant an aquatic farm permit for the purpose of farming clams on intertidal areas in Alaska? (JC)
- 2) Granting an exclusive use of beach area. (RB, DM)
- 3) Using native clam seed for exclusive use. (DM)
- 4) Distinguishing clam farming from commercial fishing for clams. (JB)

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

P.O. BOX 25526
JUNEAU, ALASKA 99802-5526
PHONE: (907) 465-4100
FACSIMILE: (907) 465-2332

April 19, 2000

Mr. Scott Thomas
Alaska Trademark Shellfish
945 Lincoln Street
Ketchikan, AK 99901

Dear Mr. Thomas:

Under Alaska Statutes 16.40.100-16.40.110, you have applied to the Alaska Department of Fish and Game (ADF&G) for an aquatic farm operation permit. In your application, you propose to farm geoducks (*Panope abrupta*) in Southeast Alaska.

This is notice that I intend to conditionally approve your aquatic farm operation permit application. After setting out the facts and pertinent laws that support my decision, I will describe the specific conditions that must be met before your permit can be issued. In addition, you are responsible for all other approvals, leases, and certificates required for aquatic farming activities on your proposed farm site(s).

It is important to clarify that an aquatic farm permit does not, in itself, give a farmer the exclusive right to harvest, for a commercial purpose, the wild fishery resources that are located at the farm site. A contrary conclusion is inconsistent with the laws that govern aquatic farming, and it may contradict the Alaska Constitution's prohibition against exclusive rights in fisheries.

However, an aquatic farmer may take wild fishery resources if they are to be used only for aquatic farming purposes. Those purposes are limited to 1) further growth or 2) propagation. The right to take wild resources for those purposes is acquired through a stock acquisition permit, issued by ADF&G under Alaska Statute 16.40.120.

A preliminary site assessment conducted by ADF&G divers in September 1999 revealed that there may be significant populations of wild geoducks on the sites you have proposed for your farms. To date you have not applied for stock acquisition permits.

Because the density of geoducks on your site may exceed that necessary to provide seed stock for propagation, it is likely that a portion of the wild geoducks at your proposed sites would remain a common property resource, which should be made available for other uses. That is because the Alaska Constitution, in article VIII, section 1, states that it is state policy to make natural resources "available for maximum use consistent with the public interest."

The 1999 site assessment revealed that wild geoduck populations at your proposed farm sites might be sufficient to support a harvest by commercial or personal use divers. It is conceivable, pending a complete stock assessment survey, that the department will authorize a commercial harvest of those stocks, in the future.

Authorizing that harvest would be consistent with the past management and development of the commercial geoduck fishery in Southeast Alaska. That fishery has existed since the early 1970s. In

recent years. geoduck divers have been subjected to limited entry, and they have voted to assess themselves to help pay for ADF&G research and management activities that will enable them to continue their existing harvests and expand into new areas as stock assessment work is done. By any measure, the commercial dive fishery is a traditional and existing use of the geoduck resource of Southeast Alaska. Excluding divers from viable geoduck populations would alter the deliberate and cautious development of that fishery.

Under Alaska Statute 16.40.105, an aquatic farm may not require significant alterations in traditional fisheries or other existing uses of fish resources. Also, a proposed farm plan must demonstrate technical and operational feasibility. Under that statute, I am prevented from approving your application unless you demonstrate that your proposed farming activity can technically and feasibly allow access to your sites for the commercial and personal use harvesting of wild geoducks that are not acquired through a stock acquisition permit.

Preserving access and harvest opportunity by other users, required by Alaska Statute 16.40.105, is consistent with a pertinent standard of the Alaska Coastal Management Program. In particular, your farm must be managed to maintain or enhance the state's sport, commercial, and subsistence fishery (6 Alaska Administrative Code 80.130). Under that standard, your farm is governed by a stipulation that provides for nondisruptive public access to fishery resources at the farm site.

Accordingly, the following conditions will be attached to your aquatic farm operation permit. You must satisfy these conditions before an aquatic farm operation permit will be issued for your aquatic farm.

1. For each proposed farm site, describe in writing to ADF&G a method for distinguishing (or segregating) wild, common property geoducks from cultivated, farmed geoducks. The method must allow practical access and commercial or personal use harvest of wild geoducks on each site that are not acquired through a stock acquisition permit. At the same time, the method must prevent excessive disturbance of cultivated, farmed geoducks by commercial access and harvesting.

2. If ADF&G, in its discretion, determines that the method described in paragraph 1 will accomplish the requirements 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.

This is my final administrative decision. If you disagree with it, you may file an appeal with the superior court under Alaska Statute 22.10.020. The appeal must be filed within thirty days of your receipt of this decision.

Sincerely,



Frank Rue
Commissioner

Enclosure

STATE OF ALASKA

DEPARTMENT OF FISH AND GAME

DIVISION OF COMMERCIAL FISHERIES

TONY KNOWLES, GOVERNOR

45

P.O. BOX 25526
JUNEAU, ALASKA 99802-5526
PHONE: (907) 465-4210

May 19, 2000

Mr. Scott D. Thomas
Alaska Trademark Shellfish
945 Lincoln Street
Ketchikan, AK 99901

Dear Mr. Thomas:

This letter is to inform you of Commissioner Rue's decision relative to general principles associated with issuance of geoduck clam operation permits. On April 19, 2000 I sent you a letter conditionally approving your permit application for an aquatic farm operation permit to farm geoduck clams. The condition in my letter required you to identify, and later comply with, a method for distinguishing (or segregating) wild, common property geoducks from cultivated, farmed geoducks. The method would have to allow other users to have practical access to the wild, common property geoducks on your proposed site that were not acquired under a stock acquisition permit. Neither you nor any other farmer was able to identify such a method.

On May 9, the Alaska Department of Fish and Game (department) held a teleconference to discuss standards that could be adopted as regulations for implementing the aquatic farm permitting statutes. The department gave participants an opportunity to present proposals to meet the condition expressed in the April 19 letter.

At the teleconference, two questions received the most attention. The first question was, "What would be a significant alteration of "traditional fisheries" or "existing uses" under AS 16.40.105(2)?" Some participants responded that only an active, ongoing fishery at a proposed site would cause farming to create that type of alteration. The second question was, "Under what circumstances may a stock acquisition permit be issued for the standing wild stock on a farm site?" Ideas on this question ranged from allowing onsite, wild shellfish acquired under a stock acquisition permit to be used only for broodstock to allowing it to be harvested and sold to finance farming operations.

Based on information received at the teleconference, the department developed the following general principles. The principles will be presented in draft regulations that will be released for public review and comment. Of particular interest to you, the principles will guide the department's actions on your pending permit applications.

1. The department believes that the best way to interpret AS 16.40.105(2), in terms of the commercial geoduck fishery, is to determine, at the time a farm 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 43.76.2000(b), as an area for which a bioassessment survey and subsequent commercial harvest will be conducted. If either condition exists, an aquatic farm would necessarily create a significant alteration of a traditional fishery or existing use and, therefore, would create a conflict under AS 16.40.105(2). If neither condition is present, locating a farm at that site would not cause a conflict under that statute.

It does not appear that the above conditions exist for any of the geoduck permit applications that are pending before the department. Therefore, the sites are not "off limits" in favor of the commercial diving industry.

However, it is important to note that the above determination will be made each time that a farm operation permit is being renewed. If a farmer wants to continuously farm at a particular site, the determination would be made every five years. 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 geoducks at the site.

2. Before geoduck farming can commence, there must be a scientifically based dive survey of the proposed farm site. The purpose is to determine the amount of standing stock presently on the site.

For the present permit applicants, ADF&G will, at its expense, conduct the surveys. All future applicants, as part of their application process, will be required to perform and pay for the "pre-planting" survey.

3. Before a farmer may harvest geoducks on the farm site, the farmer will need to conduct a "pre-harvest" dive survey – another scientifically based, verifiable survey to determine geoduck abundance. This survey will be conducted at the farmer's expense.

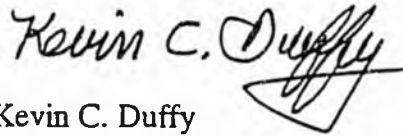
4. Based on the increased level of abundance at the farm site that can be attributed to the farmer's cultivation techniques, the farmer will be allowed to harvest the biomass that is the difference between pre-farming abundance and the present abundance.

5. Pertinent statutes do not authorize a farmer to use standing, wild stocks of geoducks for harvest and sale without having first "propagated, farmed, or cultivated" the wild geoducks. The statutes define an "aquatic farm" as "a facility that grows, farms, or cultivates aquatic farm products in captivity under positive control." It would not be consistent with those statutes to allow a farmer to harvest wild geoducks without first having done anything to improve their abundance, growth rate, or any other aspect of productivity. Therefore, the department will issue stock acquisition permits only for the purposes of providing brood or seed stock or for growing-out under controlled, enhanced cultivation.

47

If you wish to be issued a geoduck farm operation permit under the principles above, please contact Mariculture Coordinator Ken Imamura in writing within 30 days of the date of this letter. In that event, the department will issue you a permit with conditions that reflect those principles. Please note that the sooner the department hears from you the sooner we will act on the permit applications and geoduck farm operation permits. If you do not respond within 30 days, or if you indicate that you do not wish such a permit, the department will deny your application.

Sincerely,



Kevin C. Duffy
Deputy Director



Craig's Dive Center

48

Post Office Box 796 * Craig, Alaska * 99921

Phone/fax 907-826-3481

E-mail craigdiv@ptialaska.net

December 17, 1999

To:

Re: Mariculture Farm Comments

Good morning,

I would like to submit my opinions on the aquafarm permit applications currently being reviewed. My connections to the issues, besides being a resident of the state, are being a small business owner, a long-time dive fishery participant, and having a personal interest in operating my own mariculture operation eventually.

Trying to keep it brief, most of the points I'd like to bring up specifically concern the new geoduck applications, but also are relevant to existing clam operations, and they are:

- *Competition with the existing geoduck dive fishery.* There is great potential for growth in this very underdeveloped fishery. "Farmed product" would possibly have a significant negative effect on the market share/price. Fishery income here in Craig tends to stay here, where geoduck farm money would not have the connection to the local community.
- *Lack of available spat.* To the best of my knowledge, there is no geoduck spat available for farmers to plant, and will not become available for at least two years. How can one "farm" when there is no seed?

000474



Craig's Dive Center

49

Post Office Box 796 * Craig, Alaska * 99921

Phone/fax 907-826-3481

E-mail craigdiv@ptialaska.net

- *Difficulty enforcing regulations.* At these remote sites, opportunity to monitor the farm operations are next to impossible. Anecdotally, it is common knowledge that farm operators hire local people to harvest littleneck clams under their permit in Sea Otter Sound, but don't confine the harvest to the permitted area. It wouldn't take much of an investigative effort to prove up these allegations.
- *Inability of state agencies to agree upon, and clearly define the regulations.* At the last Board of Fish meeting three years ago, there was clear, direct, and emotional testimony regarding concerns with clam farm operations – many of these same issues are coming up again without any action in the intervening time. Apparently, the distinction between “farming” and a “commercial harvest” is a gray area, when it should be black and white. Acquisition of broodstock necessitates a few to a few dozen organisms, not continual harvest of wild stock to sell on the open market.
- *Intent of the applicants to farm.* Looking at the realities of a mariculture business, trying a species new to culturing in Alaska, not having available broodstock, and knowing many of the applicants personally, it is my belief that there is no intent to actually farm. Not a bad business concept to be able to take advantage of regulatory loopholes to acquire a valuable state resource for minimal expense, harvest and sell it for substantial sums, then walk away from their “farm” after the resource has been depleted.

In summary, the relevant agencies need to do the right thing by making the hard decision to clearly define and enforce true aquaculture – which is spawning and nurturing growth of a species to a marketable size.

Aquaculture is not the harvest of wild stock – essentially the giveaway of a state resource.

G0047J



Craig's Dive Center

50

Post Office Box 796 * Craig, Alaska * 99921

Phone/fax 907-826-3481

E-mail craigdiv@ptialaska.net

Thanks for your consideration,

Craig Sempert
Owner

Craig's Dive Center
PO Box 796
Craig, AK 99921

907-826-3481 ph/fax
craigdiv@ptialaska.net

000476

Moira Ingle

51

From: Moira Ingle [moira_ingle@adfg.state.ak.us]
Sent: Wednesday, February 16, 2000 8:27 AM
To: 'Ken Taylor'
Subject: RE: ATS geoduck letter

Thanks for the vote of confidence--sometimes this gets to be a frustrating job (but never boring, that's for sure!) I have to say I prefer wolves (and any other critter) to culverts, but I am getting pretty fond of those little coho juveniles--they're tough little guys, worth arguing over!

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

From: Ken Taylor [mailto:ken_taylor@fishgame.state.ak.us]
Sent: Wednesday, February 16, 2000 8:13 AM
To: moira_ingle@adfg.state.ak.us
Subject: Re: ATS geoduck letter

Thanks Moira. By the way, I read your outstanding evaluation a few weeks ago and meant to let you know how much I appreciate all of your hard work. I'm really pleased you are on our staff... I was hoping to hire you when I was in Wildlife...now I'm glad I never had the opportunity!

Guess we're going to get beat up a little by Sen. Torgerson over clams and geoducks next week... we'll survive.

Ken

Moira Ingle wrote:

I just read the letter to Governor Knowles from Alaska Trademark Shellfish (Scott Thomas), in which he asks the Governor to grant permits in time for the 2000 planting season. If you remember from that teleconference with him that we participated in, Ken, according to the hatchery there is no Alaskan seed available for planting, and none expected for at least 2 years.

9/28/00

Subject: RE: Southeast Aquatic Farm PDS
 Date: Mon, 29 Nov 1999 17:12:37 -0900
 From: "Moira Ingle" <moira_ingle@adfg.state.ak.us>
 To: "Guyla McGrady" <Guyla_McGrady@dnr.state.ak.us>
 CC: "Lana S Flanders" <lana_flanders@fishgame.state.ak.us> ,
 "William A Hanson" <bill_hanson@fishgame.state.ak.us>

Thanks for the info. As I mentioned on the phone, I wanted to highlight a couple of pieces of info on cultural sites that apparently did not make it into DNR before the preliminary best interest findings were issued. I recognize that part of the purpose of the public review period is to gather info like this, and that you most likely don't have everything. I just wanted to highlight these now, because of their regional importance (according to the local FS archeologist), and because it seems as though they may be more of a siting criteria for DNR than for ADF&G, per se. I'll also try to make sure they appear in ADF&G's final written comments, however.

In both cases, the proposed BIF states that
 "There are no known historic or cultural resources in the area."

1. ADL 106579; Thomas; West Long Island

Cultural: Immediately adjacent to the proposed aquafarm sites, Koinglas is an important Haida cultural site: one of a limited number of "14 H1 Historic and Cemetary Sites" conveyed to Sealaska (whc I believe is therefore the upland owner, not Klukwan, Inc., as identified by the applicant, or the Forest Service, as identified by DNR.) Serious concerns exist about disturbance of upland, intertidal, and subtidal areas, according to the archeologist. Possibly all three "plots" would be affected.

Subsistence: the entire area of Kaigni Strait has been identified (1999 Division of Subsistence surveys) as a traditional subsistence area for shellfish, fishing, and hunting. This would include 106578, -579, and -580. Also, abalone populations (discussed in the SWPWAP) are reduced in the area (as they are throughout the POW area as a result of commercial overfishing), but are still taken for subsistence by residents of Hydaburg and other towns.

