

SB

141

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: SB 141
 () Publish Date: _____
 Dept. Affected: Natural Resources
 BRU: Minerals, Land & Water Dev
 Component: Claims, Permits and Leases
 Component Number: 2460

Revision Date/Time (Note if correction): _____
 Title: Aquatic Farms for Shellfish
 Sponsor: Sen. TORGERSON
 Requester: (S) RES

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 |
|------------------------|--------------|--------------|------------|------------|------------|------------|
| Personal Services | 116.6 | 155.6 | | | | |
| Travel | 5.0 | 10.0 | | | | |
| Contractual | 2.5 | 325.0 | | | | |
| Supplies | 1.0 | 1.0 | | | | |
| Equipment | 7.0 | 0.0 | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 132.1 | 491.6 | 0.0 | 0.0 | 0.0 | 0.0 |

| CAPITAL EXPENDITURES | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 |
|-------------------------------|------------|--------------|--------------|--------------|--------------|--------------|
| | | | | | | |
| CHANGE IN REVENUES () | 0.0 | 58.5+ | 58.5+ | 58.5+ | 58.5+ | 58.5+ |

FUND SOURCE (Thousands of Dollars)

| | | | | | | |
|--------------------------|--------------|--------------|------------|------------|------------|------------|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | 132.1 | 491.6 | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other (Specify Type) | | | | | | |
| TOTAL | 132.1 | 491.6 | 0.0 | 0.0 | 0.0 | 0.0 |

Estimate of any current year (FY2002) cost: none

Check this box (X) if funding for this bill is included in the Governor's FY2003 budget proposal:

POSITIONS

| | | | | | | |
|-----------|---|---|--|--|--|--|
| Full-time | 3 | 3 | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

ANALYSIS: (Attach a separate page if necessary)

Figures shown here are only preliminary estimates.

This bill creates a one-time disposal program of at least 90 aquatic farmsites; changes the criteria of determining fair market value of a site where culture of indigenous shellfish is proposed; and requires DNR to condition leases for sites that culture wild stocks of indigenous shellfish to restore the wild stock upon termination or expiration of the lease to the population level that existed prior to issuance of the lease. It expands DNR's current aquatic farm program, which operates on program receipts with one employee and brings in approximately \$48.0 a year.

Operating expenditures for SB 141 could increase for FY 2004 if leases are issued for longer than 10 years, which would necessitate cadastral surveys of each site (AS 38.04.045). [CONT.]

Prepared by: Bob Loeffler
 Division: Mining, Land and Water
 Approved by: Pat Pourchot
 Agency: Natural Resources

Phone 269-8600
 Date/Time 25-Feb-02
 Date 25-Feb-02

ANALYSIS: (continued)

This analysis assumes that under Sec. 3 of the bill, it would take a full year to prepare for the one-time disposal of 90 farmsites at auction. A new unit consisting of one Natural Resource Manager I, one Natural Resource Officer II, and one Natural Resource Technician would be required. (Additional appraisal services would also be required, but would be done under contract.) Because it would take approximately three months to establish and fill the positions, only nine months of personal services costs are shown for FY 2003. Once hired, the unit will need approx. 12 months to develop timelines and procedures; give public notice to solicit nominations; write preliminary disposal decisions; evaluate nominated sites and conduct the coastal consistency review and agency/public comment period (including limited hearings); review comments/resolve conflicts; write final decisions listing approved sites; inspect sites with ADF&G and DEC to determine suitability and whether indigenous shellfish are present; contract for appraisals (\$50.0) that consider the value of existing harvestable shellfish and site productivity; give public notice of the auctions; conduct auctions; and issue final leases. The auctions would likely not be held until the fall of 2003.

Total estimated costs for DNR's portion of one-time mariculture disposal: \$351.2

As part of the disposal, the bill requires the amount of sustainable harvestable shellfish to be determined so that a value could be placed on the resource. This information is outside DNR's expertise and would likely be obtained by a Reimbursable Services Agreement with ADF&G. Costs for this item were estimated by ADF&G and are shown as a contractual item for FY04.

Total estimated costs for DNR's RSA to ADF&G to evaluate site suitability, estimate populations of wild stock consistent with sustainable yield management and the potential productivity of the site: \$272.5

Changes in revenue: +\$58.5

If all 90 sites were leased, the possible revenue of \$58.5 annually would begin in FY04. This estimate is based on an average 3-acre suspended culture site x 60 sites = \$33,000 and an average of 5-acre on-bottom culture site x 30 sites = \$25,500 (plus the additional value placed on the amount of harvestable shellfish and the potential productivity of the site; these are unknowns at this time). However, it is not known whether the market could absorb such a large number of sites at once.

Personal Services New Position Detail

DRAFT

Department of Natural Resources

Scenario: DNR FY2003 Fiscal Notes - for Positions (2481)
 Component: Claims, Permits & Leases (2460)
 BRU Name: Minerals, Land, and Water Development (330)

| PCN | Job Class Title | Time Status | Retire Code | Barg Unit | Location | Salary Sched | Range & Steps | Budgeted Months | Split / Annual Salary | COLA | Premium Pay | Annual Benefits | Total Costs |
|-----------------------|--------------------------|-------------|-------------|-----------|-----------|--------------|------------------------|-----------------------|-----------------------|------|-----------------------|-----------------|-------------|
| 10-#075 | Natural Resource Off I | FT | A | GG | Anchorage | 2A | 14 C | 9.0 | 26,538 | 426 | 0 | 11,193 | 38,157 |
| Justification: | | | | | | | Funding Detail: | | | | | | |
| SB141 | | | | | | | 1004 | General Fund Receipts | | | | 100.00% | 38,157 |
| | | | | | | | | | | | Total Funding: | 100.00% | 38,157 |
| 10-#076 | Natural Resource Off II | FT | A | GG | Anchorage | 2A | 16 D | 9.0 | 31,656 | 509 | 0 | 12,242 | 44,407 |
| Justification: | | | | | | | Funding Detail: | | | | | | |
| SB141 | | | | | | | 1004 | General Fund Receipts | | | | 100.00% | 44,407 |
| | | | | | | | | | | | Total Funding: | 100.00% | 44,407 |
| 10-#077 | Natural Resource Tech II | FT | A | GG | Anchorage | 2A | 12 C | 9.0 | 23,247 | 373 | 0 | 10,519 | 34,139 |
| Justification: | | | | | | | Funding Detail: | | | | | | |
| SB141 | | | | | | | 1004 | General Fund Receipts | | | | 100.00% | 34,139 |
| | | | | | | | | | | | Total Funding: | 100.00% | 34,139 |

