

**HB**

**341**

**SFIN**

**FILE**

# SENATE FINANCE COMMITTEE REPORT

REPORTED OUT

MAY 10 2004

SENATE FINANCE  
COMMITTEE

DATE: 04/7/04

FURTHER:

DATE TURNED  
IN TO OFFICE: May 10, 2004

Finance Committee considered

HOUSE BILL NO. 341

## HB 341 DIVE FISHERY MANAGEMENT ASSESSMENT

"An Act relating to the dive fishery management assessment."

and recommends:

- be replaced with \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to \_\_\_\_\_ Committee

**Senate Bill:**

- Same Title
- New Title

**House Bill:**

- Same Title
- Technical Title Change
- New Title w/ SCR # \_\_\_\_\_

**NEW FISCAL NOTE(S):**

Department	Date	Fiscal	Indet.	Zero.	FN#

**PREVIOUS FISCAL NOTE(S):**

Department	Date	Fiscal	Indet.	Zero	FN#
Rev	2/1/04			✓	1

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
<i>[Signature]</i>	✓			
<i>[Signature]</i>			✓	
<i>[Signature]</i>	✓			
<i>[Signature]</i>			✓	
COCHAIR: <i>[Signature]</i>				✓
COCHAIR: <i>[Signature]</i>	✓			

ADOPTED 5/8/04

WORK DRAFT

WORK DRAFT

WORK DRAFT

Action Rescinded 5/10/04

23-LS1280V  
Utermohle  
5/5/04

SENATE CS FOR HOUSE BILL NO. 341( )  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY

Offered:  
Referred:

Sponsor(s): REPRESENTATIVES WILLIAMS, Joule, Kookesh

If CS "I"  
adopted, then

~~SCR Resolution "A"~~  
~~must be adopted~~

A BILL

FOR AN ACT ENTITLED

need SCR  
in Final

1 "An Act relating to the dive fishery management assessment and relating to aquatic  
2 farming; and providing for an effective date."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 \* Section 1. AS 16.40.100(b) is amended to read:

5 (b) A permit issued under this section authorizes the permittee, subject to the  
6 conditions of AS 16.40.100 - 16.40.199 and AS 17.20, to

7 (1) acquire, purchase, offer to purchase, transfer, possess, sell, and  
8 offer to sell stock and aquatic farm products that are used or reared at the hatchery or  
9 aquatic farm: and

10 (2) acquire ownership of, harvest, and, without further cultivation,  
11 sell an insignificant population, that may be present at the aquatic farm site, of a  
12 wild stock of a shellfish species intended to be cultured at the site [. A PERSON  
13 WHO HOLDS A PERMIT UNDER THIS SECTION MAY SELL OR OFFER TO  
14 SELL SHELLFISH STOCK TO THE DEPARTMENT OR TO AN AQUATIC

1 FARM OR RELATED HATCHERY OUTSIDE OF THE STATE].

2 \* Sec. 2. AS 16.40.100 is amended by adding a new subsection to read:

3 (f) If the wild stock of a shellfish species to be cultured at an aquatic farm site  
4 exceeds the amount determined by the department to be an insignificant population,  
5 the permittee may remove and sell the excess amount of the wild stock from the site  
6 and shall pay the net proceeds, as defined by the department, from the harvest and sale  
7 of the excess wild stock to the department. The department shall deposit net proceeds  
8 received under this subsection into the general fund. The legislature may appropriate  
9 the net proceeds received under this section to the department for shellfish  
10 management.

11 \* Sec. 3. AS 16.40.105 is amended to read:

12 **Sec. 16.40.105. Criteria for issuance of permits.** The commissioner shall  
13 issue permits under AS 16.40.100 on the basis of the following criteria:

14 (1) the physical and biological characteristics of the proposed farm or  
15 hatchery location must be suitable for the farming or the shellfish or aquatic plant  
16 proposed;

17 (2) the proposed farm or hatchery may not require significant  
18 alterations in traditional fisheries or other existing uses of fish and wildlife resources;

19 (3) the proposed farm or hatchery may not significantly affect  
20 fisheries, wildlife, or their habitats in an adverse manner; [AND]

21 (4) the proposed farm or hatchery plans and staffing plans must  
22 demonstrate technical and operational feasibility; and

23 (5) the proposed farm site may not include more than an  
24 insignificant population of a wild stock of a shellfish species intended to be  
25 cultured on the site.