2. ADL 106568; Kittams; Port Santa Cruz

Cultural: Farm is immediately adjacent to upland historic site (Spanish exploration/settlement period). Similar concerns for excavation or disturbance of uplands and intertidal area.

Other: Three, not two anadromous streams in Port Santa Cruz: two within 300 yards of site, one (the only one identified by the applicant) approximately 1.5 miles away.

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

From: Guyla McGrady [mailto:Guyla_McGrady@dnr.state.ak.us]
 Sent: Monday, November 29, 1999 1:01 PM
 To: moira_ingle@fishgame.state.ak.us
 Subject: Southeast Aquatic Farm PDS

Moira, attached are the decisions for the Prince of Wales Island and SW POW Island areas. Let me know if you have any other questions. Also, I attached a copy of the teleconference info, maybe you could post this in your office or hand out. thanks, Guyla

000462

November 1, 2000

Ms. Janice Levy
Assistant Attorney General
P.O. Box 110300
Juneau, AK 99811

Dear Ms. Levy:

I have applied for a geoduck aquatic farm site lease, at Aguada Cove in Port Santa Cruz, from the State of Alaska Department of Natural Resources. I believe three employees of the Alaska Department of Fish and Game, Ken Taylor, Lana Flanders and Moria Ingle, have violated the Ethics Act, which I ask you to investigate.

Mrs. Ingle is married to Mr. Craig Sempert and they live in Craig, Alaska. Mr. Sempert owns and operates a dive shop in Craig. He is also a geoduck harvest diver and member of the Southeast Alaska Regional Dive Fishery Association, or SARDFA. SARDFA is the largest opponent to geoduck aquaculture. Mr. Sempert has vigorously opposed, and continues to oppose, DNR and ADF&G issuing me permits to establish an aquatic farm operation. This is because Mrs. Ingle's husband thinks that my aquatic farm would harm his dive shop's business interests. He also feels that he and the other members of SARDFA have exclusive rights to all undeveloped geoduck beds in Southeast Alaska.

Representing their business, Mr. Sempert, clearly outlines his opposition to the issuance of Permits by ADF&G in a 3-page letter sent to ADF&G on December 17, 1999. (Copy enclosed.) In that letter Mr. Sempert wrote:

Looking at the realities of the mariculture business, trying a species new to culturing in Alaska, not having available broodstock, and knowing many of the applicants personally, it is my belief that there is no intent to actually farm. Not a bad business concept to be able to take advantage of regulatory loopholes to acquire a valuable state resource for minimal expense. harvest and sell it for substantial sums, then

walk away from their "farm" after the resource has been depleted.

Ms. Ingle works as a habitat technician for ADF&G in Craig, Alaska. As the sole ADF&G employee in Craig, she lacked the immediate supervision and oversight that should have been required. Her direct supervisor, Mrs. Lana Flanders, knew of the conflict between my project and Mrs. Ingle's business, yet still relied on her extensively. I met with Ms. Flander's supervisor, Mr. Taylor, who is the Director of Habitat and Restoration for ADF&G, in October of 1999. At that meeting, Mr. Taylor assured me that Ms. Ingle would no longer be involved in the evaluation of aquatic farm applications, because of the obvious conflicts of interest she had, given her husband's businesses interests and personal opposition to aquatic farming.

However, after that meeting with Mr. Taylor, Ms. Ingle was continuously requested and encouraged by her supervisor Mrs. Lana Flanders to work on my project. Mrs. Flanders in a March 15, 2000, email to Mrs. Ingle stated,

Please take what we've got so far for draft ACMP comments in Port Santa Cruz, Figgins Point and Betton Island and **prepare final draft comments** for my finalization on March 21. Incorporate any input from CFMD, **add your latest info regarding use of the anchorage at Port Santa Cruz**, and add the appropriate additional stips using language in DGC's final consistency on the other farms. **Thanks for all your help in these reviews.**

Mrs. Ingle further wrote in a January 5, 2000 email,

Attached are Region 1 draft final reviews for the farms on POW. Lana has not yet reviewed them directly, although I have been working with her conceptually. They do represent the general direction we're heading, although we have more fleshing out to do. We're both available and planning to work with you right up to the end, if need be.

This documents that Mrs. Ingle was integral, if not responsible, for the evaluation of my project. Her supervisors gave Mrs. Ingle, as a habitat technician, too much responsibility. She was also allowed to research other topics not pertinent to her job and enter them into the record. In fact, the ADFG's only role in the permitting process was to address conflicts

between my project and the Alaska Coastal Management Plan (ACMP). In a November 3, 1999 email she wrote to Mrs. Flanders,

Reading through the DNR Aquatic Farmsite Permits and Leases statutes, I see a couple references to cumulative effects...

It is not the responsibility of a habitat technician to be doing research which should be handled by the Department of Law or Department of Natural Resources.

Throughout the review process, Mrs. Ingle was informed about my project via E-mail. On April 17, 2000, fully a year after the review began, Mrs. Ingle was again asked to evaluate my project by her supervisors. She expressed her disdain for my farm again and expressed SARDFAs continued interest in the project.

Mrs. Ingle organized and attended a public hearing sponsored by DNR, on my aquatic farm application as a representative of ADF&G on December 2, 1999. During this official DNR comment period there were only two general concerns for anchoring at my site, both by SARDFAs members.

Mrs. Ingle took it upon herself to use state time and monies to elaborate on this baseless anchoring controversy. Her apparent goal was to impede my lease application with an unsubstantiated violation of the ACMP. Fortunately, her search for controversy ended without support. Mrs. Ingle in a March 14, 2000, internal email to Mrs. Flanders wrote about my project,

I spoke to an urchin diver and a sport fish charter boat operator about potential conflicts. Neither the diver nor the operator felt there would be conflicts with their activities at the farm site. The charter operator indicated that he and most boats he knows fish heavily in Indiada Cove, but not in Aguada. Both individuals indicated that the best area for anchorage is at the head of Port Santa Cruz.

These comments directly supported my application. However, Mrs. Ingle and Mrs. Flanders left this pertinent information out of the public document they published a week later on March 21, 2000, the ADF&G Final ACMP Comments. In fact, they published the following contradictory information.

ADF&G staff talked to several trollers, a sport charter operator and urchin fishermen regarding uses of Port Santa Cruz, including the farmsite. Craig fishermen report that "quite a few" trollers and seiners use Port Santa Cruz, primarily as an anchorage.

ADF&G habitat staff and local fishermen confirm the importance of the majority of Port Santa Cruz, including the proposed farm site as a year-round anchorage for trollers and other users.

This contrary, undocumented, unsupportable information was extremely detrimental to the outcome of my project. The DNR and ADF&G cited these comments as the **major** component for evaluation of my project as well as the subsequent denial of my lease by DNR.

Ms. Ingle's actions on my aquatic farm site are violations of the Ethics Act. I believe she has adversely influenced the outcome of my permits by using her official position. Mr. Taylor and Mrs. Flanders have violated the Ethics Act in failing to keep Ms. Ingle out of the review process, and by allowing her to continue in the review process of my lease.

Ms. Ingle's financial interest in the Craig, Alaska business owned by her and her husband and their income derived from commercial geoduck harvesting appears to be influencing the performance of her public responsibilities in violation of AS 39.52.010(a)(1), and is a conflict of interest in violation of the Act.

She has misused her position to focus improper treatment of my application for an aquatic farm site and to bring down unfavorable treatment of my permit application in ADF&G's permit review process for aquatic farm permits. This is in violation of AS 39.52.120(a). By her association with Mr. Sempert, and adopting Mr. Sempert's antagonism towards me, she has used state time, property, and equipment to benefit her and her husband's personal and financial interests in violation of AS 39.52.120(b)(3). She also appears to have taken official actions to affect a matter in which she and her husband have a personal or financial stake, in violation of AS 39.52.120(b)(4).

Please immediately investigate this situation and these apparent violations of the Ethics Act by Mrs. Ingle, Mrs. Flanders and Mr. Taylor.

Sincerely,

Andrew Kittams

57

I have reviewed the allegations in this letter, and the complaint and it is submitted with my permission.

DATED this _____ day of November, 2000 at Petersburg, Alaska.

Andrew Kittams

STATE OF ALASKA)
)ss:
FIRST JUDICIAL DISTRICT)

WITNESS my hand and official seal the day and year in this certificate above written.

Notary Public for Alaska
My Commission

Expires: _____

(F) the costs associated with each activity or phase of development and whether financing has been secured;

(14) a description of all known human uses of fish and wildlife resources on or around the proposed site, including commercial fishing, personal and subsistence use;

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

(16) 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;

(17) if an applicant intends to apply for a stock acquisition permit to acquire wild stock, an application for a stock acquisition permit should be attached;

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

(19) if an applicant does not intend to cultivate and harvest wild stock present at the proposed site, an explanation of how wild stock of the same species intended for culture which occupy the site, can be or will be differentiated from planted stock and protected from harvest or harm by the proposed activities;

(20) information not already described regarding plans for the physical or biological alteration of a site; and

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 applicant meets the criteria in AS 16.40.105 and the regulations adopted in this chapter.

(b) The commissioner may deny an application 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 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;

(D) supports a high abundance of predators or competitors of the species intended for culture that cannot be reasonably controlled;

(2) the proposed site is

(A) used for the conduct or support of traditional fishing operations, including the setting, operation, and retrieval of fishing gear, harvesting, handling, or processing of fish, anchoring, staging, or storage of vessels or other fishing gear, or for transfer or storage of a harvested product or gear and the proposed activities will significantly alter this use;

(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 regional dive fishery development associations described in AS 43.76.200(b), unless the site has been surveyed and the site is excluded as an area that could support a commercial fishery;

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

(D) used for recreational, traditional, cultural, or ceremonial purposes associated with fish and wildlife resources on the site and the proposed activities will significantly alter this use.

(3) the proposed site or facility

(A) will significantly affect

- (i) milling, spawning, or rearing of important forage fish;
- (ii) use of the area by shorebird or waterfowl species for feeding, molting, breeding, refuge, or staging;
- (iii) marine mammal rookeries or feeding, pupping, nursing, or refuge areas;
- (iv) salmon milling, spawning, or rearing;
- (v) kelp or eelgrass beds;
- (vi) critical or unique nursery areas for fish, shellfish, or aquatic plants; or
- (vii) critical wildlife travel corridors, feeding areas, or other identified critical habitat;

(B) has been identified by a federal agency as containing critical habitat for species listed as of concern, threatened, or endangered and the proposed activities will significantly affect that species;

61

application shall be in writing and will explain the basis for the denial. Unless reconsideration is requested, a decision on an application will be considered final agency action that can be appealed under AS 22.10.020.

(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 60 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. 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. (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

62

(1) use culture methods designed to enhance the productivity of the species intended for culture;

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

(3) not store, or otherwise possess animals of the same species being cultured, that have been commercially or recreationally harvested, unless the commercially or recreationally harvested animals are clearly separated from cultured species, labeled, and if applicable, accompanied with a receipt of purchase;

(4) identify the site with signage readable from the outside boundaries of a site, including the name of the permit holder, the department's aquatic farm or hatchery operation permit number, and contact information for the permit holder;

(5) prevent aquatic farm and shellfish hatchery operations from significantly altering traditional fisheries or other existing uses of fish and wildlife resources;

(6) conduct aquatic farm and shellfish hatchery operations to avoid significantly 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 specified predators or incidental species;

(9) avoid adverse effects of predator exclusion methods on the environment and incidental species;

(10) submit an annual report;

(11) apply for stock transfer permits;

(12) report outbreaks of disease;

62

and amendments that have been approved for the culture of new species or the use of more or new kinds of gears since the submission of the last annual report.

(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 substantially complied with conditions in the previous operation permit, the Commissioner may deny the application for permit renewal, unless the Commissioner finds the noncompliance with previous permit conditions was due to circumstances beyond the permit holder's control and the permit holder has presented a plan of correction.

(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) A permit holder may continue operations until the Commissioner approves or denies an application for renewal or transfer. (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) Any person, including an aquatic farm operation permit holder and a shellfish hatchery operation permit

(11) the location and facilities at which collections will be consolidated, held, and staged prior to the transfer of the wild stock; and.

(12) other information that may be required by the department to verify that the applicant meets the requirements of AS 16.40 and 5 AAC 41.200 - 5 AAC 41.400.

(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 or shellfish operation permit holder for the purpose of cultivating mature 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;

(5) demonstrate that the culture methods used enhanced the productivity of the wild stock;

(6) limit the harvest of wild stock obtained for culture to a biomass equivalent to the increase in harvestable biomass attributed to the culture methods used; and

(7) pay for third party surveys to determine the pre-farming biomass and the pre-harvest biomass of the cultivated stock.

6-5

(d) A stock acquisition permit 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

STATE OF ALASKA
DEPARTMENT OF FISH AND GAME

Frank Rue Commissioner



66

Public Communications

P.O. Box 25526

Juneau, Alaska 99802-5526

Phone (907) 465-6166, Fax (907) 465-2332

Press Release... For Immediate Distribution, February 14, 2001

**Public Comment Period to be Re-opened for
ADF&G Shellfish Farming Regulations**

Monday, February 12th, Alaska Department of Fish & Game Director (ADF&G) of Commercial Fisheries, Doug Mecum, formally requested that the Department of Natural Resources (DNR) extend, for 60 days, the Multi-Agency Aquatic Farm Application April 30th filing deadline. Tuesday, ADF&G received a memo from DNR granting the extension that will keep the filing period open until June 30th. Extending the filing period to June 30th will allow ADF&G additional time to review public comment and make needed revisions to the ADF&G draft Aquatic Farming and Shellfish Hatchery Regulations. The extension will also allow ADF&G to re-notice the regulations after revisions are made, in order to give shellfish farmers and hatchery operators another opportunity to comment on the draft regulations. ADF&G intends to have the regulations in place prior to the June 30th filing deadline for aquatic farm applications.

Last week's ADF&G Mariculture Advisory Panel discussions clearly gave reason for revising the regulations, and extending the application deadline," said Mecum. "This allows the department to re-open the comment period on a new draft that will include many suggested changes made by the stakeholders."

The public comment period on the current Draft Regulations closed on Monday February 12th.

The proposed 2001 schedule for the Revised Draft Regulations is as follows:

- By February 23rd: review public comment and revise the draft regulations.
- February 26th: Notice and distribution of new draft regulations.
- February 26th – March 27th: Public comment period.
- Between March 14th – 19th: Hold a Statewide public hearing via teleconference.
- Between March 27th – May 8th: ADF&G review of public comment and revisions to regulations, and Department of Law review completed.
- May 8th: draft regulations filed with Lt. Governor.
- June 8th: Effective date for adopted regulations.

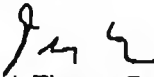
END

Dear Administrative Regulation Review Committee:

As applicants for aquatic farm in Southeast Alaska we would like to voice our concerns over draft regulation being proposed against aquatic farming. We recently submitted our applications to the Department of Natural Resources to make the application deadline of April 31, 2001. We have since been notified that the application period has been extended to accommodate changes to aquatic farm regulations. After reviewing these regulations our concern is that if these draft regulations are passed and become effective it will be almost impossible to implement our development plan and meet the requirements of the regulations.