Component Summary:

Total New Positions: 3

| Fund Description | Fund Percent | Fund Amount |
|----------------------------|--------------|-------------|
| 1004 General Fund Receipts | 100.00% | 116,703 |
| Total Funding: | 100.00% | 116,703 |

Note: If a position is split, an asterisk (*) will appear in the Split/Count column. If the split position is also counted in the component, two asterisks (**) will appear in this column.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: SB 141
 () Publish Date: _____

Revision Date/Time (Note if correction): _____
 Title An Act Relating to Aquatic Farming of Shellfish

Dept. Affected: Environmental Conservation
 BRU Environmental Health
 Component Food Safety and Sanitation

Sponsor Senator Torgerson
 Requester Senate Resources Committee

Component No. 2343

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 |
|------------------------|--------------|------------|------------|------------|------------|------------|
| Personal Services | 88.9 | | | | | |
| Travel | 13.8 | | | | | |
| Contractual | 236.3 | | | | | |
| Supplies | 18.5 | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 357.5 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

| | | | | | | |
|-----------------------------|--|--|--|--|--|--|
| CAPITAL EXPENDITURES | | | | | | |
|-----------------------------|--|--|--|--|--|--|

| | | | | | | |
|-------------------------------|--|--|--|--|--|--|
| CHANGE IN REVENUES () | | | | | | |
|-------------------------------|--|--|--|--|--|--|

FUND SOURCE (Thousands of Dollars)

| | | | | | | |
|---|--------------|------------|------------|------------|------------|------------|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | 357.5 | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other (Specify Type--Do not abbreviate) | | | | | | |
| TOTAL | 357.5 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

| | | | | | | |
|-----------|---|--|--|--|--|--|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | 2 | | | | | |

ANALYSIS: (Attach a separate page if necessary)

In preparing this fiscal note, the department has interpreted "suitable" to mean the sites offered for lease can meet the requirements for certification under the National Shellfish Sanitation Program (NSSP), which is implemented by DEC. We have also assumed that 10 new growing areas will need to be certified. The NSSP requires that the department conduct a sanitary survey of each growing area to ensure it is not subject to contamination by fecal coliform, pathogenic organisms and other pollutants and that the water quality meets the standards established in the NSSP. Surveys include an evaluation of shoreline pollution sources, analyses of hydrographic and meteorological characteristics to determine how pollutants are distributed in the water, and collection and analyses of growing water samples.

Continued: on page 2

Prepared by: Janice Adair, Director
 Division Division of Environmental Health
 Approved by: _____
 Agency Department of Environmental Conservation

Phone (907) 269-7644
 Date/Time 2/20/02 11:16 AM
 Date 2/20/2002

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

BILL NO. SB 141

ANALYSIS CONTINUATION

Continued: from page 1

The sanitary surveys of the growing areas would be conducted by a 12-month non-permanent employee, and the water samples would be collected by third-party contractors. The water samples would be analyzed by the department's Seafood and Food Safety Laboratory. A 12-month non-permanent Microbiologist would be required in the laboratory to analyze the additional 2,250 growing water samples.

The number of required water samples is determined by whether an area is "remote", defined as an area with no human habitation and that is not impacted by any actual or potential pollution sources, or "inhabited", which means the area does have human habitation. Remote areas require fewer water samples for certification than inhabited areas. In determining costs, we have assumed that 50% of the areas will be in remote areas and 50% of the areas will be in inhabited areas.

Areas must be re-certified every three years, although the sanitary survey is only required every 12 years. We have also assumed for purposes of this fiscal note that the re-certification of any area certified under this legislation will be paid for by the shellfish farmers or growers who lease sites in the areas, which is current practice. However, we have not included any increased program receipt authority in year 3, because we do not know how many of these areas will actually be leased and thus require certification.

| Line Item Description | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 |
|---|------------------|---------|---------|---------|---------|---------|
| Personal Services | | | | | | |
| • Environmental Technician II (12-month Non-perm) | \$42,064 | | | | | |
| • Environmental Microbiologist I (12-month Non-perm) | \$46,866 | | | | | |
| Subtotal: | \$88,930 | | | | | |
| Travel | | | | | | |
| • Sanitary surveys (10 areas) | \$13,840 | | | | | |
| Contractual | | | | | | |
| • Sample shipment | \$11,250 | | | | | |
| • Water sample collection (3rd party contractor) | \$225,000 | | | | | |
| Subtotal: | \$236,250 | | | | | |
| Supplies | | | | | | |
| • Laboratory commodities (2250 samples) | \$18,480 | | | | | |
| Equipment | \$0 | | | | | |
| Total | \$357,500 | | | | | |

Personal Services New Position Detail

Department of Environmental Conservation
Fiscal Note SB 141 Attachment

Scenario: DEC 2003 Fiscal Notes (2321)
Component: Food Safety & Sanitation (2343)
BRU Name: Environmental Health (207)

| PCN | Job Class Title | Time Status | Retire Code | Barg Unit | Location | Salary Sched | Range & Steps | Budgeted Months | Split / Annual Count | Annual Salary | COLA | Premium Pay | Annual Benefits | Total Costs |
|---------|-----------------------|-------------|-------------|-----------|-----------|--------------|---------------|-----------------|----------------------|---------------|------|-------------|-----------------|-------------|
| 18-#012 | Environmental Tech II | NP | A | GP | Anchorage | 1A | 12B | 12.0 | | 30,384 | 591 | 0 | 11,089 | 42,064 |

Justification:

Required to conduct sanitary surveys to implement SB 141.

Funding Detail:

| | | | |
|-----------------------|-----------------------|---------|--------|
| 1004 | General Fund Receipts | 100.00% | 42,064 |
| Total Funding: | | 100.00% | 42,064 |

18-#013 Microbiologist I

NP A GP Palmer

1A 14B 12.0 34,626 674 0 11,566 46,866

Justification:

Required to perform sample analysis to implement SB 141.