26 \* Sec. 4. AS 16.40 is amended by adding a new section to read:

27 **Sec. 16.40.155. Records and reports confidential.** Records required by  
28 statute or by a regulation adopted by the department concerning aquatic farm stocks or  
29 production, prices, and harvests of aquatic farm products and wild stocks, and annual  
30 statistical reports of individual aquatic farms or hatcheries required by statute or by a  
31 regulation adopted by the department are confidential and may not be released by the

1 department, except that the department may release the records and reports

2 (1) to the Department of Revenue and the Department of Natural  
3 Resources to assist the departments in carrying out their respective statutory  
4 responsibilities;

5 (2) as necessary to comply with a court order;

6 (3) provided by an aquatic farm or hatchery permit holder to the permit  
7 holder whose activity is the subject of the records or reports;

8 (4) regarding annual harvests of wild stocks at individual aquatic farm  
9 sites.

10 \* Sec. 5. AS 16.40.199 is amended by adding a new paragraph to read:

11 (9) "insignificant population" means

12 (A) a population of geoduck, that in the determination of the  
13 commissioner, would not attract and support a commercial fishery for that  
14 species; or

15 (B) a population of shellfish other than geoduck that, in the  
16 determination of the commissioner, would not result in significant alteration in  
17 traditional fisheries or other existing uses of fish and wildlife resources if the  
18 population were included within an aquatic farm site.

19 \* Sec. 6. AS 43.76.150 is amended to read:

20 **Sec. 43.76.150. Dive fishery management assessment.** (a) A dive fishery  
21 management assessment on fishery resources taken by dive gear shall be levied on the  
22 value of the fishery resource taken in a dive gear fishery. The species of fishery  
23 resources subject to the assessment and the rate of the assessment, as determined  
24 under (b) - (h) [(b) - (e)] of this section, shall be determined by an election under  
25 AS 43.76.160.

26 (b) A person holding a limited entry permit for dive gear or an interim-use  
27 permit for dive gear issued under AS 16.43 shall pay a dive fishery management  
28 assessment of one percent on a species of fishery resources that is subject to the  
29 assessment as determined by an election under AS 43.76.160, that is taken by dive  
30 gear, and that the person removes from the state or transfers to a buyer in the state.

31 (c) person holding a limited entry permit for dive gear or an interim-

1 use permit for dive gear issued under AS 16.43 shall pay a dive fishery  
2 management assessment of two percent on a species of fishery resources that is  
3 subject to the assessment as determined by an election under AS 43.76.160, that is  
4 taken by dive gear, and that the person removes from the state or transfers to a  
5 buyer in the state.

6 (d) A person holding a limited entry permit for dive gear or an interim-use  
7 permit for dive gear issued under AS 16.43 shall pay a dive fishery management  
8 assessment of three percent on a species of fishery resources that is subject to the  
9 assessment as determined by an election under AS 43.76.160, that is taken by dive  
10 gear, and that the person removes from the state or transfers to a buyer in the state.

11 (e) A person holding a limited entry permit for dive gear or an interim-  
12 use permit for dive gear issued under AS 16.43 shall pay a dive fishery  
13 management assessment of four percent on a species of fishery resources that is  
14 subject to the assessment as determined by an election under AS 43.76.160, that is  
15 taken by dive gear, and that the person removes from the state or transfers to a  
16 buyer in the state.

17 (f) [(d)] A person holding a limited entry permit for dive gear or an interim-  
18 use permit for dive gear issued under AS 16.43 shall pay a dive fishery management  
19 assessment of five percent on a species of fishery resources that is subject to the  
20 assessment as determined by an election under AS 43.76.160, that is taken by dive  
21 gear, and that the person removes from the state or transfers to a buyer in the state.

22 (g) A person holding a limited entry permit for dive gear or an interim-  
23 use permit for dive gear issued under AS 16.43 shall pay a dive fishery  
24 management assessment of six percent on a species of fishery resources that is  
25 subject to the assessment as determined by an election under AS 43.76.160, that is  
26 taken by dive gear, and that the person removes from the state or transfers to a  
27 buver in the state.

28 (h) [(e)] A person holding a limited entry permit for dive gear or an interim-  
29 use permit for dive gear issued under AS 16.43 shall pay a dive fishery management  
30 assessment of seven percent on a species of fishery resources that is subject to the  
31 assessment as determined by an election under AS 43.76.160, that is taken by dive

1 gear, and that the person removes from the state or transfers to a buyer in the state.