The primary species for cultivation at our farms will be geoduck clams. Under the draft regulations we would only be allowed to use the existing stocks for very limited purposes. The regulations would require us to farm around the existing stocks and comply with two management plans, one for natural occurring clams and another for planted seed stock. This is an impossible situation. Our suggestion would be for the Alaska Department of Fish & Game to put their final draft of the regulation out for public review again, and take whatever time is necessary to work with the industry to come up with workable regulations.

Sincerely,



Derek Thynes P.O. Box 1624, Petersburg, AK 99833 Ph. (907) 772-3709

Andrew W. Kittans by Stacy Kittans A.I.F.

Andy Kittans P.O. Box 1544, Petersburg, AK 99833 Ph. (907) 772-2327



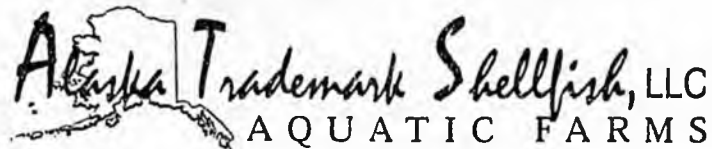
Caley McCay P.O. Box 2142, Petersburg, AK 99833 Ph. (907) 772-4823

Alaska Trademark Shelfish, LLC

From: Kim Kruse <kimk@dnr.state.ak.us>
To: <ats@kpunet.net>
Cc: <guyla_McGrady@dnr.state.ak.us>
Sent: Thursday, April 26, 2001 12:02 PM
Attach: kimk.vcf
Subject: 2001 aquatic farm applicants

Scott, here's the list you requested with the names and addresses of this year's aquatic farm applicants. Kim

Caley McCay, P.O. Box 2142, Petersburg, AK 99833 907/772-4823
Derek Thynes, P.O. Box 1624, Petersburg, AK 99833 907/772-3709
Andrew Kittams, P.O. Box 1544, Petersburg, AK 99833 907/772-2327



69

April 28, 2000

Frank Rue
Commissioner

Alaska Department of Fish and Game
P.O. Box 25526
Juneau, Alaska 99802-5526

Dear Commissioner Rue:

I have received your final administrative decisions with regard to our Aquatic Farm Operational Permits. In response to the letter I have included our applications for Aquatic Stock Acquisition Permits and supporting materials. I will comment briefly on the letter and then provide you with two practical and reasonable options to the conditions set forth in the letter and then a third option that combines a compromise of the first two options.

On page 2 of the letter, paragraph 2, the second sentence states "Also, a proposed farm plan must demonstrate technical and operational feasibility". In response to this statement I would suggest that the department go back again and review our Aquatic Farm Authorizations Shellfish & Aquatic Plants Application, or talk to the other issuing agencies, DGC, DNR and ADF&G personal, all who have had our applications for over a year and have since made final findings. A review of this information will demonstrate technical and operational feasibility.

Your letter requests a "Practical" method to a set of conditions that are not reasonable. That is to say, that aquatic farming of shellfish can coexist in the State with other uses. In fact they can coexist in a region or even a ADF&G defined sub-district. Multiple uses could probably even exist on a zero lot line, but they can not practically or reasonably coexist on the same real estate. In response I will present you with a couple of more reasonable options.

OPTION 1

- a.) Provide access to standing stock based on 50% of the total area for each site working from North to South for the first 3 years, then each subsequent year provide access to standing stock based on planting performance by area.
- b.) We will provide a Restoration Bond based on the cost of replanting by the piece. For example we are estimating that it will cost \$0.52 to replant each animal, for

each single clam we would provide \$0.52 to the State to be held in escrow until we begin replanting.

- c.) We would cover the cost for two ADF&G employees to inspect and monitor our progress and to ensure we are complying with conditions of our permits, however the cost can not exceed \$10,000 annually.
- d.) As long as there are natural stocks on our site we would provide the opportunity for any eligible person to collect geoducks from our sites for subsistence, sport or personal use as long as that use was not destructive to cultivated or enhanced shellfish.
- e.) We would clearly mark the boundaries and corners of each farm site plot and the half way line by area for each plot both on surface and on bottom.
- f.) We would keep a harvest record of all natural stock by the pound and piece to be turned into ADF&G within 48 hours of harvest. In addition we would pay ADF&G \$0.05 per pound to cover administrative costs.

OPTION 2

- a.) Provide access to 100% of the standing stock based on 100% of the total area.
- b.) As long as there are natural stocks on our site we would provide the opportunity for any eligible person to collect geoducks from our sites for subsistence, sport or personal use as long as that use was not destructive to cultivated or enhanced shellfish
- c.) Based on ADF&G's September 1999 assessments of abundance of our 3 sites for geoducks clams, the department determined there to be a 615,285 lb bio-mass. We would provide specific access for two years to 100% of what the quota would be if a commercial capture fishery were conducted on our sites for the ten year term of our lease.

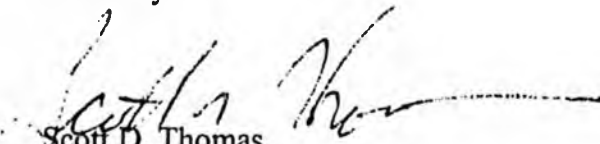
OPTION 3

- a.) Issue ATS Stock Acquisition Permits for all standing geoduck stock based on 100% of the leased area.
- b.) As long as there are natural stocks on our site we would provide the opportunity for any eligible person to collect geoducks from our sites for subsistence, sport or personal use as long as that use was not destructive to cultivated or enhanced shellfish.
- c.) We will provide a Restoration Bond of \$0.20 for every wild geoduck harvested off our leased sites, which will be held in escrow until we begin replanting.
- d.) We will pay up to \$5,000 annually for ADF&G to inspect our sites to ensure we are complying with the conditions of our permits.
- e.) We would clearly mark the boundaries and corners of each farm site, both on surface and on bottom.
- f.) We would keep a harvest record of all natural stock by the pound and piece to be turned into ADF&G within 48 hours of harvest.

d.) Based on ADF&G's September 1999 assessments of abundance of our 3 sites for geoducks clams, the department determined there to be a 615,285 lb bio-mass. We would provide specific access for two years to 100% of what the quota would be if a commercial capture fishery were conducted on our sites for 5 years. ADF&G uses a 2% harvest rate for the current experimental geoduck fishery. If a commercial geoduck fishery were conducted on our sites the annual quota would be 12,305 lbs. Over five years if a commercial fishery had taken place the total harvest would have been 61,525 lbs. We would be willing to give up *Plots 1&2 from Site 1* , for two years so the Developing, Experimental Geoduck Fishery could harvest this bio-mass. According to ADF&G's recent bio-assessments of this site, these two plots contain 204,188 lbs. In addition we would complete the water quality work for the area by July, 2000. After two years these areas would return to use in the form of aquatic farm leases.

Please give me your thoughts on these options ASAP

Sincerely


Scott D. Thomas

Mr. Steve White
January 25, 2000
Page 31

fish...or their products, and 'captivity' means having the fish...under positive control, as in a pen, pond, or an area of land or water..." AS 16.05.940(15). (Note that geoduck is an invertebrate and is included in the definition of fish, AS 16.05.940(12).)

In summary, nothing prohibits aquatic farm applicants from harvesting and selling standing stock on aquatic farm sites.

V.

Suggested Solutions

We urge ADF&G to withdraw the ADF&G Geoduck Guidelines from consideration. We urge ADF&G to attempt to come to a mutually agreeable solution to a seemingly difficult problem for ADF&G to address. We believe that a mutually agreeable solution should address the primary concerns that ADF&G disclosed to us earlier this year.

We believe that each application for a geoduck aquatic farm site and stock acquisition permit should address ADF&G's three legitimate concerns set forth above. We also believe that the following factors should be incorporated into reasonable policies on geoduck aquatic farm and acquisition permits:

1. All applications should be addressed on a case-by-case basis, on a site-specific basis.
2. ADF&G should be able to recover management costs to oversee and administer aquatic farm development. ATS would pay ADF&G five percent of its annual gross sales to pay for administrative and management costs.
3. An aquatic farm applicant should be required to provide contractual and financial security to insure that it will not take a resource and run, and if it does, the State will be able to mitigate impacts to the resource.

Mr. Steve White
January 25, 2000
Page 32

4. Each site will be open to inspection at any time by ADF&G personnel.

5. Independent auditors or observers could be provided by the applicants to reduce administrative burdens on ADF&G and to provide the State with a periodic unannounced site visits to insure that applicants adhere to conditions of permits.

6. To ensure ADF&G that standing stock is maintained on a sustainable yield basis, applicants would restock the substrate with geoducks. This stock replacement would be in addition to planned farm planting, as well as continued natural seeding. These seeding measures should insure that each site is continuously kept well above the maximum natural biomass. This will also address the State's concern of "take and run."

7. In accordance with AS 16.40.120(b)(1) and ADF&G's Commissioner's policies, property rights to "standing stocks" pass to the permittee with the lease. The stock acquisition permit will allow standing stock to become the property of the farm permit holder. The farm permit holder will not be restricted to harvest standing stock during commercial dive openings. However, the farmer will notify ADF&G at least 14 days in advance of harvest operations on a site.

8. ATS will allow ADF&G personnel on site at any time. ATS will file annual reports that will include such information requested by ADF&G including the number and poundage of geoducks harvested, the number of diver-hours on site, the number of harvest and planting days, and gross revenues and expenses.

IV.

Conclusions

I look forward to meeting with you and discussing this letter and the concerns, issues and possible solutions in more detail. Again, I believe that it is more beneficial for all parties involved in this matter to expend time, energy, and

The Alaska State Constitution

Article VIII

Natural Resources

SECTION 15. NO EXCLUSIVE RIGHT OF FISHERY. No exclusive right or special privilege of fishery 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.

Early April--- Third revision of regulations completed and sent to Department of Law.

Early May--- Review completed by DOL and regulations filed with the Lt. Governor

Early June--- Regulations become effective.

Late June--- 2001 application period for aquatic farm sites closes.

Summary of Revisions to Aquatic Farm Permitting Regulations

- Three drafts of regulations completed.
- Two separate public comment periods provided.
- Five opportunities for oral public comments on the regulations provided.
- Two meetings of a mariculture panel, composed of industry experts and affected stakeholders, convened to review and discuss changes to regulations.
- Over 160 changes made to the second and third version of the regulations in response to public comments and the work of the mariculture advisory panel.

Some of the major changes to the regulations that were adopted in response to public comments are:

- Transfer and renewal of existing permits made routine as long as continuing operations consistent with conditions and terms of the original permit.
- Removed requirements from regulations that are the responsibility of DNR or DEC.
- Deleted requirement to provide proof of financing.
- Extended period of aquatic farm permit from five to ten years.
- Removed requirement that department requests for additional information from farm applicant be supplied within 30 days.
- Provided increased flexibility to applicants in meeting application requirements.
- Modified a number of the definitions of terms used in the regulations such as: aquatic farming, adversely affect other uses, or fish and wildlife populations, and their habitats, and enhance the productivity at the farm site.
- Changed 'will' to 'may' regarding a number of requirements that might result in rejection of an application for an aquatic farm site.

**Regulatory Review Committee
April 24, 2001
Doug Mecum, Director
Division of Commercial Fisheries**

Chronology of Events Concerning Revision of Aquatic Farm Regulations

1996-1998

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

1999

Aquatic Farm application period reopens.

Forty-one applications submitted, including applications to farm "on-bottom" littleneck clams and geoducks, species native to Alaska.

Meetings held with aquatic farm applicants, at their request, to assist in application process (One day for littleneck clams applications and one day for geoducks).

During reviews department recognizes need to redraft permitting regulations to address issues regarding naturally occurring stocks and "on-bottom" farming.

2000

During 1999 and 2000 11 aquatic farming permits were issued. Nine geoduck permits were also approved for issuance, but rejected by the applicants because of their opposition to certain permit conditions.

March--- Geoduck farm applicants file judicial appeal of conditions in permits.

December--- Revised permitting regulations released for public comment. First public comment period extended from mid-January to early February.

2001

January--- Public hearings held in Ketchikan, Juneau and Anchorage on proposed regulations with links to teleconference sites in several other communities. Department establishes Mariculture Advisory Panel.

February--- First meeting of mariculture panel to work on proposed regulations. Second draft, revised based on public comments and mariculture panel work on the first draft, released for public review and comment on February 26 with a second 30 day public comment period provided. DNR, at the request of ADF&G, extends deadline for application for aquatic farm sites.

March--- Second meeting of mariculture panel to discuss second draft of permitting regulations. Second public comment period closed the March 27.

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

May 01, 2001

The Honorable Fran Ulmer
Lieutenant Governor
State of Alaska
P.O. Box 110015
Juneau, Alaska 99811-0015
Mailstop: 0015

Dear Lieutenant Governor:

In the next few weeks it is expected that you will be receiving for signature and filing, Regulations repealing and readopting 5 AAC 41, establishing rules for the permitting and operation of Aquatic Farms and Hatchery Operations under AS 16.40.100-.199, "The Aquatic Farm Act." Since first drafted in early 2000 the regulations have undergone revisions in an attempt to better align them with statute.

The Committee has carefully followed the progress of these regulations and has maintained an open discussion with stakeholders on how they will affect the industry. It is our concern that even with the latest revision these proposed regulations contain substantial flaws in that they do not allow for meaningful opportunities to develop shellfish farms. It is our opinion that some of these regulations may be in direct contradiction to the intent of the Aquatic Farm Act, and because these regulations are being promulgated to implement this act; it is the Legislature's responsibility to weigh in.

At least one group also believes the Department intends to hamper shellfish farm growth and is currently involved in litigation over aquatic farming permits. A final ruling on this case has yet to be issued and should the court decide in favor of the Appellants could require the Department to completely rewrite the regulations.


For the past 15 years, the Department of Fish & Game has managed mariculture under policies that apparently have resulted in 56 successful aquatic farms around the state. While it may not be a perfect way to run a department or an industry it was working. Problems began when the Department began promulgating regulations that directly contradicted their past policies and arguably the statute itself.

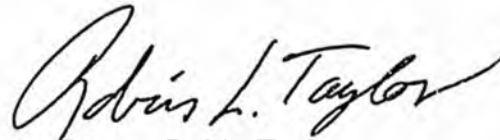
Today, we are approaching what the Department perceives as the end of a process. The Committee is concerned that it is only the beginning of additional unnecessary litigation costs that will be born both by the state and individuals attempting to Foster shellfish farming.

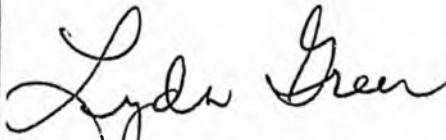
**LETTER TO LT. GOVERNOR FROM
COMMITTEE**

Therefore, the Administrative Regulation Review Committee requests that you use the Governor's option delegated to you under AS 44.62.040 (c) and return these regulations to the adopting agency until such time as all litigation and appeals have been resolved. The Department can continue to issue permits as they have for the past 15 years. A copy of this letter is being sent to the Commissioner of Fish & Game and the Attorney General. Thank you for your assistance in this matter.