Funding Detail:

| | | | |
|-----------------------|-----------------------|---------|--------|
| 1004 | General Fund Receipts | 100.00% | 46,866 |
| Total Funding: | | 100.00% | 46,866 |

Component Summary:

Total New Positions: 2

| Fund Description | Fund Percent | Fund Amount |
|----------------------------|--------------|-------------|
| 1004 General Fund Receipts | 100.00% | 88,930 |
| Total Funding: | 100.00% | 88,930 |

Note: If a position is split, an asterisk (*) will appear in the Split/Count column. If the split position is also counted in the component, two asterisks (**) will appear in this column.

FISCAL NOTE

STATE OF ALASKA
2001 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: SB 141
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Environmental Conservation
 Title: An Act Relating to Aquatic Farming of Shellfish BRU: Environmental Health
 Component: Food Safety and Sanitation
 Sponsor: Senator Torgerson
 Requester: Senate Resources Committee Component Number: 2343

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 |
|------------------------|--------------|------------|------------|------------|------------|------------|
| Personal Services | 86.0 | | | | | |
| Travel | 13.8 | | | | | |
| Contractual | 236.3 | | | | | |
| Supplies | 18.5 | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 354.6 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

| | | | | | | |
|-----------------------------|--|--|--|--|--|--|
| CAPITAL EXPENDITURES | | | | | | |
|-----------------------------|--|--|--|--|--|--|

| | | | | | | |
|-------------------------------|--|--|--|--|--|--|
| CHANGE IN REVENUES () | | | | | | |
|-------------------------------|--|--|--|--|--|--|

FUND SOURCE (Thousands of Dollars)

| | | | | | | |
|--------------------------|--------------|------------|------------|------------|------------|------------|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | 354.6 | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other (Specify Type) | | | | | | |
| TOTAL | 354.6 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

Estimate of any current year (FY2001) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2002 budget proposal:

POSITIONS

| | | | | | | |
|-----------|---|--|--|--|--|--|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | 2 | | | | | |

ANALYSIS: (Attach a separate page if necessary)

In preparing this fiscal note, the department has interpreted "suitable" to mean the sites offered for lease can meet the requirements for certification under the National Shellfish Sanitation Program (NSSP), which is implemented by DEC. We have also assumed that 10 new growing areas will need to be certified. The NSSP requires that the department conduct a sanitary survey of each growing area to ensure it is not subject to contamination by fecal coliform, pathogenic organisms and other pollutants and that the water quality meets the standards established in the NSSP. Surveys include an evaluation of shoreline pollution sources, analyses of hydrographic and meteorological characteristics to determine how pollutants are distributed in the water, and collection and analyses of growing water samples. The sanitary surveys of the growing areas would be conducted by a 12-month non-permanent employee, and the water samples would be collected by third-party contractors. The water samples would be analyzed by the department's Seafood and Food Safety Laboratory. A 12-month non-permanent Microbiologist would be required in the laboratory to analyze the additional 2,250 growing water samples.

Continued: on page 2

Prepared by: Janice Adair, Director
 Division: Division of Environmental Health
 Approved by: Kurt Fredriksson
 Agency: Department of Environmental Conservation

Phone (907) 269-7644
 Date/Time April 2, 2001 8:30 a.m.
 Date 4/2/01

For distribution information, call the Governor's Legislative Office

**FISCAL NOTE
STATE OF ALASKA
2001 LEGISLATIVE SESSION**

Continued: from page 1

The number of required water samples is determined by whether an area is "remote", defined as an area with no human habitation and that is not impacted by any actual or potential pollution sources, or "inhabited", which means the area does have human habitation. Remote areas require fewer water samples for certification than inhabited areas. In determining costs, we have assumed that 50% of the areas will be in remote areas and 50% of the areas will be in inhabited areas.

Areas must be recertified every three years, although the sanitary survey is only required every 12 years. We have also assumed for purposes of this fiscal note that the recertification of any area certified under this legislation will be paid for by the shellfish farmers or growers who lease sites in the areas, which is current practice. However, we have not included any increased program receipt authority in year 3, because we do not know how many of these areas will actually be leased and thus require certification.

| Line Item Description | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY2007 |
|---|------------------|---------|---------|---------|---------|--------|
| Personal Services | | | | | | |
| • Environmental Technician II (12-month Non-perm) | \$40,659 | | | | | |
| • Environmental Microbiologist I (12-month Non-perm) | \$45,375 | | | | | |
| Subtotal: | \$86,034 | | | | | |
| Travel | | | | | | |
| • Sanitary surveys (10 areas) | \$13,830 | | | | | |
| Contractual | | | | | | |
| • Sample shipment | \$11,250 | | | | | |
| • Water sample collection (3rd party contractor) | \$225,000 | | | | | |
| Subtotal: | \$236,250 | | | | | |
| Supplies | | | | | | |
| • Laboratory commodities (2250 samples) | \$18,480 | | | | | |
| Total | \$354,594 | | | | | |

22-LS0361\L
Utermohle
2/19/02

CS FOR SENATE BILL NO. 141(RES)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY THE SENATE RESOURCES COMMITTEE

**Offered:
Referred:**

Sponsor(s): SENATOR TORGERSON

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to aquatic farming of shellfish; and providing for an effective date."**

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 *** Section 1.** AS 38.05.083 is amended by adding a new subsection to read:

4 (g) Upon the expiration or termination of the lease, a person who holds a lease
5 for an aquatic farming site where wild stocks of shellfish indigenous to the site are
6 cultured shall, as a condition of the lease, restore the wild stock of shellfish, as
7 consistent with sustained yield management of the wild stock, to the population level
8 that existed on the site when the lease was initially issued.