2 (i) [(f)] A dive fishery management assessment may only be levied or  
3 collected on a fishery resource in an administrative area if

4 (1) there exists in that administrative area an association determined by  
5 the commissioner of fish and game to be a qualified regional dive fishery development  
6 association under AS 16.40.240; and

7 (2) the species of fishery resource subject to the dive fishery  
8 management assessment and the rate of the dive fishery management assessment, as  
9 provided under (b) - (h) [(b) - (e)] of this section, is approved by an election under  
10 AS 43.76.160.

11 \* Sec. 7. AS 43.76.160(b) is amended to read:

12 (b) The dive fishery management assessment is levied under AS 43.76.150(b),  
13 (c), (d), [OR] (e), (f), (g), or (h) in an administrative area on the effective date stated  
14 on the ballot if

15 (1) the assessment is approved by a majority vote of the eligible  
16 interim-use permit and entry permit holders voting in an election held in the  
17 administrative area under this section; and

18 (2) the election results are certified by the commissioner of fish and  
19 game.

20 \* Sec. 8. AS 43.76.160(c) is amended to read:

21 (c) In conducting an election under this section, a qualified regional dive  
22 fishery development association shall adopt the following procedures:

23 (1) the qualified regional dive fishery development association in the  
24 administrative area shall hold at least one public meeting not less than 30 days before  
25 the date on which ballots must be postmarked to be counted in the election to explain,  
26 as appropriate, the reason for approval or amendment of the proposed dive fishery  
27 management assessment, the reason for the proposed rate of the dive fishery  
28 management assessment, or the reason for termination of the dive fishery management  
29 assessment and to explain the registration and voting procedure to be used in the  
30 election; the qualified regional dive fishery development association shall provide  
31 notice of the meeting by

1 (A) mailing the notice to each eligible interim-use permit and  
2 entry permit holder;

3 (B) posting the notice in at least three public places in the  
4 administrative area; and

5 (C) publishing the notice in at least one newspaper of general  
6 circulation in the administrative area at least once a week for two consecutive  
7 weeks before the meeting;

8 (2) the qualified regional dive fishery development association shall  
9 mail two ballots to each eligible interim-use permit and entry permit holder; the first  
10 ballot shall be mailed not more than 45 days before the date ballots must be  
11 postmarked to be counted in the election; the second ballot shall be mailed not less  
12 than 15 days before the date ballots must be postmarked to be counted in the election;  
13 the qualified regional dive fishery development association shall adopt procedures to  
14 ensure that only one ballot from each eligible interim-use permit and entry permit  
15 holder is counted in the election;

16 (3) the ballot must

17 (A) indicate the species of fishery resources subject to the dive  
18 fishery management assessment;

19 (B) indicate whether the election relates to a dive fishery  
20 management assessment under AS 43.76.150(b), (c), (d), [OR] (e), (f), (g), or  
21 (h);

22 (C) ask the question whether the dive fishery management  
23 assessment on the fishery resources addressed on the ballot shall be approved,  
24 amended, or terminated, as appropriate;

25 (D) indicate the boundaries of the administrative area in which  
26 the dive fishery management assessment will be levied or terminated;

27 (E) provide an effective date for the approval, amendment, or  
28 termination of the dive fishery management assessment; and

29 (F) indicate the date on which returned ballots must be  
30 postmarked in order to be counted;

31 (4) the ballots shall be returned by mail and shall be counted by an

1 auditor selected by the qualified regional dive fishery development association and  
2 approved by the commissioner of fish and game; the qualified regional dive fishery  
3 development association shall pay the costs of counting the ballots.

4 \* **Sec. 9.** AS 43.76.170 is amended to read:

5 **Sec. 43.76.170. Amendment of dive fishery management assessment.** (a)

6 The rate of the dive fishery management assessment levied on a species of fishery  
7 resources under AS 43.76.150(b), (c), (d), [OR] (e), (f), (g), or (h) may be amended  
8 by the commissioner of revenue upon majority vote at an election held under  
9 AS 43.76.160 in the administrative area in which the dive fishery management  
10 assessment is levied.