Sincerely:

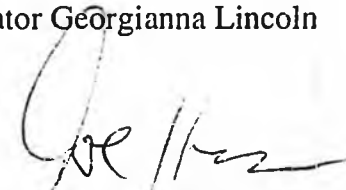

Representative Lesil McGuire
Chair


Senator Robin Taylor
Vice-Chair


Senator Lyda Green

Senator Georgianna Lincoln


Representative Jeannette James


Representative Joe Hayes



FRAN ULMER
LIEUTENANT GOVERNOR
STATE OF ALASKA

May 1, 2001

The Honorable Lesil McGuire, Chair
Administrative Regulation Review Committee
Alaska State Legislature
State Capitol, Room 115
Juneau, AK 99801-1187

Dear Representative McGuire:

I have received your letter requesting that I return to the Department of Fish and Game regulations repealing and readopting 5 AAC 41, establishing rules for the permitting and operation of aquatic farms and hatchery operations under AS 16.40.100-199. You are requesting that I "use the Governor's option delegated to [me] under AS 44.62.040(c) and return these regulations to the adopting agency until such time as all litigation and appeals have been resolved."

These regulations are currently undergoing technical review by the Department of Law and have not yet come to my office for filing. When they do come, I will follow the statutory requirements for reviewing them under the statute cited in your letter. The standards for returning regulations to the adopting agency are quite clear, and are set out in the attached memorandum from the Department of Law.

Sincerely,

A handwritten signature in black ink, appearing to read "Fran Ulmer".

Fran Ulmer
Lieutenant Governor

Enclosure

MEMORANDUM

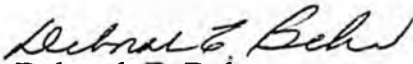
State of Alaska
Department of Law

To: The Honorable Fran Ulmer
Lieutenant Governor

Date: May 1, 2001

File No.:

Tel. No.: 465-3600

From: 
Deborah E. Behr
Assistant Attorney General
and Regulations Attorney
Legislation and Regulations Section

Re: Lieutenant Governor's role
in reviewing and returning
regulations under
AS 44.62.040(c)

You have requested legal advice as to the scope of your ability to review and return regulations before filing under AS 44.62.040(c).

AS 44.62.040(c) states as follows:

(c) Before submitting the regulations and orders of repeal to the lieutenant governor under (a) of this section, every state agency that by statute possesses regulation making authority, except boards and commissions and the office of the ombudsman, shall submit to the governor for review a copy of every regulation or order of repeal adopted by the agency, except regulations and orders of repeal identified in (a)(1) - (2) of this section. The governor may review the regulations and orders of repeal received under this subsection. The governor may return the regulations and orders of repeal to the adopting agency before they are submitted to the lieutenant governor for filing under (a) of this section. (1) if they are inconsistent with the faithful execution of the laws or (2) to enable the adopting agency to respond to specific issues raised by the Administrative Regulation Review Committee. The governor may not delegate the governor's review authority under this subsection to a person other than the lieutenant governor.

(Emphasis added.)

As you know, the governor has formally delegated to you this "review and return" function for state regulations.

The statute provides standards for the return of regulations. The first standard is, in essence, a legal standard -- whether the regulation is "inconsistent with the faithful execution of the laws." In evaluating a regulation for consistency under this standard, you may rely upon the Department of Law's legal opinion approving or disapproving the regulation for filing. See AS 44.62.060(b).

The second standard allows you to return regulations "to enable the adopting agency to respond to specific issues raised by the Administrative Regulation Review Committee."

It is reasonable to interpret this provision as referring to new issues not previously raised and responded to by the adopting agency. But regardless of whether the agency previously considered and responded to a particular issue raised by the committee, AS 44.62.040(c) places no obligation on you to return the regulation -- both the review and the return of regulations under that statute are discretionary, not mandatory actions.

If you return regulations adopted by an agency and approved for filing by the Department of Law, the reason stated for the return must meet the statutory standards. AS 44.62.040(c) does not authorize the lieutenant governor to return regulations for any other reason.

Finally, you have asked what your duties are for filing of the regulations if you decide to return regulations to "enable the agency to respond to specific issues raised by the Administrative Regulation Review Committee." Once the adopting agency has responded to the issues and returned the regulations for filing, your filing duties are ministerial and the regulations should be promptly filed. (1992 Inf. Op. Att'y Gen.; (Jan. 24; 663-92-0325)

If you need more information, please let me know.

DEB:jf

Dear Committee Members,

The following statement is a memo I wrote my to my lawyer by way of explanation.

Dear Bruce,

The most obvious story is that top-level Com-fish managers Director Doug Mecum and Region one director Scott Marshall took control of the process at a very early stage. They did not allow staff to do their job and then review the results. A consequence of this reality is that applicants never got an opportunity to obtain the proper evaluations of their proposals. Upper level management made their decision not to issue permits before evaluations were conducted. The logic was, why do all the work of evaluating development plans when it has been predetermined that permits would not be issued? Director level and Commissioner level elevations in the ACMP process were pointless because the Director made the decisions in the first place. They controlled the direction from the beginning. The e-mail record documents a continuous stream of attempts on the part of Ken Imamura to do the right thing and objecting to what was being forced upon him, to the point where he will most likely retire this spring instead of going through another application process. There are many Ken e-mails that support the positions in our complaint. The e-mails between Steve McGee and former Mari-culture coordinator Jim Cochran are the most revealing of many. I would like to put this one in some context for you. There was a major policy meeting on October 14, 1999. Even Jackie Timothy could not get an invitation. At that meeting Doug Mecum convinced Commissioner Rue that the previously issued permits for on-bottom aquaculture allowing harvest of standing stock of littlenecks were experimental and provisional. Doug needed the Commissioner's support to proceed with his plan and basically lied to him about the facts. Steve McGee knew it was a lie and contacted Cochran to verify the facts. These are the e-mails that we have. I believe that these e-mails are only the tip of the iceberg and staff like Steve McGee, Ken Imamura and Robert Pirokowski have a story to tell about how they where over-ruled and over-run by the bias of the commercial fisheries managers in the department.

Committee members,

I heard Director Mecum make this same statement to you at the hearing, that the permits were experimental. Casting this fact in this light allows the Director to minimize the significance of the precedence that was established by this action as well as the underlying legal rationale. He also made the statement that he had legal advice from the AG that it was unconstitutional to privatize the standing stock. Enclosed are a series of documents that indicate otherwise.

Thank you,
Steve LaCroix

CONSTITUTIONALITY

Assistant Attorney General, Steve White prepared a document on this issue in 1996 for presentation at a conference on "Broadening Alaska Shellfish Farming Opportunities". He said, "Under the constitution the state can allocate harvest opportunities among various users...Allocating between groups is acceptable under the constitutions, and it is only inside the group that eligibility and equal-access are implicated...Allocation among uses is what the state may do. But we have constitutional problems when we say that this person is eligible for membership in a particular group, but another person may not qualify." (Complete text enclosed, page 38-40)

He goes on to say that,

"Two features, **exclusivity** and seniority, are problematic for farming. They cannot be prohibited because they are needed for a viable industry. Obviously, no one is going to invest in this industry if they do not have **exclusive right** to a particular site, that is if someone else can take of the resource, particularly their enhanced product."

Steve White, the assistant attorney general for ADF&G is saying that without an exclusive right to the site the industry is not viable. Recognition of this fact is why the constitution exempted the efficient promotion of aquaculture from the exclusive right of fisheries prohibition in Article VIII, section 15.

In 1988 the legislature expressed its desire to have a viable aquatic farming industry for shellfish by passing the aquatic farm act. The act restricts farming to sites that "may not require significant alterations in traditional fisheries or other existing uses of fish and wildlife resources." Determination by the legislature that aquatic farming is a preferred **beneficial use** of public resources does not violate the constitution as long as equal access values are not violated. There are no laws restricting who is eligible to apply for an aquatic farm. Anyone who desires to farm may make an application. What the state may not do is create a special privilege within the user group. For example it cannot allow one farmer the use of standing stock and not another.

When confronted with problems resulting from his interpretation of the statutes through proposed regulations by committee members last week the director said, "We will have to seek legislative remedy." In other words, the legislature will have to bring the statutes into compliance with his regulations. This statement demonstrates the director's lack of understanding that it is the regulations that have to be consistent with the statutes.

Article IX, Section 7. Dedicated Funds. The proceeds of any state tax or license shall not be dedicated to any special purpose...

This is the section of the constitution that SARDFA had to structure its self-assessment around in order to have a viable commercial fishery. ADF&G refused to allow the development of the fishery unless they were funded. One of the reasons for the

prohibition on dedicated funds is to minimize the influence of income to agencies on good policy decision-making. Maybe that is what is happening in this case. The bias of the director in favor of commercial fisheries is compounded by income the department receives from funds dedicated to commercial geoduck fisheries management that are based on the value of the fishery. Is it possible the director's motivation is more than a defender of the constitution?

Sincerely yours,

Stephen La Croix

Administrative Regulations Review Committee

At the hearing on April 24th the director of com-fish, Doug Mecum, attempted to create three impressions, which I believe are false.

- 1) The stakeholder panel members and industry are generally happy with the proposed regulations. False
- 2) The "department" is supportive of aquaculture and is doing everything within its power to promote it. False
- 3) The Attorney General has given the department legal advise that transfer of standing stock on the leased farm site to the permit holder is unconstitutional. The director therefore has no choice in the matter. False

RESPONSES

- 1) As you may recall from testimony last week there were several topics at the regulation panel meetings that we were not allowed to discuss. Fact is we were not allowed to discuss anything. No debate was allowed. We were only allowed to respond to the proposals with suggested changes to the language or brief comments. Subjects that may relate to the court case were off limits. We were not given an opportunity to make constructive additions to the proposals that would promote the industry. We still have not seen a final version of the regulations project. If the director were sincere in his intent to promote aquaculture he would have no problem showing us the submitted version of the regulations and taking every level of input we are willing to provide.
- 2) I have presented several documents for your review that demonstrate that it has been the intention of the director to deny these permits from the start. It is my testimony today that these proposed regulations are simply a method to kill on bottom aquaculture by subverting the plain intent of the statutes. That is why the director is not willing to show us his work or postpone the process to take real input from stakeholders on the substantive unresolved issues. (Page 1,7,8)
- 3) The Attorney General has consistently supported the legality of aquatic farming in Alaska for leasing and transfer of interests in the resources on the leased site. Enclosed documents are samples of these positions. The director made the decision that use of the standing stock is unconstitutional not the attorney general. He does not want to transfer the stock and this is the excuse. The statute has no problem with the use of standing stock as long as the proposal does not alter existing uses. (Pages 24,25,31,37,38-40)

REQUEST

I agree with Steve McGee that they are doing all they can to kill my farm application. (Page, 10) One of the things they are doing to kill my application is promulgating regulations. I suggest to this committee they ask the department to suspend

the filing of these regulations, that they be processed under negotiated rule making so the critical issues of standing stock can receive proper public input, and that the process be delayed until after the Superior Court ruling. This request can be made of the Governor under the authority of,

AS 44.62.040 (c) Before submitting the regulations The governor may return the regulations and orders of repeal to the adopting agency before they are submitted to the lieutenant governor for filing under (a) of this section, (1) if they are inconsistent with the faithful execution of the laws or (2) to enable the adopting agency to respond to specific issues raised by the Administrative Regulations Review Committee. The governor may not delegate the governor's review authority under this subsection to a person other than the lieutenant governor.

Sincerely yours,

Stephen La Croix

FAX TRANSMITTAL

FRAN ULMER
Lieutenant Governor



P.O. Box 110015
Juneau, AK 99811-0015

(907) 465-3520
Fax: (907) 465-5400

DATE: 5-21-01

TO: Rep. Lesil McGuire

FAX NO.: (907) 269-⁰²²⁹~~0223~~

PAGES: 8 w/ cover

FROM: Lt. Governor's office

MESSAGE: Aquatic Farm Regulations



FRAN ULMER
LIEUTENANT GOVERNOR
STATE OF ALASKA

May 21, 2001

The Honorable Lesil McGuire
Alaska State Legislature
Administrative Regulation Review Committee
716 W. 4th Avenue, Suite 350
Anchorage, AK 99510-2133


Dear Representative McGuire:

On May 18, 2001, I filed regulations amending 5 AAC 41.200- 5 AAC 41.400, Aquatic Farming. The regulations take effect on June 17, 2001.

Under AS 44.62.040(c), the Lieutenant Governor has two reasons for returning regulations to a department before filing: "(1) if they are inconsistent with the faithful execution of the laws or (2) to enable the adopting agency to respond to specific issues raised by the Administrative Regulation Review Committee."

The Department of Law reviewed the regulations and found no basis for returning them under the first standard.

I have enclosed copies of correspondence with the Department of Fish and Game which reflect its response to specific concerns expressed by the Legislature's Administrative Regulation Review Committee, and position as to why the regulations needed to be filed at this time.

Sincerely,

Fran Ulmer
Lieutenant Governor

Enclosure

cc: Commissioner Frank Rue, Department of Fish and Game
Bruce Botelho, Attorney General, Department of Law

STATE OF ALASKA


TONY KNOWLES, GOVERNOR

DEPARTMENT OF FISH AND GAME OFFICE OF THE COMMISSIONER

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

MEMORANDUM

TO: Fran Ulmer, Lt. Governor
State of Alaska

FROM: 
Frank Koc, Commissioner
Department of Fish and Game

DATE: May 17, 2001

SUBJECT: Mariculture Regulations

You have asked the department to respond to specific issues raised by the Administrative Regulation Review Committee (ARRC) regarding the mariculture regulations the department has adopted. On May 8, 2001, I sent you a memorandum detailing the process the department went through in adopting these regulations, including the extended public comment period and the changes the department made to the regulations in response to public comment. In addition, the department appeared in front of the ARRC twice to respond to questions and concerns about the process for the development of these regulations.

The ARRC has raised no new issues in its letter sent to you on May 1, 2001, asking that you refrain from signing the regulations.

The ARRC's first concern is that the regulations do not allow for the meaningful opportunity to develop shellfish farms. Without any specific examples it is difficult to respond to this concern; however, the mariculture industry has commented extensively on these regulations and has let the department know their concern that these regulations will inhibit the growth of the mariculture industry. The department disagrees with this viewpoint and believes that these regulations will promote the efficient development of mariculture consistent with the state's constitution and statutes. This is not a new issue to the department.

Second, the ARRC states its opinion that some of the regulations may be in direct contradiction to the intent of the Aquatic Farm Act. The Assistant Attorney General we have been working with on these regulations has reviewed them, and it is her legal opinion that the regulations are consistent with the Aquatic Farm Act, AS 16.40 *et seq.*, and the Alaska Constitution. The fact that some people believe that the regulations are inconsistent with the Aquatic Farm Act is not a new issue to the department.

Lt. Governor Fran Ulmer

2

May 17, 2001

Third, the ARRC believes the regulations should not go into effect because ongoing litigation could result in a need to rewrite the regulations. One of the issues in the current litigation between aquatic farmers and the department is that the department applied policies that were not in regulation. In order to prevent a situation where this allegation could be leveled at the department again, and because the department will be acting on new applications submitted during a new application period that closes at the end of June, the filing of these regulations cannot wait for a ruling from the court which may or may not impact the substance of these regulations. It is important for the department to proceed with the regulations to guide it through future application reviews and to avoid further litigation. This issue was discussed at length during the public comment period and with the ARRC, and is not a new issue that the department has not considered.

Having responded to the specific issues raised by the ARRC, it is my hope that you will sign these regulations expeditiously. We wish to accept, review, and approve new applications for aquatic farms this year. The application period ends July 2, 2001, so we need the regulations in place as soon as possible.