9 *** Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to
10 read:

11 **LEASE OF AQUATIC FARMING SITES FOR FARMING OF SHELLFISH.** (a)
12 The commissioner of natural resources shall offer for lease to the public before July 1, 2003, a
13 minimum of 60 sites suitable for suspended culture of shellfish, 20 sites suitable for aquatic
14 farming of clams, and 10 sites suitable for aquatic farming of geoducks. The commissioner
15 shall offer the sites for lease by public auction under AS 38.05.075. The commissioner shall

1 offer for lease through offices of the department those sites that were not leased when offered
2 at a public auction held under this subsection. The leases entered into under this subsection
3 are subject to AS 38.05.083(b) - (g). The renewal of the leases entered into under this
4 subsection is subject to AS 38.05.083(a).

5 (b) Before offering leases for aquatic farming sites under (a) of this section, the
6 commissioner of natural resources shall solicit nominations of sites suitable for aquatic
7 farming of clams, geoducks, and other shellfish from the aquatic farming industry in the state
8 and the public. The commissioner of natural resources, in consultation with the Department
9 of Fish and Game and the Department of Environmental Conservation, shall identify sites
10 suitable for aquatic farming of clams, geoducks, and other shellfish. The sites identified by
11 the commissioner must include sites in areas of the state where aquatic farming activities are
12 already occurring. Aquatic farming sites for on-bottom culture of shellfish must be located in
13 areas where either (1) an indigenous population of the shellfish species to be cultivated is not
14 present, or (2) if an indigenous population of the shellfish species to be cultivated is present,
15 aquatic farming of the shellfish species would not interfere with an established commercial,
16 subsistence, or personal use fishery. After the commissioner has published the final list of
17 sites suitable for farming of clams, geoducks, and other shellfish, the commissioner shall offer
18 the sites for lease in accordance with (a) of this section.

19 (c) The aquatic farming sites that are offered for lease under this section are in
20 addition to those offered by the commissioner of natural resources under regulations adopted
21 by the Department of Natural Resources under AS 38.05.083. Aquatic farming leases issued
22 under AS 38.05.083 before the effective date of this Act may not be counted toward the
23 satisfaction of the requirement established by (a) of this section; however, leases for aquatic
24 farming sites that are issued after the effective date of this Act on the basis of lease
25 applications filed with the department before the effective date of this Act may be counted
26 toward the satisfaction of the requirement established by (a) of this section.

27 * Sec. 3. This Act takes effect immediately under AS 01.10.070(c).

ALASKA STATE LEGISLATURE

Chairman: Senator John Torgerson
Vice Chair: Senator Gary Wilken
Senator Rick Halford
Senator Ben Stevens
Senator Robin Taylor
Senator Kim Elton
Senator Georgianna Lincoln



Official Business

State Capitol, Room 427
Juneau, AK 99801
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SENATE RESOURCES COMMITTEE

SPONSOR STATEMENT

CS SB 141(RES) Aquatic Farms for Shellfish

Last year, the Department of Fish and Game proposed new mariculture regulations that were met with sharp criticism from the aquatic farming industry. The industry felt the proposed regulations were too restrictive and would essentially constitute a regulatory ban on shellfish farming in Alaska. SB 141 was then introduced in an effort to preserve an industry that has been proven successful in the diversification of Alaska's economy.

CS SB 141 (RES) requires the Department of Natural Resources to offer public leases for 60 suspended shellfish sites, 20 clam sites, and 10 geoduck sites. These leases are in addition to permits already issued. Before offering the leases, the commissioner must solicit nominations for sites from the aquatic farming industry and the public and select sites that don't interfere with established commercial, subsistence, or personal use.

CS SB 141 is intended to maintain the existence and prosperity of a valuable Alaskan industry without interfering with other user groups.

ALASKA STATE LEGISLATURE



Senator John Torgerson, Chair
Senator Drue Pearce, Vice Chair
Senator Rick Halford
Senator Pete Kelly
Senator Robin Taylor
Senator Kim Elton
Senator Georgianna Lincoln

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SENATE RESOURCES COMMITTEE

SPONSOR STATEMENT

SB 141 Aquatic Farms for Shellfish

The Alaska Department of Fish and Game recently proposed new mariculture regulations that were met with sharp criticism from the aquatic farming industry. The industry feels that the proposed regulations impose such restrictive and unreasonable operational procedures for farmers that, if implemented, would constitute a regulatory ban on shellfish farming in Alaska. SB 141 is a good faith effort to mitigate the unsatisfactory relationship between the aquatic farming industry and the Department. This legislation is also intended to preserve an industry that has been proven successful in diversifying the economy of Alaska.

SB 141 requires the Department of Natural Resources (DNR) to offer public leases on 60 suspended shellfish sites, 20 clam sites, and 10 geoduck sites. These leases are in addition to permits already issued. The leasing program charges more money for sites rich in harvestable shellfish and less money for barren sites. If shellfish are located on the site, the farmer must abide by the sustained yield principle of management when harvesting the wild stock. When selecting the sites for lease, the Commissioner of DNR must solicit nominations from the industry and select sites that don't interfere with established commercial, subsistence, or personal use.

SB 141 is a step in the right direction to maintain the existence and prosperity of a valuable Alaskan industry without interfering with the right of all Alaskans to harvest a common property resource within the state.

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit



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Juneau, AK 99811-3300
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FAX (907) 465-2347
Internet e-mail address:
legaudit@legis.state.ak.us

October 23, 2000

Members of the Legislative Budget
and Audit Committee:

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

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

October 23, 2000

Audit Control Number
11-30002-01

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

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

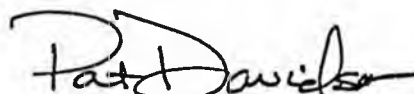

Pat Davidson, CPA
Legislative Auditor

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OBJECTIVES, SCOPE, AND METHODOLOGY

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

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

Objectives

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

Scope and Methodology

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

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

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

Toward that end, we reviewed the following documents:

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

We also interviewed the following individuals:

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

ORGANIZATION AND FUNCTION

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

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

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

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

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

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

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

Mariculture Oversight and Assistance

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

BACKGROUND INFORMATION

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

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

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

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

Critical habitat area management plans developed from Alaska Statute

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

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

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

In April 1994, the goals and policies of the December 1993 Kachemak Bay and Fox River Flats Critical Habitat Area Management Plan were adopted in regulations by reference. The plan requires a special area permit for any habitat altering activity, including construction. Division

of Habitat and Restoration is required to review each special area permit application for consistency with these goals and policies.