11 (b) The commissioner of revenue shall amend the rate of a dive fishery  
12 management assessment under (a) of this section following an election in an  
13 administrative area if

14 (1) a petition, that is signed by at least 25 percent of the number of  
15 persons who voted under AS 43.76.160 in the most recent election approving or  
16 amending the dive fishery management assessment on the species of fishery resources  
17 in the administrative area that are the subject of the petition, is presented to the  
18 commissioner of fish and game requesting amendment of the rate of the dive fishery  
19 management assessment on a species of fishery resources; the petition must state  
20 whether the proposed rate of the dive fishery management assessment is to be levied  
21 under AS 43.76.150(b), (c), (d), [OR] (e), (f), (g), or (h); only a person who would be  
22 eligible to vote in an election to amend the rate of the assessment may validly sign the  
23 petition;

24 (2) an election is held in accordance with AS 43.76.160; the ballot  
25 must ask the question whether the dive fishery management assessment on a species of  
26 fishery resources taken in the administrative area shall be amended and must state  
27 whether the dive fishery management assessment on the species of fishery resources is  
28 to be levied under AS 43.76.150(b), (c), (d), [OR] (e), (f), (g), or (h) if the assessment  
29 is amended; the ballot must be worded so that a "yes" vote is for amendment of the  
30 dive fishery management assessment and a "no" vote is for continuation of the current  
31 dive fishery management assessment;

1 (3) a majority of the eligible interim-use permit and entry permit  
2 holders who vote in the election cast a ballot for the amendment of the dive fishery  
3 management assessment; in this paragraph, "eligible interim-use permit and entry  
4 permit holders" has the meaning given in AS 43.76.160; and

5 (4) the qualified regional dive fishery development association  
6 provides notice of the election in accordance with AS 43.76.160 within two months  
7 after receiving notice from the commissioner of fish and game that a valid petition  
8 under (1) of this subsection has been received.

9 \* Sec. 10. AS 43.76.180(a) is amended to read:

10 (a) The dive fishery management assessment levied on a species of fishery  
11 resources under AS 43.76.150(b), (c), (d), [OR] (e), (f), (g), or (h) shall be terminated  
12 by the commissioner of revenue upon majority vote at an election held under  
13 AS 43.76.160 in the administrative area in which the dive fishery management  
14 assessment is levied.

15 \* Sec. 11. AS 43.76.190(a) is amended to read:

16 (a) A buyer who acquires a fishery resource that is subject to a dive fishery  
17 management assessment levied under AS 43.76.150(b), (c), (d), [OK] (e), (f), (g), or  
18 (h) shall collect the dive fishery management assessment at the time of purchase and  
19 shall remit the total dive fishery management assessment collected during each  
20 calendar quarter to the Department of Revenue by the last day of the month following  
21 the end of the calendar quarter. In this subsection, "calendar quarter" means each of  
22 the three-month periods ending March 31, June 30, September 30, and December 31.

23 \* Sec. 12. AS 43.76.190(c) is amended to read:

24 (c) The owner of fishery resources removed from the state is liable for  
25 payment of the dive fishery management assessment levied under AS 43.76.150(b),  
26 (c), (d), [OR] (e), (f), (g), or (h) if, at the time the fishery resource is removed from  
27 the state, the assessment payable on the fishery resource has not been collected by a  
28 buyer. If the owner of the fishery resource is liable for payment of the dive fishery  
29 management assessment under this subsection, the owner shall comply with the  
30 requirements under (a) and (b) of this section to remit the assessment to the  
31 Department of Revenue and to maintain records.

1 \* Sec. 13. The uncodified law of the State of Alaska is amended by adding a new section to  
2 read:

3 APPLICABILITY. AS 16.40.100, as amended by secs. 1 and 2 of this Act, and  
4 AS 16.40.199, as amended by sec. 5 of this Act, apply to wild stocks present

5 (1) on the effective date of this Act at an aquatic farm site for which a permit  
6 was issued under AS 16.40.100 on or before the effective date of this Act; and

7 (2) at an aquatic farm site on the date that possession of the site is transferred  
8 by the Department of Natural Resources to an aquatic farm permit holder for which a permit  
9 is issued under AS 16.40.100 after the effective date of this Act.

10 \* Sec. 14. The uncodified law of the State of Alaska is amended by adding a new section to  
11 read:

12 APPLICATION OF AS 16.40.105 TO EXISTING PERMITS AND APPLICATIONS  
13 FOR PERMITS. AS 16.40.105, as amended by sec. 3 of this Act, is applicable to applications  
14 for issuance of aquatic farm permits received on or before the effective date of this Act and to  
15 aquatic farm permits issued by the commissioner of fish and game on or before the effective  
16 date of this Act. An application for an aquatic farm permit received by the commissioner of  
17 fish and game on or before the effective date of this Act or an aquatic farm permit issued by  
18 the commissioner of fish and game on or before the effective date of this Act is valid if the  
19 site for which the permit application is made or for which the permit has been issued is  
20 consistent with AS 16.40.105, as amended by sec. 3 of this Act, and regulations adopted by  
21 the commissioner as necessary to implement AS 16.40.105, as amended by sec. 3 of this Act.