Thank you.

cc: Representative Lesil McGuire, Administrative Regulations Review Committee Chair
Bruce Botelho, Attorney General, Department of Law
Doug Mecum, Commercial Fisheries Director, ADF&G
Ken Taylor, Habitat and Restoration Director, ADF&G

STATE OF ALASKA

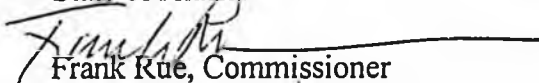
TONY KNOWLES, GOVERNOR

DEPARTMENT OF FISH AND GAME
OFFICE OF THE COMMISSIONER

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

MEMORANDUM

TO: Fran Ulmer, Lt. Governor
State of Alaska

FROM: 
Frank Rue, Commissioner
Department of Fish and Game

DATE: May 17, 2001

SUBJECT: Mariculture Regulations

You have asked the department to respond to specific issues raised by the Administrative Regulation Review Committee (ARRC) regarding the mariculture regulations the department has adopted. On May 8, 2001, I sent you a memorandum detailing the process the department went through in adopting these regulations, including the extended public comment period and the changes the department made to the regulations in response to public comment. In addition, the department appeared in front of the ARRC twice to respond to questions and concerns about the process for the development of these regulations.

The ARRC has raised no new issues in its letter sent to you on May 1, 2001, asking that you refrain from signing the regulations.

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Second, the ARRC states its opinion that some of the regulations may be in direct contradiction to the intent of the Aquatic Farm Act. The Assistant Attorney General we have been working with on these regulations has reviewed them, and it is her legal opinion that the regulations are consistent with the Aquatic Farm Act, AS 16.40 *et seq.*, and the Alaska Constitution. The fact that some people believe that the regulations are inconsistent with the Aquatic Farm Act is not a new issue to the department.

Third, the ARRC believes the regulations should not go into effect because ongoing litigation could result in a need to rewrite the regulations. One of the issues in the current litigation between aquatic farmers and the department is that the department applied policies that were not in regulation. In order to prevent a situation where this allegation could be leveled at the department again, and because the department will be acting on new applications submitted during a new application period that closes at the end of June, the filing of these regulations cannot wait for a ruling from the court which may or may not impact the substance of these regulations. It is important for the department to proceed with the regulations to guide it through future application reviews and to avoid further litigation. This issue was discussed at length during the public comment period and with the ARRC, and is not a new issue that the department has not considered.

Having responded to the specific issues raised by the ARRC, it is my hope that you will sign these regulations expeditiously. We wish to accept, review, and approve new applications for aquatic farms this year. The application period ends July 2, 2001, so we need the regulations in place as soon as possible.

Thank you.

cc: Representative Lesil McGuire, Administrative Regulations Review Committee Chair
Bruce Botelho, Attorney General, Department of Law
Doug Mecum, Commercial Fisheries Director, ADF&G
Ken Taylor, Habitat and Restoration Director, ADF&G



FRAN ULMER
LIEUTENANT GOVERNOR
STATE OF ALASKA

May 15, 2001

Commissioner Frank Rue
Department of Fish and Game
PO Box 25526
Juneau, AK 99802-5526

Dear Commissioner Rue:

I have received regulations for filing from your department amending 5AAC 41.200-41.400, Aquatic Farming.

As you are aware, these regulations were the subject of several meetings of the Legislature's Administrative Regulation Review Committee (ARRC). The committee, in a letter dated May 1, 2001 (enclosed), expressed concern that the regulations discourage development of aquatic farms and suggested the department should return to relying on previous regulations for permitting aquatic farms. The committee requested that I not file the regulations until all pending litigation and appeals are completed.

Under AS 44.62.040(c), the Lieutenant Governor has two reasons for returning regulations to a department prior to filing: "(1) if they are inconsistent with the faithful execution of the laws or (2) to enable the adopting agency to respond to specific issues raised by the Administrative Regulation Review Committee."

The Department of Law has reviewed the regulations and found them to meet the first standard. Regarding the second standard, are there any specific issues raised by the ARRC letter to which you have not responded? I would appreciate some information as to why these regulations need to be filed at this time.

Thank you for your prompt response.

Sincerely,

A handwritten signature in black ink, appearing to read "Fran Ulmer".

Fran Ulmer
Lieutenant Governor

Enclosure

cc: Representative Lesil McGuire, Chair, Administrative Regulations Review Committee
Bruce Botelho, Attorney General, Department of Law

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

P.O. BOX 25526
JUNEAU, ALASKA 99802-5526
PHONE: (907) 465-4100
FACSIMILE: (907) 465-2332

MEMORANDUM

OFFICE OF THE
MAY-11 2001
LIEUTENANT GOVERNOR

TO: Fran Ulmer, Lt. Governor
State of Alaska

FROM: *Frank* Frank Rue, Commissioner
Department of Fish & Game

DATE: May 8, 2001

SUBJECT: Mariculture Regulations

You will soon be receiving a regulation packet from the Department of Law amending 5 AAC 41.200 - 41.400. These regulations govern the application for, and review and issuance of, aquatic farm permits. This memorandum provides a summary of: the need for the amended regulations; the effects of the regulations; the process for adopting the amended regulations, including how the regulations changed as a result of public comments; and a description of the issues that remain controversial.

Background:

The Alaska State Legislature authorized the farming of shellfish and aquatic plants in 1988. Under state law, the Department of Fish and Game (ADF&G) is responsible for the permitting of aquatic farms and the Department of Natural Resources DNR is responsible for the leasing of state tidelands upon which aquatic farms are to be situated. Litigation against the Department of Natural Resources over leasing procedures resulted in a moratorium on the application for farm permits from 1996 through 1998.

When the application period was reopened in 1999, 41 applications for aquatic farm permits were received. Many of the applications proposed "on-bottom" farming of species native to Alaska, specifically littleneck clams and geoducks, a species of large clam occurring in a sub-tidal environment. While there had been interest in farming these species prior to the moratorium, the 1999 application period presented a level of interest that was well beyond anything the state had dealt with previously.

Lt. Governor Fran Ulmer

2

May 8, 2001

During the review of the 1999 applications, it became clear ADF&G needed to amend the existing regulations to provide more specificity about the information required of the applicants and the procedures and criteria used in evaluating applications. This was especially the case with applications for "on-bottom" farming of native species.

Effects of Amended Regulations:

The amended regulations describe in greater detail than the existing regulations the information required on applications for aquatic farm permits. Section 41.240 provides more specificity concerning the criteria and standards the ADF&G will use in reviewing and issuing aquatic farm permits. Of particular interest in this section are provisions that implement the criteria established in statute for review and determination of the suitability of applications for aquatic farm permits. These criteria are found in Alaska Statute 16.40.105. Section 5 AAC 41.250 further specifies discretionary permit conditions that ADF&G may apply to permits. Other sections describe permit transfer and renewal procedures and definitions of terms used in the aquatic farming regulations. The amended regulations also deal with issues raised by the new interest in "on-bottom" farming of native species. These sections include: 5 AAC 41.245, Acquisition of Wild Resources, and 41.290, Aquatic Stock Acquisition Permit.

Process for Developing the Regulations:

While the need to amend these regulations became apparent during 1999, the workload associated with reviewing the applications submitted during the application period slowed the ADF&G's efforts. Draft regulations were published for public review and comment in early December of 2000. At the request of the Alaska Shellfish Growers Association, the department extended the deadline for written comments until the middle of February, a comment period of approximately two months. During January, public hearings were held in Ketchikan, Juneau, and Anchorage on the proposed regulations; additional communities were connected via audio-conference. Some of these communities were: Homer, Kodiak, Seward, Cordova, Sitka, Petersburg, Wrangell, and Craig.

The department also convened a mariculture advisory panel to discuss and advise the department on the draft regulations. Representation on this panel included the Alaska Shellfish Growers Association, the Seward Shellfish Hatchery, the University of Alaska Sea Grant Program, an individual geoduck farm applicant, the United Fishermen of Alaska, the Alaska Marine Conservation Council, and the Southeast Alaska Regional Dive Fisheries Association. This group met twice. These meetings were connected via audio-conference to the same communities that were connected to the public hearings, and additional public comments were taken at both meetings.

A second draft of the regulations was prepared in an attempt to address as many of the concerns as possible that were expressed during the public comment period and during the mariculture advisory panel. This draft of the regulations was released for an additional 30-day period of public review and comment on February 26. After the closure of the second public comment period and the second meeting of the mariculture advisory panel, a third draft was prepared and submitted to the Department of Law for legal review and subsequent filing with the Lt. Governor. Over 160 changes

Lt. Governor Fran Ulmer

3

May 8, 2001

from the original proposed regulations are contained in the final regulations the department is submitting to you for filing. Many of the changes were minor. Some of the most significant changes were:

- The process for transfer and renewal of existing permits was simplified. Under the amended regulations transfer and renewal is routine as long as continuing operations remain consistent with conditions and terms of the original permit.
- Removed requirements from regulations that are the responsibility of DNR or DEC.
- Deleted requirement to provide proof of financing.
- Extended period of aquatic farm permit from five to ten years.
- Removed requirement that department requests for additional information from farm applicant be supplied within 30 days.
- Provided increased flexibility to applicants in meeting application requirements.
- Modified a number of the definitions of terms used in the regulations such as: aquatic farming; adversely affect other uses, or fish and wildlife populations, and their habitats; and enhance the productivity at the farm site.
- Changed "will" to "may" regarding a number of requirements that could result in rejection of an application for an aquatic farm site.

Remaining Controversy:

Some individuals remain opposed to the regulations because the regulations do not allow an aquatic farmer to assume outright ownership of naturally occurring shellfish present on their farm site. Such action would be contrary to state law and Article VIII of the Alaska Constitution.

A number of individuals also oppose the regulations because they are currently in litigation with the State of Alaska concerning their aquatic farm applications. They argue that no regulations should be adopted prior to the completion of this litigation.



April 19, 2001

The Honorable John Torgerson
Alaska State Senate
State Capitol Building
Juneau, Alaska 99801-1182

Dear Senator Torgerson:

We thank you for introducing SB 141 and for your effort to assist Alaska's struggling mariculture industry.

We would also like to apologize for not giving the bill more attention sooner. We have been so busy managing our lawsuit against the State over its impediments to aquatic farming and battling the new proposed draft regulations, that we have not had the necessary time to work with you on SB 141..

I believe the bill is a good start and sends ADF&G a clear message that the legislature supports shellfish aquatic farming. As you know many member of the aquatic farming industry recently commented on specifics of the bill at your recent Senate Resources Committee meeting. Rather than going into the bill again I believe it would be more productive to address the fundamental problems the industry is having in the state.

The problem is not the Aquatic Farm Act, as the DNR Director of Mining Land and water, Richard Thompson said " The Aquatic Farm Act has worked well for years".

The problem as we see it is that our current administration has refused to follow state law. In addition, despite our good faith attempts to comply with the ACT, ADF&G has continually changed its informal policies and interpretations of the ACT, which in effect have pulled the rug out from our ability to develop this industry. We have been completely blindsided by ADF&G's efforts to thwart the aquatic farm industry in this State. In addition, it appears the Director of Commercial Fisheries has been dictating most of the effort to stop this industry, and has not been held accountable to anyone.

More troubling is that it now appears that the Alaska Department of Law is willing to circumvent their statutory requirements and internal policies in order to satisfy their client agency, and they appear to be trying to strike down a state law, instead of meeting their duty to uphold the law and defend the legislature's policies. *(Please see letter from our attorney Bruce Weyhrauch to Steve LaCroix regarding this issue.)*

The Honorable John Torgerson
April 19, 2001
Page 2

The enclosed letter raises some serious questions about the Department of Law and whether they are following their own procedures in their defense to our suit to get aquatic farm permits. In light of the information in this letter, we ask that your office seek a formal opinion from Attorney General Bruce Botelho about the questions raised in the letter.

Our company and aquatic farmers state wide have been treated very unfairly for the past 2 years by ADF&G, which seems willing to do everything possible to quash on bottom shellfish farming in the state. What the state agency charged with carrying out the legislature's intent in developing aquatic farming has been doing to us is a complete abuse of discretion. There is absolutely no science behind ADF&G's positions against aquatic farming

Despite ADF&G's position that aquatic farmers are now satisfied with the draft regulations, if the Lieutenant Governor signs these regulations; and they go into effect there will be no "new" on bottom shellfish culture in Alaska. Essentially the proposed regulations will put a ban on clam farming in the state, similar to the ban in Kachemak Bay.

I am not sure if passing new legislation is the answer at this point, especially since the administration refuses to follow the current laws. Some believe that taxing the aquatic farm industry would solve the problem. Please note that if the State allows aquatic farming to develop, we would still be required to pay a fisheries business tax, annual lease fees and restoration bonding. We do not, and have never opposed these revenue-enhancing measures that would benefit the State. In fact, our company has already paid tens of thousands of dollars to the state in fees and we are still not in business. Our second annual lease fees are due in less than 30 days and we still do not have ADF&G operational permits.

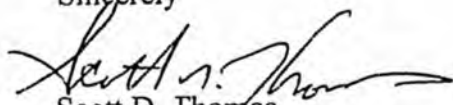
We believe that efforts by the legislature to assist the industry should focus on creating a viable industry and enhancing the resource, rather than taxation. Getting the industry up and running and forcing the administration to follow state law should be the priority.

In closing, I know that we and other aquatic farmers would be more than pleased to come before you and your committee to answer questions our concerns you have about our farms. We appreciate your effort to help develop this industry in the state, diversify our resource-based economy with a clean, environmentally sound industry, that is growing everywhere except Alaska. We also appreciate this opportunity to get clarification whether ADF&G officials are being inappropriately supported in their effort to stop aquatic farming by the Department of Law.

The Honorable John Torgerson
April 19, 2001
Page 3

Thank you again, and please call me at (907) 225-1171 if you have any question or would like additional information.

Sincerely



Scott D. Thomas

Cc:

Sen. Robin Taylor
Sen. Georgianna Lincoln
Sen. Kim Elton
Sen. Dave Donley

Rep. Lesil McGuire
Rep. Lisa Murkowski
Rep. Drew Scalzi
Rep. Jeannette James
Rep. Peggy Wilson

LAW OFFICE OF
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114 S. FRANKLIN ST.

SUITE 200

JUNEAU, ALASKA 99801

TELEPHONE: (907) 463-5566

FAX: (907) 463-5858

April 5, 2001

Mr. Steven LaCroix
P.O. Box 5322
Ketchikan, AK. 99901

Re: ATS & Zaugg et al. v. State et al.
File: 269.329

You and five other individuals are involved in an appeal in Alaska Superior Court. Among the issues on appeal are whether the Alaska Department of Fish and Game has violated Alaska law by failing to timely issue you aquatic farm permits, and failed to followed statutory criteria in issuing you permits. In addition, ADF&G and the Department of Law had advised the public that shellfish stock present on leased aquatic farm sites becomes the property of an aquatic farmer. ADF&G has now reversed that position and the Department of Law is defending ADF&G's refusal to follow Alaska statutes and ADF&G's "new" position that the stock on aquatic farm sites do not pass to the aquatic farmer.

At a recent oral argument before the superior court on your appeal, the assistant attorney general representing ADF&G even went so far as to question the constitutionality of a statute adopted by the Alaska Legislature. You asked whether the Department of Law has violated any law or duty in taking the positions that it has.

I should first note that this is the first case that I have seen where a private party is trying to get the Department of Law and a state agency to follow the law, and the state is ignoring the law and arguing that a statute

Mr. Steven LaCroix
April 5, 2001
Page 2

is constitutionally infirm. The state has turned the roles of what is usually a private party challenging a statute, completely around. In doing so in this case, the state appears to be acting contrary to its earlier advice to agencies. The more difficult question this situation presents is, if the Department of Law has violated its public trust or statutory duties in this case by taking these positions, what remedy do you have.