The initial aquatic farm sites involved suspension-type operations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The litigation and the development of the eventual statutory remedy resulted in DNR suspending state aquaculture leasing applications for three years. As a result, there was a pent-up demand for such permits when the application window was reopened in January 1999. At that time DNR received more than 40 applications¹ for aquatic farming leases.

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

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

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

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

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

or

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

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

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

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

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

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

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REPORT CONCLUSIONS

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

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

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

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

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

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

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

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

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

No exclusive right or special privilege of fisheries shall be created or authorized in the natural waters of the State. This section does not restrict the

power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State. [Emphasis added.]

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

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

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

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

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

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

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

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

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

1. Inconsistent with the requirements of AFA.

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

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

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

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

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

The department did not originally dispute any of the permits on any of these operational grounds. By attempting to impose conditions to the extent of making the operations unfeasible, the department was not acting consistently with AFA's statutory mandate that DFG "encourage the establishment and responsible growth" of aquatic farming in the State.

Exhibit 1

AFA Establishes Four Criteria for Issuance of an Aquatic Farm Permit

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

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

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

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

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

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

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

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

Besides these industry friendly regulatory actions, DFG staff accompanied representatives of the University of Alaska Fairbanks' (UAF) marine advisory program (MAP), to various public meetings where they encouraged attendees to consider becoming entrepreneurs and take up aquatic farming. In such presentations, which were admittedly lead by an enthusiastic

proponent from UAF-MAP, the department's presence gave the impression that the agency supported such commercial development, in accordance with the AFA's legislative intent.

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

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

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

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

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

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

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

As discussed in the Background Information section, the aquatic farming applications for sites in Kachemak Bay are subject to the provisions of the Kachemak Bay and Fox River Flats Critical Habitat Area management plan. Staff of DFG's Division of Habitat and Restoration (DHR) reviewed the permit applications for consistency with the plan.

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

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

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

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

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

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

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

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

One staff member involved with the review of SE geoduck applications was married to a dive fisherman who is on the eligible list for a Commercial Fisheries Entry Commission (CFEC) limited entry permit and also on CFEC's 2000 permit holder list for Geoduck dive fishery. Since a major issue surrounding the geoduck applications involves whether farming operations have an impact on the existing dive fishery, such a relationship raises a concern about a conflict of interest.

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

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

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

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

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

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

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

In this context, DFG has approved almost every application for oyster and mussel farms throughout the State. The department has conducted numerous meetings and teleconferences

with shellfish farmers to provide technical assistance for their operations or assist them in modifying their applications in order to comply with regulatory requirements governing operations.

Operational viability of the Qutekcak Shellfish Hatchery has been jeopardized

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

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

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

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

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

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

FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

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

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

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

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

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

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

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

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

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

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

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

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

Exhibit 2

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

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

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

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

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

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

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

Recommendation No. 2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation No. 3

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

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

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

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

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

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

Recommendation No. 4

DFG should foster staff awareness of potential conflicts of interest.

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

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

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

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

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

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

Recommendation No. 5

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

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

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

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

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

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STATE OF ALASKA

DEPARTMENT OF FISH AND GAME

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December 28, 2000

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RECEIVED
DEC 28 2000
LEGISLATIVE AUDIT

Dear Ms. Davidson:

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

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

Use of Common Property Resources

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

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

On-bottom Farming in Kachemak Bay Critical Habitat Area

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

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

Efforts by DFG to Implement AFA

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

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

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

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

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

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

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

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

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

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

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

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

Misinterpretation of State Law

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

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

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

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

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

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

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

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

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

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

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

Comparison of Commercial Dive Fishery and Aquatic Farming Not Valid

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

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

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

DFG Policies Do Not Jeopardize Shellfish Hatchery

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

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

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

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

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

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

DFG Inconsistencies

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

Permitting of on-bottom farming

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

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

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

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

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

Promotion of aquatic farming

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

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

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

Recommendation No. 1:

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

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

Recommendation No. 2:

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

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

Recommendation No. 3:

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

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

Recommendation No. 4:

DFG should foster staff awareness of potential conflicts of interest.

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

Recommendation No. 5:

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

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

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

Sincerely,



Frank Rue
Commissioner

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STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES
OFFICE OF THE COMMISSIONER

TONY KNOWLES, GOVERNOR

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JAN 02 2001

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December 21, 2000

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

Ref: Audit Control No 11-30002-01

Dear Ms. Davidson:

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

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

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

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

Sincerely,



Carol Carroll
Director

Cc: Pat Pourchot
Bob Loeffler
Nancy Welch
Kim Kruse

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ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit



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January 4, 2001

Members of the Legislative Budget
and Audit Committee

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



Pat Davidson, CPA
Legislative Auditor

Subject: Senate Bill 141

Date: Sat, 17 Mar 2001 21:28:56 -0900

From: "Stephen La Croix" <s.w.lacroix@worldnet.att.net>

To: "Darwin Peterson" <Darwin_Peterson@legis.state.ak.us>

Darwin,

I want to thank Senator Torgerson and his staff for their efforts to address problems we have been having developing the aquatic farm industry here in Alaska for many years and for the introduction of this bill which is designed to force some action on the issue. It is a great start. I apologize for not responding sooner. It has been a struggle just to keep up with the problems we have been confronted with lately on regulations and in the courts and I have not taken the time to start a new project.

Comments on the language. I am restricting my comments to geoduck farming.

Section 1. It takes at least five years for geoducks to grow from seed. The first five years are capitol intensive, money going out and none coming in. It would help if the lease allowed for a payment structure that minimized the costs during this time period. Appraisals present several problems. My main concern is the negative impact on the industry if they are not realistic. I see a need to put additional restriction on this. Reappraisal has the potential to develop into a mechanism for the state to be determining profit margins for farmers.

Section 2. The key issue here is accurate population estimates.

Section 3. (a) I would prefer to see open bid auctions.

(b) It is the policy of ADF&G only to allow farming of indigenous species. The language allowing sites in areas where the species is not present would be in conflict with that policy. We do not currently have aquatic farming of geoducks anywhere in the state. It may be necessary to define the terms like "established and interfere" in this section as we had a lot of problems with similar terms in the Aquatic Farm Act. My experience is that you may not want to leave it up to the department to define these terms.