22 \* Sec. 15. This Act takes effect immediately under AS 01.10.070(c).

SENATE FINANCE COMMITTEE  
5/10/2004 COMMITTEE ACTION

<b>Bill Number</b>	HB 341		
<b>Amendment</b>			
<b>Motion</b>	to Rescind Action of		
	ADOPTING Version "I"		
<b><u>Motion by</u></b>	Dyson		
<b><u>Objection by</u></b>			
<b><u>Removed</u></b>			
<b><u>Second Objection by</u></b>			
<b><u>Committee Member</u></b>	<b>Y</b>	<b>Vote</b>	<b>N</b>
Senator Bunde			
Senator Dyson			
Senator Hoffman			
Senator Olson			
Senator Stevens			
Co-Chair Green			
Co-Chair Wilken			
<b><u>Tally</u></b>			
Yea			
Nay			
Absent			
<b><u>MOTION</u></b>	MOTION PASSED		

Action on Version "I"  
 was rescinded

23-LS1998\A  
Utermohle  
5/6/04

**SENATE CONCURRENT RESOLUTION NO.**  
**IN THE LEGISLATURE OF THE STATE OF ALASKA**  
**TWENTY-THIRD LEGISLATURE - SECOND SESSION**

**BY THE SENATE FINANCE COMMITTEE**

**Introduced:**  
**Referred:**

**A RESOLUTION**

1 **Suspending Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State**  
2 **Legislature, concerning House Bill No. 341, relating to the dive fishery management**  
3 **assessment.**

4 **BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 That under Rule 54, Uniform Rules of the Alaska State Legislature, the provisions of  
6 Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, regarding  
7 changes to the title of a bill, are suspended in consideration of House Bill No. 341, relating to  
8 the dive fishery management assessment.

# Alaska State Legislature

Co-Chair  
House Finance Committee  
Subcommittee Chair  
Environmental Conservation  
Courts

During Session:  
State Capitol  
Juneau, AK 99801-1182  
(907) 465-3424  
Fax (907) 465-3793

In Ketchikan:  
50 Front Street, Suite 203  
Ketchikan, AK 99901  
(907) 247-4672  
Fax (907) 225-8546

*Representative William K. Williams*

## **Sponsor Statement for SCSHB 341(FIN) Dive Fishery Management Assessment**

### **“An Act relating to the dive fishery management assessment and relating to aquatic farm and hatchery permits.”**

The Senate Finance Committee Substitute for House Bill 341 amends the state's Aquatic Farming Act (AS 16.40.100 – 199) to allow aquatic farms to continue to operate in compliance with a recent Supreme Court decision. Additionally, the bill makes some minor changes in the tax code for dive fisheries management, requested by the Southeast Alaska Dive Fishery Association (SARDFA) to provide more flexibility in its operations.

SARDFA was formed in 1998, under AS 43.76.150-210. SARDFA works in partnership with the Alaska Department of Fish & Game and the Department of Environmental Conservation in developing its Annual Operating Plan. The Annual Operating Plan determines how the dive assessments, a self-imposed tax on the value of harvested dive resources, will be spent. The creation of SARDFA provided an innovative approach to the development of biologically and economically sustainable fishery resources. SARDFA partners industry, government, and local communities in successful fishery resource development.

The association has successfully managed existing dive fisheries and developed new fisheries in southeast Alaska using revenues collected from the self-imposed tax of its members. Under AS 43.76.150 and AS 43.76.160, association members elect to tax themselves by species at a rate of one percent, three percent, five percent or seven percent of the value of their landings in a particular dive fishery. Sections 6 through 12 of SCSHB 341 would give association members the option to elect to tax themselves at the two percent, four percent or six percent rates. The additional rates provide flexibility for the association members to determine what rate is necessary for a particular species. SCSHB 341 does not alter any other portions of AS 43.76.150-210. The election and management process remains the same.