Background

You and other aquatic farmer appellants have sought, among other things, to require ADF&G to issue aquatic farm permits using the criteria in AS 16.40.105, which sets forth 4 specific criteria that must be met:

The commissioner shall issue permits under AS 16.40.100 on the basis of the following criteria:

- (1) the physical and biological characteristics of the proposed farm or hatchery location must be suitable for the farming or the shellfish or aquatic plant proposed;
- (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 or hatchery may not significantly affect fisheries, wildlife, or their habitats in an adverse manner; and
- (4) the proposed farm or hatchery plans and staffing plans must demonstrate technical and operational feasibility.

Mr. Steven LaCroix
April 5, 2001
Page 3

Before submitting applications for aquatic farm permits, ADF&G's Commissioner wrote that shellfish farmers could harvest shellfish resources as part of their operations and that "property rights to 'standing stocks' pass to the permittee with the lease, operations permit and stock acquisition permit." Earlier correspondence by ADF&G personnel indicate that "brethren in Com Fish are doing all they can to try and kill all the farm applications we got for things like geoducks . . . I guess they just don't accept that the Legislature passed the Aquatic Farm Act and the AG's Office says its all legal and constitutional."

Earlier the department said that the "amount of resource that would be lost to the 'public' was miniscule, so let them have the standing crop as part of the act of 'farming'..." The department was quite certain in its position:

Acquisition permits allow harvest and direct sale of wild stock, if that wild stock is within the boundaries of a permitted aquatic farm site. We have discussed the legality of this at length with the AG's office and within the mariculture program at HQ. Having established a precedent ... in Southeast, it would be difficult for the department to significantly change its permitting practices at this point in the permit review process. Simply put, the standing stock (pre-existing wild stock) on a leased and permitted aquatic farm site becomes the property of the aquatic farm site operator, to be disposed of in any legal manner. This includes commercial harvest and sale. (Emphasis added.)¹

¹ The quotations and citations to department statements that are in this letter have all been taken from documents that have been admitted into the record of this case, and are direct quotes from ADF&G staff.

Mr. Steven LaCroix
April 5, 2001
Page 4

ADF&G is alluding to other aquatic farms that harvest and sell all of the littleneck clam resource on the aquatic farm site.

At oral argument, the state assistant attorney general referenced Article 8, section 3 (common use), and section 15 (exclusive right of fishery prohibited except for limited entry and aquaculture). The assistant attorney general stated in part:

In the state's view, if the department were to authorize an aquatic farmer to make any use they chose of a wild resource on a farm site, merely by issuing an aquatic farm operating permit, or a stock acquisition permit, the department would be violating both these clauses of the constitution. That is because the appellants would be given the right to occupy a parcel of land and everything on the land including these sedentary geoduck clams, and those wild resources would be privatized. Then they would be able to exclude all other and have the exclusive right to harvest geoduck clams that are on their farm site.

You correctly have observed that ADF&G is already giving at least one on bottom aquatic farmer unfettered access to littleneck clams to do what ever the farmer wants with them (i.e. sell them). Apparently, the Department of Law and ADF&G do not have a problem with arguing that you cannot use wild geoduck stock on your sites, but already-authorized littleneck clam farmers can.

The assistant attorney general went on to say at oral argument:

However, if you say for the sake of argument, that the Aquatic Farm Act is the statutory scheme that provides for limited entry into aquaculture, the state again argues

that it hasn't been done in such a way to insure that it has the least possible impact on the common use clause and other open access values in the constitution. In [citing cases], the Alaska Supreme Court said that in reviewing legislation that burdens the equal access clause of article 8, the purpose of the burden must be at least important and the means used to accomplish the purpose must be divined the least possible infringement on article 8's open access values.

Frankly, the state doesn't believe that the exclusive right to fishery clause were probably contemplated by the legislature when it passed the aquatic farm act. And the reason for this is that the aquatic farm act, if you read the legislative history, talks about suspended culture, it doesn't talk about on bottom farming. In fact, in the appellants' brief they talk about the fact that the aquatic farm act basically took provisions out of the department's regulations and put them into statute to provide the frame work for issuing an operating permit for aquatic farming. I think that that's good evidence that they probably weren't considering all these interesting constitutional impacts that on bottom farming presents.

The appellants have offered no explanation of how their proposed use of wild stock on a farm site can be done in a way that is consistent with the open access values of article 8 in the constitution and how the statutes if read in the way they are proposed can be distinguished with other similar statutes that have been struck down by the Alaska Supreme court as violating the common use or exclusive rights clauses.

This position by the Department of law at oral argument seems to directly contradict its earlier positions. It certainly raises at least the question of whether the argument by this one assistant attorney general had been reviewed internally in the Department of Law before it was made.

Statutes enacted by the legislature have a presumption of constitutionality, according to the Department of Law. Moreover, when the Alaska legislature passed the Aquatic Farm Act, the Department of Law conducted an extensive review of the bill and found only policy questions, but no legal problems.

In a 1986 opinion (663-86-0453), the attorney general's office wrote that when "examining whether a state statute is constitutional, the first step is an acknowledgement of the presumption followed with virtual uniformity by the courts that favors the validity of an act of the legislature and that dictates that all doubts must be resolved in support of an act." *Id.* (citing 2A N. Singer, Sutherland Statutory Construction § 45.11 (4th ed. 1984)).

The opinion went on to state that the "Alaska Supreme Court has recognized the 'well-established rule of statutory construction' that if possible courts should construe statutes to avoid unconstitutionality." *Id.*, quoting Kimoktoak v. State, 584 P.2d 25, 31 (Alaska 1978). "That rule recognizes that the legislature, like the courts, is pledged to support the state and federal constitutions and that the courts, therefore, should presume that the legislature sought to act within constitutional limits." *Id.*

The Department of Law stated that when examining a statute, "any doubts about the validity of the statute must be resolved in favor of its constitutionality." *Id.*

Mr. Steven LaCroix
April 5, 2001
Page 7

In another earlier opinion, the Office of the Attorney General wrote that there "is a heavy presumption in favor of the constitutionality of any statute. (No. J-66-829-81, Sept. 1981, citing Sutherland Statutory Construction § 45.11.) "The law strongly favors the construction of statutes to be consistent with constitutional requirements." Id., citing State v. Sundberg, 611 P.2d 44 (Alaska 1980); Summers v. Anchorage, 589 P.2d 863 (Alaska 1979). "According to Sutherland: It has even been said that 'a strained construction is not only permissible, but desirable if it is the only construction that will save constitutionality.'" Id., quoting Sutherland Statutory Construction § 45.11 at 34 (footnote omitted).²

Department of Law's Duties

AS 44.23.020(b) sets for the duties and powers of the Department of Law and provides, in part, that the attorney general shall:

(2) represent the state in all civil actions in which the state is a party;

(3) prosecute all cases involving violation of state law, and file informations and prosecute all offenses against the revenue laws and other state laws where there is no other provision for their prosecution;

² It should also be noted that the Attorney General, in Opinion A66-411-81 (June 1981), advised ADF&G: "When 'shall' is construed to be directory, the idea of permission is not involved. The legislature directs the course of action to be taken and the person or body undertaking to proceed under the statute is vested with no discretion to vary or omit parts or all of the designated procedure." Id., citing D. Sutton, 'Use of 'Shall' in Statutes', Sutherland Statutory Construction, Vol. 1A at 504 (4th ed. C.D. Sands 1975). In this case, AS 16.40.105 states "the commissioner shall issue permits under AS 16.40.100." ADF&G has specifically not followed this directive, and again the Department of Law is not supporting or defending the legislature's directive.

(4) administer state legal services, including the furnishing of written legal opinions to the governor, the legislature, and all state officers and departments as the governor directs; and give legal advice on a law, proposed law, or proposed legislative measure upon request by the legislature or a member of the legislature. ...

There is not a great deal of interpretation of this broad statute by the courts. In State v. Breeze, 873 P.2d 627, 632 (Alaska App. 1994), the court found it appropriate for the attorney general, in his discretion, to disqualify himself from pursuing a violation of law, and appoint a special prosecutor. There, the attorney general believed that a special prosecutor was necessary because a conflict existed if the attorney general pursued a claim. Id. (special prosecutor necessary to "maintain public confidence in the judicial process" and assure prosecution is "without bias or any appearance of impropriety.")

In Alaskans for a Common Language, Inc. v. Kritz, 2000 WL 772905 (Alaska 2000), sponsors of an initiative that required the government to use English, sought to intervene to a challenge to the initiative. The Governor politically opposed the initiative and the Department of law questioned the constitutionality of the initiative.

The court stated the rule that the governor has a duty to defend a law enacted by initiative, which duty is executed by the attorney general. The court, however, cited to circumstances that could raise questions in the public's mind as to whether the executive branch is committed to defending the constitutionality of the initiative with conviction and vigor.

The court wrote, "based on the presumption of adequate government representation, we presume that the Attorney General's

Mr. Steven LaCroix
April 5, 2001
Page 9

Office would not fail to defend the constitutionality of the initiative energetically and capably." Id. at 5.

The court found that the initiative's sponsors could intervene to argue their interests in court after writing that "the Attorney General's Office's questions about the [initiative], could create an appearance of adversity. Every strategic decision made by the Attorney General's Office in defending the legislation might be publicly questioned and second-guessed by the initiative's sympathizers." Id. "That this suspicion may be unfounded does not make it less inevitable." Id.

In this case, there is no other intervenor as an Appellee (on the state's side) to take over argument that the state is making here. The state warmly welcomed an amicus brief by SARDFSA, which represents a small group of divers in Southeast Alaska dive fisheries.

The attorneys at the Legislative Affairs Agency would only be notified that the attorney general's office pronounced a statute unconstitutional if notified by a court's published decision or by the attorney general's office by way of a written opinion. Therefore, the LAA has no apparent knowledge of the Department of Law's position on its constitutional concerns about the Aquatic Farm Act in this case.

I attach a portion of the Department of Law's Civil Manual ("DOL Manual"). This manual sets forth the internal policies and procedures that Department of Law attorneys apparently must adhere to. Several portions of this manual are relevant to its statutory duties and how the Department interprets those duties.

"If a prior opinion or memorandum of advice is overruled, the reason for that action must be expressly stated and the opinion or memorandum of advice being superseded must be identified clearly." Id. at page 15. As indicated above, prior opinions of the Department of law

were superceded in this case, and this provision of the DOL Manual do not appear to have been followed in this case.

The Department of Law is to apply "the presumption of constitutionality" of a statute and assistant attorney generals "should not lightly opine that an existing statute or regulation is unconstitutional." DOL Manual page 19. It appears that this policy was not followed in this case.

"All opinions in which we say a statute or regulation 'is' unconstitutional must be 'formal' opinions and must be signed by the attorney general or deputy attorney general. We should not advise the client agency that it need not implement the statute, unless we conclude that the statute "is" unconstitutional." DOL Manual page 20.

The assistant attorney general in this case, at best, strongly suggests that the Aquatic Farm Statutes are unconstitutional, and that the ADF&G's advice if followed, would be unconstitutional. It is not clear that the attorney general or deputy attorney general agrees or has signed off on this position; that would take an audit or internal investigation. It would also be important to determine if the assistant attorney general in this case advised ADF&G in writing that its actions were unconstitutional if it followed through on its public advice to aquatic farmers regarding standing stock on aquatic farm sites.

Remedies

It appears that the Department of Law has selected to change its policies, and not defend a statute passed by the Legislature. It also appears that the Department of Law has chosen to ignore precedent of its office, and authorities that its office has relied upon before, in arguing in this case that the Aquatic Farm Act, that you are attempting to get ADF&G to follow, is unconstitutional.

Mr. Steven LaCroix
April 5, 2001
Page 11

If that is indeed the position that the Department of Law has chosen to take against you in this case, what remedies do you have? It appears that there is little you can do except to have the Attorney General change its position, have the Governor intervene, or redress this problem to the Legislature. It may be possible to have the Attorney General investigate the actions of the assistant attorney general in this case to determine if they are consistent with state and Department policies.

In Public Defender Agency v. Superior Court, 534 P.2d 947 (Alaska 1975), the public defender agency appealed a superior court's decision ordering the attorney general's office to prosecute a father for nonpayment of child support. The court addressed the duties of the attorney general under AS 44.23.020.

The court wrote that "an attorney general is empowered to bring any action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the state's litigation which he thinks best." Id. at 950 citing State v. Finch, 280 P. 910 (Kansas 1929). "This discretionary control over the legal business of the state, both civil and criminal, includes the initiation, prosecution and disposition of cases." Id.

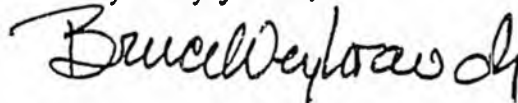
"When an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts. To interfere with that discretion would be a violation of the doctrine of separation of powers. ... Both federal and state courts have ... held that the Attorney General cannot be controlled in either his decision of whether to proceed, or in his disposition of the proceeding." Id. (citations omitted).

Mr. Steven LaCroix
April 5, 2001
Page 12

The court held that it did not have the "power to control the exercise of the Attorney General's discretion as to whether the will take action in any particular cases of contempt for non-support." Id. at 951.

This means that you would not have much success in attempting to have a court order the Department of Law to take or not take a certain position. The Public Defender case would prevent a court from doing that. Please call me to discuss this letter, and your possible options, at your convenience.

Very truly yours,

A handwritten signature in cursive script that reads "Bruce B. Weyhrauch". The signature is written in black ink and is positioned above the printed name.

Bruce B. Weyhrauch

Enclosure



Mission Statement: To develop, expand, and enhance new and existing dive fisheries in Southeast Alaska.

Julie Decker, Executive Director
Gig Decker, Executive Director's Assistant
Box 2138, Wrangell, AK 99929
Ph: 907-874-3110; Fax: 907-874-4270
gigjulk@aptalaska.net

Governor Knowles
Office of the Governor
P.O. Box 110001
Juneau, AK 99811-0001

January 8th, 2000

Dear Governor Knowles;

On behalf of the Southeast Alaska Regional Dive Fisheries Association, or SARDFFA, the Board of Directors would like to request that the application period for aquatic farming (Jan. 1st - April 30th, 2001) be stayed until the litigation Alaska Trademark Shellfish vs. State of Alaska is settled. The Board of Directors met on January 5th, 2000, and unanimously approved this request.

SARDFFA does not believe it is proper to hold an aquatic farm application period at this time for two reasons: (1) there is pending litigation which may seriously alter the future of aquatic farming, (2) ADF&G has not adopted regulations clarifying the Aquatic Farm Act (AS 16.40.100-199).

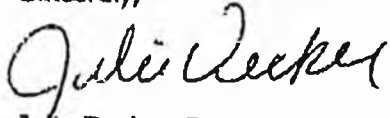
SARDFFA is participating in the above litigation in support of the State's denial of geoduck farm permits which would give the wild geoduck stocks to potential farmers for harvest and sale. ADF&G has estimated the amount of wild stocks on these sites is 891,000 pounds. The commercial harvest for all of Southeast Alaska in 2000 was 400,000 pounds.

ADF&G now has draft regulations regarding aquatic farming out for public review. ADF&G plans to have the regulations in place by April 15th, 2001. However, this time frame could easily be off, allowing potential aquatic farmers to apply for permits without regulations being in place to guide this process. This would leave the State open for further litigation in the future.