(c) There are 10 geoduck permits currently under appeal. There is a good chance that more applications will be processed during the next application period ending June 2001. These facts may have impact on how you wish too structure this section.

General Comments.

The fundamental concepts proposed in this bill are good. The bill requires the

leaseholder to;

- 1) Pay fare market value.
- 2) Bid for the opportunity to farm.
- 3) Restore the ground if/when vacated.

I have concerns about the regulatory agencies abilities to determine things like "fare market value". Value has a habit of changing over time. The potential for DNR to over value the resource is great. The result will be that no one will bid on the offerings. It is not too far of a stretch to think that an agency might intentionally inflate values to insure that no one bid and still comply with the letter of this law.

Should a farmer have to restore the stocks and pay fare market value? This seems like paying twice. The more important factor is the restoration of the wild stock. I propose that it be a requirement of the lease to pay a predetermined amount equal to the cost to replace each

animal

from the wild stock at the farm site as it is removed. These funds would act like a performance bond. It would be returned upon documentation that restoration requirements had been complied with.

One impact of this bill may be to alter the ADF&G attitude for issuing operational permits they will be receiving between now and July 1, 2002.

We have not had insurmountable problems with the ADNR in acquiring leases for farming. The problems have been with ADF&G in getting operational permits. This bill addresses ADNR statute only. It may not get any more farms on line if ADF&G remains uncooperative. We may need some language insuring that these identified sites will qualify for operational permits.

STATE OF ALASKA

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

TCNY KNOWLES, GOVERNOR

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April 2, 2001

The Honorable John Torgerson
Alaska State Senate
State Capitol, Room 427
Juneau, AK 99801-1182

Dear Senator Torgerson:

The Alaska Department of Fish and Game (ADF&G) has reviewed SB 141. I support your efforts to encourage the growth of the mariculture industry in Alaska. However, in a previous letter to you regarding this legislation, ADF&G and DOL expressed concerns that the bill did not address the common property and exclusive right of fishery issues that were the crux of the problem with the last round of applications for geoduck and clam farms. Those concerns remain, but the department would also like to offer some specific suggestions for improving SB 141. Our concerns with the current language are as follows:

In section 1, the bill requires the Department of Natural Resources (DNR) to include the value of harvestable shellfish resources on the site, in determining the fair market value. This implies that a farmer obtains resources on the site by virtue of having a lease from DNR. The common property clause in the Constitution prohibits this.

Section two requires a farmer to restore wild stock to the level that existed when the lease was issued, again implying that the farmer somehow has obtained a right to harvest wild resources on the site. A harvest of wild resources on a farm site could violate both the common property and exclusive right to fishery clauses in the Constitution. Section 2 is also somewhat confusing and the department is unsure what it would mean for a farmer to "restore the wild stock of shellfish, as consistent with sustained yield management of the wild stock, to the population level that existed on the site when the lease was initially issued." In most contexts, sustained yield deals with harvest levels, not restoration levels.



The department supports the idea in section three, subsection (b) that sites for on-bottom farming could be chosen in areas where wild stock do not exist, but subsection (c) allows a farmer to apply for a site the farmer has chosen, with no such restriction on the presence of wild stock.

Lastly, a definition for what constitutes an established commercial, subsistence, or personal use fishery should be included in the bill.

The department is not opposed to the idea of site selection, but believes that in order to avoid the pitfalls of the last round of applications, this legislation should provide specific site selection standards, with only one mechanism for applying for a lease. For example, site selection could be three tiered. If the abundance of clams on a site is at a certain threshold density, no on-bottom farming would be allowed. If there are no wild species present of the species intended for culture, and the habitat is suitable, on-bottom farming would be allowed if the proposed operations are consistent with other statutory factors. If the site contained an abundance of wild species of the kind intended for culture between the threshold density and zero, the department could permit a commercial fishery to harvest all the wild stock or perhaps conduct a test fishery with the proceeds going to the state to assist with research, monitoring and management. These site standards could apply whether the bill ultimately authorized an auction system, or continues with the current application system.

These site standards would address the issues raised under the "common use" clause and the "no exclusive right of fishery" clause in the Alaska Constitution, and would go a long way toward allowing the department to simply implement the Aquatic Farm Act and issue permits to bona fide aquatic farm operators, without having battles over statutory and constitutional interpretation.

If these concepts sound acceptable to you, we could offer some proposed language to put in the bill.

Sincerely,



Frank Rue
Commissioner

cc: Honorable Representative Drew Scalzi
Doug Mecum, ADF&G
Geron Bruce, ADF&G
Gordy Williams, ADF&G
Bob Loeffler, DNR
Pat Galvin, DGC
Janice Adair, DEC
Shannon O' Fallon, DOL
Shari Kochman, Governors Office



Dear Senator Torgerson,

3/28/01

The intent of SB 141 is unclear.

1. Does this legislation provide for leasing of subtidal sites for the propose of harvesting naturally occurring resource;
2. Does it provide for leasing aquatic farm sites to allow the planting and farming of shellfish;
3. All of the above?

Let's take 1. First. As you know in Southeast private harvesting of commercially viable quantities of the naturally occurring geoduck resource is a contentious issue. On this same note, if this bill did intend the state to lease aquatic tracts to harvest naturally occurring shellfish, Alaska would be mimicking the current practice in the state of Washington.

Washington's tract leasing program has become very expensive in it's short life and has developed a number of unintended negative impacts. The most serious of these problems is the increased opportunity for poaching. Full advantage has been taken of this opportunity. The Washington geoduck fishery is rife with poaching and gangsterizm, just type in geoduck in any Internet search engine and be amazed what it spits out. What is equally as unsettling, many of these offenders from Washington are doing business in this state, and if the opportunity is offered in Alaska there is no reason to believe we wouldn't experience the same difficulties. The attached Associated Press article details the corruption issues Washington is grappling with in its geoduck fishery.

Although a windfall for state government, the skyrocketing cost of a Washington geoduck tract has driven the price of a lease beyond the reach of the common man. In a fishery that once allowed the independent diver to harvest product worth up to ten dollars a pound, now find this same person harvesting for a leaseholder at a paltry thirty to sixty cents a pound. None of the results of tract leasing bode well for Alaska or our common property divefishery.