Sections 1 through 5, 13 and 14 amend the Aquatic Farming Act. In mid-April, the State Supreme Court ruled that the Act requires the Department of Fish and Game to deny shellfish farmers exclusive rights to any wild geoducks on their proposed farm sites. Since then, SARDFA, the Alaskan Shellfish Growers Association and the Department have negotiated an agreement that would allow these farmers

to harvest "insignificant" populations of standing stocks of geoducks. In order to be implemented, this agreement would require a change in statute. Sections 1 through 5, 13 and 14 of this bill would allow the Department to authorize shellfish farmers to harvest insignificant standing stocks on their sites. The parties have agreed on regulatory language to define the terms.

*Contact: Tim Barry, Aide to Representative Bill Williams at (907) 465-3424*

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

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

## MEMORANDUM

May 7, 2004

**SUBJECT:** Sectional summary of SCS HB 341( ), draft version I; An Act relating to the dive fishery management assessment and relating to aquatic farming (Work Order No. 23-LS1280I)

**TO:** Representative Bill Williams  
Attn: Tim Barry

**FROM:** George Utermohle *GU*  
Legislative Counsel

You have requested a sectional summary of SCS HB 341( ), draft version I; An Act relating to the dive fishery management assessment and relating to aquatic farming.

As a preliminary matter, note that a sectional summary of a bill is not an authoritative interpretation of the bill. The bill itself is the best statement of its contents.

**Section 1** of the bill amends AS 16.40.100(b) to provide that an aquatic farm permit issued under AS 16.40.100 authorizes the permittee to acquire ownership of, harvest, and, without further cultivation, sell a wild shellfish stock that may be present on the site of the aquatic farm.

**Section 2** of the bill adds a new subsection to AS 16.40.100 to provide that an aquatic farm permittee who harvests a quantity of a wild shellfish stock that exceeds the amount determined by the Department of Fish and Game to be an insignificant population of the shellfish species must pay the net proceeds from the sale of the wild stock to the department for deposit into the general fund. The legislature may appropriate the net proceeds to the Department of Fish and Game for shellfish management.

**Section 3** of the bill amends AS 16.40.105 to provide that the commissioner of fish and game may not issue an aquatic farm permit if the proposed site includes more than an insignificant population of a wild stock of a shellfish species that is proposed to be cultured on the site.

**Section 4** of the bill amends AS 16.40 to add a new section to provide that certain records and reports regarding aquatic farming that are required by the Department of Fish and Game are confidential and may not be released except under specific circumstances.

Representative Bill Williams

May 7, 2004

Page 2

**Section 5** of the bill amends AS 16.40.199 to add a definition of "insignificant population."

**Section 6** of the bill amends AS 43.76.150 by adding three new subsections. Each new subsection authorizes the members of a regional dive fishery development association to approve the levy of a dive fishery management assessment at a different rate. Under current law a dive fishery management assessment may be levied at the rate of one, three, five, or seven percent of the value of specified dive fishery resources. The new subsections added to AS 43.76.150 would allow for the levy of an assessment at the rate of two, four, or six percent. If this bill is enacted, the members of a dive fishery development association could vote to levy an assessment of one, two, three, four, five, six, or seven percent on the value of dive fishery resources that they sell or remove from the state.

**Sections 7 - 12** of the bill make technical amendments to AS 43.76.160(b), AS 43.76.160(c), AS 43.76.170, AS 43.76.180(a), AS 43.76.190(a), and AS 43.76.190(c), respectively, to conform to the new assessment rates and subsections added in AS 43.76.150, as amended by sec. 6 of the bill.

**Section 13** of the bill adds a provision of temporary law regarding the application of secs. 1, 2, and 5 of the bill to existing and future aquatic farm permits.

**Section 14** of the bill adds a provision of temporary law regarding the application of sec. 3 to aquatic farm permits issued and applications for permits received before the effective date of the bill.

**Section 15** of the bill provides that the bill takes effect immediately under AS 01.10.070(c).

If I may be of further assistance, please advise.

GU:med

04-516.med

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

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

## MEMORANDUM

May 4, 2001

**SUBJECT:** Draft SCS HB 341( ), relating to acquisition, harvest, and sale of wild stocks of shellfish present on aquatic farm and hatchery sites (Work Order No. 23-LS1280D)

**TO:** Representative Bill Williams  
ATTN: Tim Barry

**FROM:** George Utermohle *GU*  
Legislative Counsel

This memorandum accompanies the draft Senate Committee Substitute for HB 341( ) that you requested. Please note that a resolution waiving the Uniform Rules will be necessary because of the title change. This memorandum address issues raised by the new provisions of the bill, relating to acquisition, harvest, and sale of wild stocks of shellfish present on aquatic farm and hatchery sites where on-bottom aquatic farming of shellfish will be conducted. This memorandum is being provided to you so that you are aware of the constitutional issues that are potentially associated with the draft Senate Committee Substitute. Allowing a hatchery or aquatic farm permit holder to acquire, harvest, or sell wild stocks of shellfish raises issues in regard to common property resources under the Alaska Constitution and under the common law. For purposes of this memorandum, on-bottom aquatic farming means the private cultivation and development of shellfish (e.g. clams, geoducks) that are, at least initially, naturally occurring in or on the soil of an aquatic farm or hatchery.