Please fully consider this request. If you have any questions regarding this request, please contact SARDFFA's President, Dennis Watson (907-826-3275), as I will be out of the office between Jan. 9th and 27th.

**SARDFFA REQUEST TO EXTEND
APPLICATION PERIOD & RESPONSE**

Sincerely,



Julie Decker, Executive Director

Cc: Frank Rue, Commissioner, ADF&G (hard copy & email)
Pat Pourchot, Commissioner, ADNR (hard copy & email)
Kevin Duffy, Deputy Commissioner, ADF&G (via email)
John Sisk, Governor's Aid (via email)
Steve White, Assistant Attorney General (via email)
Shannon O'Fallon, Assistant Attorney General (via email)
Doug Mecum, Director of Commercial Fisheries, ADF&G (via email)
Guyla McGady, Aquatic Farm Coordinator, ADNR (via email)
Ken Imamura, Mariculture Coordinator, ADF&G (via email)
Paul Grant, Attorney (via email)
SARDFA Board of Directors (via email)

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

TONY KNOWLES, GOVERNOR

400 WILLOUGHBY AVENUE
JUNEAU, ALASKA 99801-1796
PHONE: (907) 465-2400
FAX: (907) 465-3886

550 W 7TH AVENUE, SUITE 1400
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-8431
FAX: (907) 269-8918

February 9, 2001

Ms. Julie Decker, Executive Director
SARDFA
Box 2138
Wrangell, AK 99929

Subject: Aquatic Farm Application Opening, January 1, 2001 through April 30, 2001

Dear Ms. Decker:

The Governor has asked me to respond to your letter of January 8, 2001 concerning the Aquatic Farm Application Opening now underway. I appreciate your concern that the opening conflicts with pending litigation as well as the Department of Fish and Game draft regulations on the subject that are out for public review.

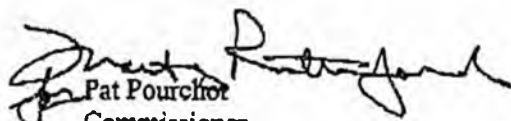
The conflict you point out is real. Unfortunately, the Department of Natural Resources is required by regulation to schedule an opening every two years between January 1 and April 30 and therefore the current opening is necessary to comply with those regulations.

I would note that the litigation you reference is specifically directed at on-bottom fisheries like geoduck, and suspended culture, such as oysters, is not involved. Therefore it could be argued that it would not be appropriate to delay or extend the entire application period when only a part of the industry is in question.

However, our regulations do involve the entire industry. The Department of Fish and Game hopes to have the regulations in effect by April 15. As you point out, that date could slip. The Department of Fish and Game held a workshop on February 7, to address the draft regulations and the final schedule for the regulations may be affected by the workshop discussions. Once we know the final schedule for the Department of Fish and Game's regulations the Department of Natural Resources may extend or modify the dates of the Aquatic Farm Application Opening.

I hope this addresses some of your concern. I appreciate your interest.

Sincerely,


Pat Pourchot
Commissioner

cc: Governor Tony Knowles
Commissioner Frank Rue, Department of Fish and Game
Bob Loeffler, Director, Division of Mining, Land and Water

Develop, Conserve, and Enhance Natural Resources for Present and Future Alaskans.

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Submitted by	Date Modified	Ak Admin Journal	Attachments	Public (Web edit)
Mary Stone/OOC/ADFG	on 02/26/2001 at 03:46 PM	[not printed]	No files attached	

Aquatic Farming And Shellfish Hatcheries

Category: Notices of Proposed Regulations
Publish Date: 02/26/2001

Department: Fish & Game
Location: Statewide
Region: Statewide

Body of Notice:

Aquatic Farming And Shellfish Hatcheries

THIRD 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;
- (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 the THIRD SUPPLEMENTAL NOTICE adding to the SECOND NOTICE OF PROPOSED CHANGES that was issued on January 26, 2001, the SUPPLEMENT NOTICE OF PROPOSED CHANGES that was issued on January 3, 2001, and the NOTICE OF PROPOSED CHANGES that was issued on December 15, 2000 concerning these proposed regulation changes. This THIRD SUPPLEMENTAL NOTICE is being issued to allow a public comment period on the new draft regulations, that were revised by the department after reviewing the public comments received during the previous public comment period, and to announce another public hearing.

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 March 27, 2001.

A public hearing will be held in Juneau, Alaska on March 15, 2001 from 9:00 a.m. to 5:00 p.m. in the Commissioner's conference room at the Alaska Department of Fish and Game Headquarters building at 1255 West 8th Street, and teleconferenced to the Department of Fish and Game field offices in Kodiak, Homer, Soldotna, Anchorage, Cordova, Sitka, Petersburg, Wrangell, Ketchikan, and Craig. At the March 15th hearing, the department will take public testimony and chair a panel of invited representatives of groups who are interested in the proposed regulatory changes to discuss the proposed changes. Persons interested in participating by phone at one of the above Fish and Game field offices should appear in person at the office location.

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 March 12, 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.

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

(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 2030 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

Online Public Notice

State of Alaska Online

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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

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-.

Steven G. McGee, Fishery Biologist IV

Revision History:

02/26/2001 03:46:15 PM by Mary Stone/OOC/ADFG/State/Alaska/US

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

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

STATE OF ALASKA

DEPARTMENT OF ADMINISTRATION
DIVISION OF ALASKA LONGEVITY PROGRAMS

*Pioneers' Homes & Advisory Board
Longevity Bonus*

Tony Knowles, Governor

PO Box 110211
Juneau, AK 99811-0211
Phone (907)465-4400
FAX (907)465-4108
(907)465-8886

April 5, 2001

The Honorable Lesil McGuire
Alaska State House of Representatives
Alaska State Capitol
Room 418
Juneau, AK 99801-1182

Dear Representative McGuire,

At the Regulations Review Committee hearing last week you requested through your aide, Jim Pound, a copy of the Pioneers' Home rate increase history and proposed schedule for future rate increases. The schedule is attached.

Also, Mr. David Pree, Anchorage Pioneers' Home (APH) resident, testified at the hearing about the funding of the APH heating, ventilation, and air conditioning (HVAC) upgrade project. Mr. Pree is a member of the APH HVAC residents' committee and has attended numerous meetings and received complete documentation regarding the project. I have enclosed a copy of a letter from Dan Smith, Department of Transportation (DOT) project manager to Mr. Pree which indicates Mr. Pree's involvement and access to the HVAC documentation.

Mr. Pree has apparently been unable to fully appreciate the approach the legislature took to fund the HVAC project. In fact, there have been a number of factors which have impacted the initial funding sources.

The division submitted a \$1,488.1 supplemental budget request for the APH HVAC upgrade in early 2000. It was approved for \$1,130.0 (\$250.0 AHFC; \$440.0 FY00 Pioneers' Home program receipts; \$440.0 FY01 program receipts). This plan under funded the division's request by \$358.1. Only \$300.0 was available in FY00 program receipts. No excess program receipts are anticipated for FY01. In the meanwhile the cost of the project was estimated at \$1,550.0 leaving the project short funded by \$1,000.0. The shortfall of \$1,000.0 has been requested in the capital supplemental budget.

I hope that this information is helpful. Please contact me if you need additional information.

Sincerely,


James L. Kohn

Director

Pioneers' Homes Rate History

Pioneers' Home Effective Date	Residential	Assisted Living	Skilled Nursing
1954	\$150		\$195
July 1966	\$180		\$225
July 1976	\$225		\$275
October 1983	\$425		\$525
December 1989	\$525	\$630	\$800
February 1993	\$600	\$700	\$880
February 1994	\$665	\$780	\$975
February 1995	\$735	\$860	\$1,100

Effective Date	Coordinated Services	Basic Assisted Living	Enhanced Assisted Living	Alzheimer's & Dementia Related Disorders	Comprehensive Services
July 1996	\$934	\$1,289	\$1,553	\$1,579	\$1,864
July 1997	\$1,140	\$1,720	\$2,140	\$2,200	\$2,630
July 1998	\$1,340	\$2,150	\$2,730	\$2,815	\$3,395
July 1999	\$1,540	\$2,580	\$3,315	\$3,430	\$4,160
July 2000	\$1,735	\$3,005	\$3,905	\$4,040	\$4,920

Notes : July 1996 was the first rate increase in the Pioneers' Homes Advisory Boards seven year plan to move charging Pioneers' Homes resident the full cost of care.

A payment assistance program is available for residents who cannot afford to pay the monthly rates.

Pioneers' Homes Proposed Rate Increases

Effective Date	Coordinated Services	Basic Assisted Living	Enhanced Assisted Living	Alzheimer's & Dementia Related Disorders	Comprehensive Services
July 2001	\$1,935	\$3,435	\$4,490	\$4,655	\$5,685
July 2002	\$2,135	\$3,865	\$5,080	\$5,270	\$6,450

FACSIMILE

State of Alaska

PAGE 1 of 1

Department of Transportation and Public Facilities
Central Region - Division of Construction & Operations
Public Facilities Branch

TO: **David Pree**
Anch. Pioneers' Home Resident
TEL: (907) 247-6175
FAX NO: (907) 343-7272

DATE: February 13, 2001
FILE NO:

FROM: **Dan Smith**
Project Manager
TEL: (907) 269-0809
FAX NO: (907) 269-0806

SUBJECT: Anch. Pioneer's Home Ventilation
Project 54854

Request for Information

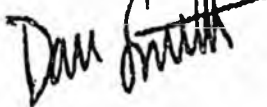
Hello David,

Thank you for your interest in this project. We appreciate your valuable input as well as that of the other residents and the Resident Committee.

Rather than fax the documents that you requested, I will bring a copy of the Professional Service Agreement and Statement of Services that the Department has with MBA Consulting Engineers, Inc. to the Resident Meeting scheduled for tomorrow at 1:00pm. In addition to the document that you have requested we will have a copy of the Schematic Design and Cost Estimate that has been produced for the initial phase of this project. In the Schematic Design submittal you can get a good idea of the solutions that have been developed to address all of the known Humidification and Ventilation problems with the facility.

I look forward to discussing these solutions with you tomorrow.

Thanks,



Dan Smith

Xc: Gary Sheridan, DOA/DALP

FACT SHEET
For
ANCHORAGE PIONEERS' HOME
VENTILATION/HUMIDIFICATION SYSTEM UPGRADES
November 2000

General:

The Division has determined that the ventilation/humidification system at the Anchorage Pioneers' Home is in serious need of major upgrades and repairs. The identified problems are varied and complex, however, in general, the overall air quality of the building is not adequate to meet health needs of both residents and staff. In specific areas, air quality is well below standards and has caused complaints ranging from dizziness, headaches, and vomiting to doctor's excuses prohibiting some employees from working in certain areas. Based on known conditions the Division believes that it is imperative that this project be funded through the Fiscal Year 2001 budget process to ensure timely resolution of these conditions.

Justification:

- 1) A 1992 Building Condition Survey identified a broad variety of air quality issues and need for resolution. These conditions included:
 - Exhaust systems throughout facility (both Main Bldg.-South and the North Addition) are insufficient to meet air quality requirements of residents and staff. Upgrade.
 - Ventilation system in the Main Bldg.-South is inadequate and does not meet required codes. Upgrade.
 - Existing humidification system in Main Bldg.-South is totally nonfunctional; and, nonexistent in the North Addition. Upgrade existing on South and add new on North.
 - Short-circuiting of boiler exhaust is occurring between boiler exhaust stacks and some office windows at 2nd floor level. Relocate stacks.
 - Kitchen Hood exhaust fan not adequate, ducting does not meet code. Replace fans, reroute duct through roof as required. An independent air quality study of the kitchen hood exhaust system was performed in 1998, confirmed system was not adequate, and airflow through the hood needed to be increased.
 - Kitchen and laundry areas overheat in summer. Provide ventilation and cooling.
 - Oxygen storage room does not contain exhaust fan and ducting. Provide.
 - Physical Therapy room in North Addition has inadequate airflow. Increase air circulation.

- 2) Dishwashing room overheats and has lack of air circulation.
 - 50% of dishwashing employee physicians have issued work restrictions directing that they not be directed to work in dishwashing room due to poor air quality conditions.
 - Actual inspection during operations reveals exhausting of steam from dishwasher is very poor with inadequate fresh air make up.

3) Parkview & Gardenview Neighborhoods, North Addition, lacks ventilation, exhausting and humidification.

- In summer 1999 employees working in these areas complained of dizziness, headaches, vomiting, etc., and had loss of time. They felt it was due to air quality.
- The Department of Environmental Conservation (DEC) was engaged and conducted a voluntary testing in May-June 1999.
- DEC's findings were limited, however, their testing confirmed a lack of adequate fresh outdoor air supply and problems associated with inadequate humidity levels. Such conditions could lead to increased discomfort and drying of mucous membranes, etc.

4) Complaints related to Main Bldg. South Ventilation.

- Numerous complaints of lack of fresh air and overheating were received throughout the summer in the Main Bldg. South.
- There is an excessive use of portable fans throughout facility to improve air quality conditions. Little is gained as fans usually circulate existing air that is already stale and overheated. Many are placed in door openings and on tables leading to tripping and falling hazards.

5) Complaints related to odors.

- While the bldg. is well maintained by housekeeping staff, odor control is almost impossible due to the lack of adequate exhausting of the building. This condition sheds negativity during visits by family and friends as well as creates an unpleasant atmosphere for residents and employees.

6) Bathing Rooms.

- Temperatures in bathing rooms reach and exceed 100 degrees during use that is unacceptable for resident and employee health.
- Fresh air supply and exhausting is inadequate.

Update:

The Division submitted a \$1,488,100 supplemental budget request for the APH Ventilation/Humidification System Upgrade in early 2000. It was approved for \$1,130,000 (\$250,000 AHFC; \$440,000 FY2000 program receipts; \$440,000 FY2001 program receipts). This reduced our request by \$358,100. We took immediate action to begin the project with a Reimbursable Services Agreement to the Department of Transportation in 2000 (\$250,000 AHFC; \$300,000 FY2000 program receipts). It was determined that we would not be able to collect additional program receipts in FY2000 and that there would be shortfall in FY2001 program receipts. This in effect, leaves the project short approximately \$1,000,000 to complete it (\$1,488,100 original cost estimate minus \$550,000 available funds). The project is presently in design stage. A more definitive cost estimate will be made available by December 30, 2000.

Action Required:

The Division is seeking Capital Improvement Project funding in a Supplemental Budget Request for \$1,000,000 to complete the project. It is evident the air quality problems are significant and pose serious health problems to residents and employees of the Home. Public relations are also jeopardized due to lack of ability to control unappealing odors that linger throughout the facility. It is not a question of better or more cleaning, it is a matter of a proper air exchange system that presently does not exist.

Gary Sheridan, Consulting Manager, DALP

Natural Resources

11 AAC 05. makes changes in fees for different types of plat copies. New technology allows for copies from microfilm to CD-ROM. Changes fees for various formats for obtaining digital images of recorded documents. Fees will also be changed for Uniform Commercial Code changes and search requests.