Question 2. If this bill specifically provides for leasing aquatic farm sites with little or no naturally occurring resource, for the propose of planting and farming shellfish, GREAT! If this bill creates a procedure for identifying potential aquatic farm sites that are biologically and publicly acceptable, BETTER YET! I do though question the necessity of requiring a mandatory number of these sites. It would occur that state agencies pressured into filling this quota could feel compelled to make decisions that would compromise a well rounded acceptance of the sites. All things considered a bill developed around the general Primus of question 2. Would be a welcome relief from the current practice.

Question 3. If this bill would allow for both tract leasing and, planting and farming, it would leave ADP&G in the same quandary it is currently in of having to interpret unclear and potentially contentious language, with the additional negative connotations associated with tract leasing. Enough has been said on these subjects.

It would also seem prudent to stall this legislation until the court decision on the shellfish farmers appeal has been rendered, and to see if the shareholders round tables produce some positive results. Without the court decision we don't know what the rules are. If the roundtables result in some standards and regulations everybody can live with maybe further legislation will not be necessary.

Thank You

Mayor



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Local News : Monday, February 26, 2001

Clamming abuses cited

By The Associated Press

OLYMPIA - A shortage of state oversight has allowed commercial harvesters to abuse Washington's geoduck-clam population to the point where the \$40 million-a-year industry could collapse, an internal report by the Department of Fish and Wildlife shows.

The report, obtained by The News Tribune of Tacoma under the state's Freedom of Information Act, shows commercial harvesters have engaged in a pattern of illegally discarding lower-quality geoducks and leaving them to die on the seabed.

It also suggests that monitors provided by the state and Indian tribes to watch harvesting slept on the job, deliberately underreported catch amounts and even accepted bribes.

The departments of Fish and Wildlife and Natural Resources, as well as area Indian tribes, are responsible for overseeing the harvest of the giant clams, which can sell for \$8 a pound and are considered a delicacy in Asia. The state leases tracts of seabed to commercial harvesters.

"Everybody bent the rules as much as they could get away with," said Tom Farler, a former contract

compliance officer with the Department of Natural Resources (DNR). "And if we weren't around, they bent them that much more."

Three grades

The 3-1/2- to 4-pound clams come in three grades, with only the highest grade - those with the longest siphons and lightest coloring - fetching high prices.

Divers can't tell what grade the clams are until they dig them. Often, if the divers dig a lower-grade clam, they simply dump it back on the seabed, where it becomes easy prey for starfish and crabs. That way, lower-grade, cheaper clams don't count toward their quota.

Illegal harvesting dates at least to 1997 and '98, when federal judges sentenced two people to prison for buying or shipping tens of thousands of pounds of illegally harvested Washington geoducks.

In 1999, state officials discovered members of the Skokomish Indian Tribe secretly dumping nearly 58,000 pounds of low-grade geoducks at one underwater site on Hood Canal.

Those cases and tips from some harvesters about further abuse prompted a two-year investigation by Fish and Wildlife's special investigative unit.

The department says it found numerous instances of harvesting off-tract, shallow harvesting, under-reporting catch or failing to report it altogether, selling to unlicensed buyers and discarding low-grade geoducks.

It also found monitors provided by both the DNR and some tribes were not always present when harvesting occurred. Once, as divers harvested off-tract near Vashon Island, the monitor reportedly slept.

Monitors also reportedly weighed geoducks

inaccurately or simply guessed how much each weighed.

Graft reported

The monitor for one South Sound tribe was allegedly paid to underreport catch, Fish and Wildlife said, and was threatened and assaulted for publicly admitting it.

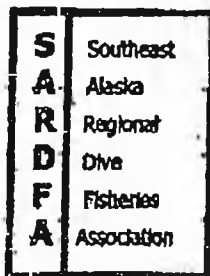
That monitor later accused other monitors of doing the same thing.

The industry cannot sustain itself at its current level of harvest, Fish and Wildlife said, adding it would like to improve monitoring, conduct post-harvest surveys of all geoduck tracts and develop market strategies to reduce or eliminate incentives for wasting low-grade clams.

Part of the problem is bureaucratic confusion between the DNR and Fish and Wildlife over which staffs play what roles in managing the harvest. The agencies have been negotiating for six months to iron out the difficulties.

Tony Meyer, spokesman for the Northwest Indian Fisheries Commission, said the tribes recognize the need to increase monitoring and enforcement of the geoduck fishery and are working with the state to do so.

At least one tribe, the Suquamish, has moved to eliminate dumping of low-grade geoducks by requiring its fishermen to keep and sell all of their harvest to the tribe, which pays the same rate for all geoducks.



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
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Senator Tongerson
 Representative Scalzi
 Alaska State Legislature
 State Capitol
 Juneau, AK 99801-1182

March 30th, 2001

RE: Comments on SB 141/ HB 208

Dear Senator Tongerson & Representative Scalzi,

SARDFA would like to thank you for taking the time to meet with us while we were in Juneau. SARDFA appreciates your support of the commercial dive fishery and your proactive approach towards development of the aquatic farming industry. SARDFA would like to submit some specific comments and propose changes for Senate Bill 141/ House Bill 208.

SARDFA foresees several problems with offering leases of wild resources to the highest bidder. First, allowing the resource to go to the highest bidder often sets up a system that is beneficial to large corporations and precludes the smaller, independent business person. Second, this form of leasing of wild stocks seems to be following the direction of the state of Washington.

Please allow me to give you some information regarding commercial diving and aquatic farming of geoducks in Washington. For its commercial dive fishery, Washington leases tracts of its wild geoducks on subtidal lands to the highest bidder through its Department of Natural Resources. This system does several things:

- 1) It brings in approximately \$30 million per year to the WA DNR (or 80% of the ex-vessel value).
- 2) It yields approximately \$0.50/per pound to the diver (or approximately 10%).
- 3) It yields approximately \$0.50/per pound to the lease holder (or approximately 10%).
- 4) It allows large Chinese-owned, Canadian companies to dominate the leases and control the geoduck markets.
- 5) It precludes management by the WA Fish & Wildlife Service, and does not allow the commercial industry to employ other management techniques or begin enhancement strategies.
- 6) It has encouraged high-grading of geoducks, which may lead to problems with sustainability.