On-bottom aquatic farming raises complex, unresolved legal issues under the equal access clauses of the Alaska Constitution [common use section (art. VIII, sec. 3)<sup>1</sup>; no exclusive right of fishery clause (art. VIII, sec. 15)<sup>2</sup> and uniform application section (art.

---

<sup>1</sup> Article VIII, Sec. 3, Constitution of the State of Alaska states:

**Common Use.** Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

<sup>2</sup> Article VIII, sec. 15, Constitution of the State of Alaska states:

**No Exclusive Right of Fishery.** No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress

VIII, sec. 17)<sup>3</sup>], under the sustained yield section of the Alaska Constitution (art VIII, sec. 4)<sup>4</sup>, and under the public trust doctrine.

\* \* \*

A fundamental question that must be addressed before the constitutional equal access issues can be considered is whether the animals being cultured at on-bottom aquaculture facilities are common property resources or private property. The equal access clauses apply only to fish occurring in their natural state. Fish in private ponds and pens are not in their natural state. Once fish are reduced to possession then they are no longer in the natural state and are not subject to the open access provisions of the constitution.

If privately owned stocks of shellfish are being cultured at an aquatic farm then the equal access provisions of the constitution would not apply. The use of state submerged lands to culture privately owned aquatic organisms would not be significantly different from the use of state uplands to raise cattle. However, the issues are significantly different if the operator of an aquatic farm obtains a parcel of state submerged lands and begins culturing the common property resources that were present on those submerged lands. Then a critical issue becomes how the common property resources present on the submerged lands are converted to private use, if not to private ownership, without violating common use and sustained yield provisions of the Alaska Constitution and the common law public trust doctrine.

The nature of the private ownership interest conveyed in common property resources will also affect the ability of and the ease with which the state can convey those resources to private ownership. The state has traditionally provided for private ownership of the harvestable surplus of common property resources. That is what happens when the state allows fishermen and hunters to reduce fish and wildlife to personal possession by taking

---

among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

<sup>3</sup> Article VIII, sec. 17, Constitution of the State of Alaska states:

**Uniform Application.** Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

<sup>4</sup> Article VIII, sec. 4, Constitution of the State of the Alaska states:

**Sustained Yield.** Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

fish and wildlife. The ability of the state to allow fishermen and hunters to take fish and wildlife is primarily subject to the common use, open access, and sustained yield provisions of the Alaska Constitution. The state can also provide that aquatic farmers could own, or at least have an ownership interest in the increased production of common property resources that directly results from the efforts of an aquatic farmer to cultivate, enhance, and develop the resources that are present on the site of an aquatic farm. The most problematic degree of ownership that the state could convey in a common property resource is absolute ownership of the entire resource (the brood stock and its subsequent production in perpetuity) that is present on the site of an aquatic farm. The more significant impediments to granting absolute ownership of common property resources to private persons would arise under the common use, no exclusive right of fishery, and sustained yield provisions of the Alaska Constitution.

\* \* \*

I. EQUAL ACCESS. The equal access clauses of the Alaska Constitution provide for equal access to fish, wildlife, and water resources of the state. Each of these clauses have specific implications for the use of fishery resources of the state but taken together they have been found to mean: exclusive or special privileges to take fish are prohibited. McDowell v. State, 785 P.2d 1, 6 (Alaska 1989). The equal access provisions "are not implicated unless limits are placed on admission to resource user groups." Tongass Sport Fishing Association v. State, 866 P.2d 1314, 1318 (Alaska 1994); citing, McDowell, 785 P.2d at 8 & n. 14. Under this view of the equal access clauses there is no infringement of the open access provisions as long as no impermissible restrictions are placed on entry into a fishery user group.