11 AAC 06 includes legibility and use of English as well as requirements for the documentation needed to file and record plats. It also makes changes to language including deleting the words "as prescribed by statute" in section .030 (b) (1) Cited Statutes: **AS 34.65.030, .040, AS 40.15.010, AS 45.29.102, .501-.525, .702-.709** Public Comment **N/A** Written Comment by: **05/15/01**

Proposed Regulations

Department of Administration

2 AAC 41.015-Pioneer Home Fees-This is an increase of fees for the Pioneer Homes. The increase is between 12 and 15 percent. The change is designed to meet a gradual goal of having the residents cover all costs of the Pioneer Homes by FY 2003. Implemented statute AS 47.55.030. Public hearing 3/23/01 Written comments by 4/13/01

7 AAC 42-Changes will bring DOA Assisted Living Regulations up to H&SS regulations 7 AAC 75, 47-will increase asst. living rates, clarify services, eligibility etc. 75-add "barrier crimes" conviction as an employment bar, improve safety, change liability insurance and professional liability insurance requirements, require additional training for staff add fees for non-compliance inspections clarify requirements edit regulations to bring up to date. Cited Statutes-AS 47.05.010, AS 47.24.017, AS 47.25.130, .170, .195, AS 47.33.005, .040, .070, .100, .400, .410, .540, .910, .920 Public Hearings 4/25, 5/2, 5/10, 5/11 Written Comment by 5/15/01

Community & Economic Development

Notice or Inquiry

Regulatory Commission of Alaska

Long Distance Access Rate Differences. The RCA is seeking information on potential reform of the rules governing interstate and intrastate long distance access rules. Presently the interstate access charge is about 1.9 cents per minute and intrastate access charge in 13 cents per minute. This intrastate access charge may go up. The RCA believes that may be prevented with reform at the state level. Details can be found at <http://www.state.ak.us/rca> Order R-01-1 (1) Written Comments with details by 06/13/01. Those comments will be reviewed and additional comments must be submitted by 07/16/01. Public hearing on submitted comments: 08/01/01

3 AAC 52.200 makes certain Commission regulations applicable to all telephone utilities

3 AAC 52.333-.334 procedures for intrastate inter-exchange equal access and repealing current procedures for changing a subscribers intrastate inter-exchange carrier

3 AAC 53.260 repealing procedures for a subscriber to change local exchange telecommunications carrier

3 AAC 53.290- new procedures for changing a subscribers local exchange telecommunications carrier

3 AAC 53.190-new procedures for local and intra and interstate telecommunications carriers based on Federal Communications Commission regulations.

3 AAC 53.199 Defines terms and changes in 3 AAC 53.190
Cited Statutes: AS 42.05.141, .151 Public Hearing 05/25/01 Written Comment by 05/04/01

Division of Insurance

3 AAC 31.060-adds a \$1,000 initial application fee and a \$600 annual continuation fee for a certificate of authority for a joint title plant company. When two or more title companies work together. Cited Statutes: AS 21.06.250 & AS 21.66.210 Public Hearing N/A Written Comments by: 05/21/01

Board of Barbers

12 AAC 09.003-Transitional Licensure for Practitioners of body piercing and tattooing and permanent cosmetic coloring-The Board will issue the license to individuals who meet the requirements and pay the fee. Implemented Statute AS 08.13.030; Sec. 31, Ch. 93, SLA 2000 Public Hearing N/A Written comments by 4/06/01

Board of Public Accountancy

12 AAC 44.300 changes in the amount of continuing education required for licensing renewal.

12 AAC 04.400 changes in what must be reported when renewing a license about continuing education participation

12 AAC 04.430 changes in the continuing education requirements necessary to reinstate an inactive license.

12 AAC 04.440 changes in the requirements for reinstatement of a lapsed license.
Cited Statutes: AS 08.04.425 & .440 Public Hearing N/A Written Comment by 05/01/01

3 AAC 134.060 & .150(a) Shared Fisheries Business Tax Program-distribution of funds will be changed to one-half of apportionment rather than proportionate to per capita. Only on half of the one half will be distributed to applicants in the beginning the remainder to be held until all appeals are resolved. Implemented Statute AS 29.60.450 Public Hearing N/A Written Comments 03/15/01

3 AAC 151.010- Safe Communications Program- New, additional reporting requirements for municipalities requesting payments under the safe communities program. Implemented Statute AS 29.60.350-.375 Public Comment N/A Written Comments by 03/15/01

3 AAC 130.042, .043, .044-State Revenue Sharing Program- Replace the current local head count census and housing unit method population estimates with Dept. of Labor estimates. There are also proposed changes relating to deadlines. Implemented Statute AS 29.060.010-.310 Public Hearing N/A Written Comments by 03/15/01

Board of Dental Examiners

12 AAC 28.080-Filing Reports- report requirements by dentists and anesthesia team following a death in a dental office.

12 AAC 28.420- Report of continuing education-The board will alter the reporting on continuing education for dental hygienists

12 AAC 28.640-Mandatory Reporting-dentist will be required to report problems associated with a death of medical complications that occur after parenteral sedation has been used.
Implemented Statutes AS 08.32.071, 0832.160, 08.36.070, 08.36.248, 08.36.250, 08.36.315
Public Comments N/A Written Comments 3/8/01

12 AAC 28.500-Dental Hygienist Examinations-will alter examination requirements for dental hygienists.

12 AAC 28.610-Parenteral Sedation Permit-will alter the education and training requirements

12 AAC 28.620-Education, training and Certification-will comply with section .610

12 AAC 28.960 Registration of Dental Radiological Equipment-corrects date by which equipment must be registered and details on seal.

12 AAC 28.965-Inspection of Dental Radiological Equipment-approval of inspection forms and issuance of seals

12 AAC 28.970-Review of Application-adopts forms for registration and inspection of dental radiological equipment.
Cited Statutes AS 08.32.020, .060, AS 08.36.070, .075, .248, .315 **Public Comment N/A**
Written Comment by: 05/14/01

12 AAC 02.150- Board of Chiropractic Examiners- establishing a specialty designation fee.

12 AAC 02.200- Board of Dispensing Opticians- changes in license and renewal fees

12 AAC 02.330- Board of Psychologist & Psych. Assoc. changes in license and renewal fees.

12 AAC 02.330- Board of Veterinary examiners- changes in license and renewal fees

12 AAC 02.370- Board of Certified Real estate Appraisers- changes in license and renewal fees
Cited Statutes- AS 08.20.180, .185, AS 08.71.120, .160, As 08.86.135, .140, AS 08.87.110, .120, .310, AS 08.98.190 **Public Hearings N/A Written Comment by 04/09/01**

Board of Nursing

12 AAC 44.705-Grounds for denial of nursing license based criminal history. Changes will create a new section that establishes specific crimes that may result in a denial of license of registered and practical nurses and certified nurse aides. Cited Statutes AS 08.68.100, .270, .331, .334 Public Comment N/A, Written Comment by: 04/30/01

State Medical Board

12 AAC 40.033- establishes requirements for inactive physician license

12 AAC 40.352- changes requirements for reinstating a lapsed paramedic license

12 AAC 40.473- changes requirements for reinstating a lapsed Physician Asst. license

12 AAC 40.963- establishes an expiration date for certain supporting documents submitted with an application for license.

Cited Statutes AS 08.64.100, .107, .313 Public Hearings N/A Written Comment by 04/07/01

Education & Early Development

4 AAC 62 changes that will correct or clarify the rules governing the health and safety of children in child care by revising provider qualifications and by lowering the adult/child ratio. Cited Statutes AS 14.07.020, .060, AS 14.37.020 Public Hearing: 06-07-01, Written Comment by: 05/18/01

4 AAC 12.010 changes in the costs of criminal background checks for teachers seeking certification bringing the cost in line with the Department of Public Safety charges. Cited Statutes: AS 14.07.020 & .060 Public Hearing: 06/07/01 Written Comments by: 05/18/01

Environmental Conservation

Extension Notice Public Workshop 03/13/01 Written comments by 03/16/01

18 AAC 50. These regulations involve air quality for companies that are by design or location away from the mainstream parts of the state. They establish when public comment on air quality is required. Statute reference AS 44.46.025, AS 46.03.020 AS 46.14 ~~Written Comment 02/20/01~~ ~~Public Hearing closed~~

18 AAC 90 (supplemental notice) -changes will require administrators of public and private schools to notify parents or guardians that pesticides are about to be used at the school. The regulations do not apply to antimicrobial pesticides and those that the children will be inaccessible to the children. Also requires that a notice is to be posted at the location and includes certain record keeping. Those applying pesticides must also meet new requirements for certified applicators. Cited Statutes: AS 46.03.330 & .730, Public Comment N/A Written Comment by: 05/29/01

Fish and Game

5 AAC 39.135-Confidential Data Released Form Requirements-Requires Comm. Fish Entry Comm. Permit holder requesting fish ticket information for 3rd parties to use an ADF&G form. Implemented Statute AS 16.05.050 & .815 Public Comment N/A Written Comment 03/19/01

Commercial Fisheries Entry Commission

20 AAC 05.320-places in regulation the maximum number of entry permits in the SE AK and PWS herring purse seine fishery.

20 AAC 05.400-changes in gear codes for diving gear from the list of exceptions regarding interim use permit holder

20 AAC 05.425-allows interim use permit holders to file a renewal form electronically

20 AAC 05.560-allows interim use permit holders to sign and submit forms electronically

20 AAC 05.690-extinguishes a non-useable portion of a pot crab use permit when the permit is transferred.

20 AAC 05.1750- clarifies procedures with a permanent transfer of a permit upon death of permit holder.

20 AAC 05.1910-updates charges for staff time and for shipping and handling. Cited Statutes: AS 16.43.100, .110, .150, 170, 210, .220, .240 Public Comment: 04/20/01, Written Comment by: 05/01/01

Health & Social Services

2 AAC 42, 7 AAC 47, 7 AAC 75-changes to assisted living regulations to make current and consistent with DOA regulations (*See Administration*)

7 AAC 07.045- this will establish and implement review standards for Certificate of need for nursing home beds. Review standards will also be established for seniors wishing to stay at home by increasing in home and community based services. Cited Statutes AS 18.07.031, .041, .043, .071, .081, .111 Public Hearing N/A Written Comment by 04/20/01

7 AAC 43-changes medicaid regulations to create a consumer directed care service program. Cited Statutes AS 43.07.030 Public Hearings 03/28/01, 04/05/01 Written comment by 04/12/01

Filed Regulations

Community & Economic Development

Regulatory Commission of Alaska

3 AAC 52.355- Construction of facilities by intrastate interexchange telecommunications carriers for the origination and termination of service. Effective **3/9/01**

Board of Occupational Licensing

12 AAC 02.965- Failure of a professional to meet continuing education requirements and how to reinstate license upon requirement completed. Effective **3/14/01**

3 AAC 28 charges under the division of insurance for consumer credit insurance including disability, unemployment, and death Effective **07/02/01**

3 AAC 99 changes to regulations referencing Alaska Industrial Development and Export Authority loans and leases Effective **02/08/01**

12 AAC 75- changes to Occupational licensing requirements for Registered Guides and Transporters Effective **04/06/01**

Board of Dental Examiners

12 AAC 28- Renewal and reinstatement of Professional licenses. Effective **03/14/01**

12 AAC 28- changes to local anesthetics, professions dental issues and definitions Effective **03/30/01**

Education

4 AAC 12.060 New requirements for teacher certification in French and German. Effective **04/01/01**

4 AAC 12.010 lowering teacher certificate fees to \$90- Effective **03/02/01**

4 AAC 06.740 Required scores on elementary school standardized tests Effective **03/16/01**

20 AAC 15.945 Emergency Regulations made permanent- This continues the lower loan origination fee associated with Postsecondary Education student loans. Emergency Regulations took effect 12/18/00. Cited Statute: AS 14.43.120 Effective: **12/18/00**

4 AAC 06- **Chart of Accounts and Accounting Codes-** Annual revision of Chart of Accounts and accounting codes for uniform accounting system statewide. Filed **04/17/01**, effective **05/17/01**

Education (Cont.)

20 AAC 15- Student Loan Disbursements and Authorizations of Institutions- Provisions to establish new loan awards and how that money is distributed. It further clarified appeal procedures and institution complaint procedures **Filed: 04/18/10 Effective 04/27/01**

Environmental Conservation

18 AAC 72 & 18 AAC 80-environmental concerns over smaller wastewater and public water systems regarding distance, inspections and monitoring **Effective 03/25/01**

Fish & Game

5 AAC 95-closure of Kachemak Bay and Fox River area to on bottom mariculture. **Effective 04/12/01**

Board of Game

5 AAC 85- Notice of spring meeting in Interior **3/02/01-3/16/01**

Board of Fish

5 AAC 01.570- 5 AAC 75.076-Technical corrections, corrections and corrections to the sport fishing logbook. **Effective 3/11/01**

5 AAC 93.320-Hatchery Salmon use Authorization-repealed **Effective 3/09/01**

5 AAC 01-5 AAC 77 Conversion of Latitude and Longitude-Technical corrections regarding conversion of latitude and longitude **Effective 3/11/01**

5 AAC 28.537-Opens a seven-day state season in Chignik (area L) for Pacific Cod immediately following the closure of the federal season. **Effective 3/17/01**

5 AAC 27.605-.965 Board of Fish regulations for Western Alaska Areas Herring Fishery. **Effective 04/04/01**

Fish & Game

5 AAC 01, 28,35,47,75- Commercial and Sport Groundfish Fisheries technical regulations that includes Charter, and commercial. New log book procedures, b' Cook Inlet clarification of the boards intent. **Filed 04/19/01 Effective: 05/19/01**

20 AAC 05-Chatham Blackcod Longline Fishery Limits. Establishes the number of area blackcod longline limited entry permits. **Filed 04/17/01 Ef.**

Fish & Game and Natural Resources

5 AAC 95 & 11 AAC 20-closes the use of Personal Watercraft (jet skies, a certain motorized boats) in the Kachemak Bay, and the Fox River critical habitat Areas. Cited Statutes: AS 16.05.020, AS 16.20.500 AS 41.20.020 Effective: 05/03/01

Health & Social Services

7 AAC 71.145 & 7 ACC 72.010, .210, .290, .400-.900- Standards for the operation of a community mental health facility. Effective 3/16/01

7 AAC 43. 104, .108, .395, .453, .642, .830, .921, .922, .923, .926, .927, .942 Medical procedure coding and Relative Value units for 2001 in order to bill and for terminology Effective 2/5/01

7 AAC 43.040, .075, .550, 552, .555, .557, .558, .560,. 1990- Establishes criteria for inpatient mental health treatment by updating Medicaid payment regulations and allows for a review and appeal to those payments based on the facility and the need. Cited Statutes As 47.05.010, AS 47.07.030, .040 Filed 03/20/01 Effective 04/19/01

Labor and Workforce Development

8 AAC 85.225- permits department to collect unemployment overpayments by claim against the Permanent fund Dividend. Effective 3/3/01

Natural Resources

11 AAC 80.065, .075, .085-Renewal requirements for pipeline right-of-way leasing. Effective 1/11/01

11 AAC 05.010-eliminates fee for nominating RS-2477s

11 AAC 51 & .53 -repeals existing and establishes new regulations for the management of all public easements and RS-2477s including width and reservation standards. Also includes new rules for nominating and reviewing RS-2477s. Regulations also include give the Department the ability to restrict access in certain situations. Cited Statutes: AS 19.10.010, AS 19.30.400-.420, AS 38.04.058, .200, AS 38.05.127, AS 40.15.305 Filed: 04/03/01 Effective 05/03/01

Public Safety

13 AAC 85- amendments to the requirements for police and corrections officers. Effective 04/12/01

Revenue

15 AAC 40 Motor Fuel Tax Regulations-Various changes to existing regulations designed to make the process easier for taxpayers. Effective 04/1/01