SARDFA members believe this is exactly the opposite direction Alaska should be taking to protect the long-term sustainability of the geoduck resource. In the words of a SARDFA member, "Some of the dirtiest words a geoducker can hear are DNR, Auction, Highest Bidder and Lease".

However, in Washington, geoducks are being successfully farmed on private, intertidal areas, where very few, if any, wild stocks grow. This example demonstrates that wild geoducks are not needed for biological or financial reasons in order to farm geoducks. The two most important factors in successful geoduck farming are having the proper substrate and having access to seed.

Although SARDFA understands the necessity to make suggestions of changes which will remedy this situation to our satisfaction, SARDFA does not currently see a clear solution to this problem.

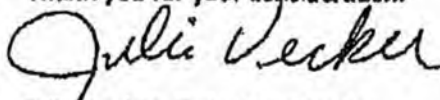
SARDFA also foresees conflicts between existing users, such as the problems the geoduck fishery is currently having. SARDFA is concerned about continued, future conflicts with commercial, subtidal geoduck beds. SARDFA suggests three possible solutions for this problem that could be inserted into these bills:

- 1) Requiring on-bottom farming sites be intertidal.
- 2) Requiring on-bottom farming sites have little stocks. For example, setting density levels above which the site would not be suitable.
- 3) Requiring geoduck farming sites have no wild stocks.

In 1997, the divers and municipalities in Southeast recognized that with budget reductions, there was little hope of money being appropriated to develop the dive fisheries. Thus, the divers and the municipalities stepped forward to develop a program in which the divers would tax themselves and work in a partnership with ADF&G and ADEC to develop the fishery in an orderly and economically beneficial manner. SARDFA is glad to report that we are moving forward in a coordinated and productive mode. Senator Tongerson, you were a supporter of our legislation and it is something you should be pleased to have had a part in. SARDFA hopes the aquatic farming industry will be one that is mutually beneficial to the dive industry, not destructive to it.

SARDFA would be glad to work with you and your staff on developing these recommendations or developing others. SARDFA supports aquatic farming and desires to assist you in the development of this industry in a way that is supplemental to the dive fisheries, not detrimental.

Thank you for your consideration.



Julie Decker, Executive Director

Cc: Senator Taylor
Representative Williams
Representative Wilson
Representative McGuire
United Fishermen of Alaska
Doug Mecum, ADF&G
SARDFA Board of Directors

LEGAL SERVICES

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
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 4, 2001

SUBJECT: Consequences of SB 141 on current litigation and proposed regulations of the Department of Fish and Game (Work Order No. 22-LS0361\J)

TO: Senator John Torgerson
Attn: Darwin Peterson

FROM: George Utermohle 
Legislative Counsel

You have inquired as to the consequences that SB 141 may have on litigation brought by certain shellfish farmers (Alaska Trademark Shellfish, et al. v. State of Alaska, Department of Fish and Game, (Sup. Ct No. 1KE-00-211CI)) and proposed regulations currently being considered by the Department of Fish and Game.

BACKGROUND. SB 141 relates to aquatic farming of shellfish. The bill makes changes to the leasing procedures of the Department of Natural Resources for aquatic farming sites and requires that the Department of Natural Resources identify and offer for lease a specific number of sites for aquatic farming of shellfish. SB 141 does not affect the authority of the Department of Fish and Game in regard to aquatic farming under AS 16.40.

ONE: What effect will the passage of SB 141 have on the current litigation (Alaska Trademark Shellfish, et al. v. State of Alaska, Department of Fish and Game) involving the regulation of aquatic farming by the Department of Fish and Game?

The plaintiffs in the litigation are challenging administrative actions of the department that denied them permits necessary to conduct aquatic farming using wild stock on the site of their aquatic farm. The actions that are being challenged in the litigation were taken under the department's authority under AS 16.40 and regulations adopted under AS 16.40. SB 141 does not alter the statutory authority of the department under AS 16.40. Thus SB 141 will not affect the litigation.

TWO: What effect will SB 141 have on the proposed aquatic farming regulations currently being considered by the Department of Fish and Game?

Senator John Torgerson
April 4, 2001
Page 2

The proposed regulations currently being considered by the Department of Fish and Game are to be adopted under the authority of AS 16.40. SB 141 does not amend the authority of the department under AS 16.40 or any other statute governing the activities of the department. Thus SB 141 will not affect the ability of the department to adopt the proposed regulations.

* * *

SB 141 provides that under certain circumstances on-bottom farming of shellfish or in-situ cultivation of shellfish indigenous to an aquatic farming site may occur under the leases authorized under the bill. It is not clear under AS 16.40 whether either on-bottom farming of aquatic organisms or in-situ farming of indigenous aquatic organisms was envisioned by the legislature when it authorized aquatic farming in 1988. The proposed regulations being considered by the Department of Fish and Game do provide for the issuance of stock acquisition permits for such activities. However, AS 16.40 could be made more clear on this issue, so that the department has express authority to issue permits for acquisition or use of wild stocks for on-bottom aquatic farming and for in-situ aquatic farming of indigenous aquatic organisms.

If I may be of further assistance, please advise.

GU/jhb
01-004.jhb



Rodger Painter, vice president
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Phone/Fax: (907) 463-3600
rodgerpainter@hotmail.com

February 21, 2002

Honorable John Torgerson
State Capitol, Suite 427
Juneau, AK 99801-1182

Dear Senator Torgerson:

Your efforts to create a "bank" of aquatic farm sites are greatly appreciated by aquatic farmers throughout the state. The committee substitute for SB 241 you have developed has made a good bill even better, and we are enthusiastic about working with you to move it through the process this year.

We are particularly grateful for the changes in the committee substitute. We believe SB 141 represents a wise investment in creating new economic development opportunities in coastal Alaska with the use of one of the state's most abundant natural resources. What a better way to bolster the sagging economies of coastal regions than promote an environmentally friendly industry supporting year-round jobs.

We believe this approach to aquaculture development may become a model for the rest of the country. We again thank you.

Sincerely,

Rodger Painter
Vice President