A. ACCESS TO AQUATIC FARMING USER GROUP. As long as the aquatic farming user group is open to all who want to participate in the user group, the equal access clauses of the Alaska Constitution as currently applied by the Alaska courts would not come into play. If access to the user group is limited then the means chosen to limit entry into the group must be consistent with equal access. The limited entry amendment<sup>5</sup> which was adopted in 1972 authorized the imposition of restrictions on access to commercial fisheries. Under the more common understanding of the 1972 limited entry amendment, limited entry is allowed to the extent necessary to: one, conserve the fishery resource; two, prevent economic distress to fishermen and those who depend upon them; and three, foster the efficient development of aquaculture. An alternative interpretation of the 1972 limited entry amendment would suggest that the amendment effectively

---

<sup>5</sup> The "limited entry" amendment to the no exclusive right of fishery clause added language intended to authorize the state to establish limitations on entry into the commercial fisheries. The added language read: "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."

exempts aquaculture from the no exclusive right of fishery clause of the Alaska Constitution. The Alaska Supreme Court has not determined which interpretation is the correct interpretation.

Even with the adoption of the limited entry amendment in 1972, the ability of the state to establish commercial fishery limited entry programs is not without limits. Whatever limited entry system the state establishes must be structured so as to pose the least possible impingement on equal and open access to the user group. Thus far the state's limited entry system for commercial fisheries under AS 16.43 has achieved this balance between equal and open access and the goals of limited entry. State v. Ostrosky, 667 P.2d 1184 (Alaska 1983); Johns v. Commercial Fisheries Entry Commission, 758 P.2d 1256 (Alaska 1988).

In order to limit entry into on-bottom aquatic farming, the state would have to achieve the same balance between open access and the goals of limited entry that the state has achieved with commercial fisheries limited entry. The fact that the constitution specifically recognizes that the development of aquaculture is itself a valid goal of limited entry may allow the state some additional latitude in regulating entry into aquaculture, including on-bottom aquatic farming, but there still remains tension with the open access provisions of the constitution.

**B. USE OF SUBMERGED LANDS.** The leasing of rights to state submerged lands for fisheries purposes also raises exclusive fishery issues. The Department of Natural Resources issues leases for the use of state submerged and tide lands for fisheries purposes. For example, the department issues leases for shore fishery sites for set gillnets under AS 38.05.082 and for aquatic farming under AS 38.05.083. One of the benefits of these leases is that the leaseholder obtains exclusive use of the site for fishery purposes and may exclude other fishermen from the site.

From one perspective, a shore fishery lease looks like a grant of an exclusive right of fishery.<sup>6</sup> However, since 1963 the Department of Law has held the view that shore fishery leases convey a property interest in land, not in fish or the fishery. 1963 Alaska Attorney General Opinion No. 3. Even though the purpose of the lease was to assist fishing, the department found that no exclusive rights of fishery were created by the lease. The Department of Law has continued to maintain this favorable view of shore fishery leases. 1981 Inf. Alaska Atty. Gen. Op. (file no. A66-424-81) April 21; 1983 Inf. Alaska Atty. Gen. Op. (file no. 366-511-83) July 6. The Alaska Supreme Court has, in dicta, accepted this permissive view toward shore fishery leases under AS 38.05.082. See, CWC Fisheries v. Bunker, 755 P.2d 1120 (Alaska 1988).

---

<sup>6</sup> Shortly after statehood, the Department of Law reached the conclusion that shore fishery leases constituted the granting of an exclusive right of fishery and thus violated the prohibition against exclusive rights of fishery. 1960 Alaska Attorney General Opinion No. 9, dated April 8, 1960.

This favorable view of shore fishery leases for set net sites stems from the limited interest in land that is conveyed by the lease to the lease holder. The shore fishery lease does not convey an exclusive right to use the water of the state or the fishery resources of the state. The lease does not assure an exclusive share or quota of the resource or that fish will be actually harvested. The lease does not bar use of the site for other purposes as long as those other uses do not interfere with the purpose of the lease. Additional factors supporting the validity of the shore fishery leases are that the leases are for a period of reasonable but finite duration and that the state receives compensation for the use of the land.

Leases of tide and submerged lands for aquatic farming can be expected to receive this same favorable acceptance provided that the leases do not convey a property interest in fishery resources present on the land. The use of state-owned submerged and tide lands for the aquatic farming of privately owned aquatic animals and plants would not raise issues involving exclusive use of fishery resources under the Alaska constitution. However, leases for on-bottom aquatic farming of naturally occurring aquatic resources are more likely to involve rights to fisheries resources and thus are more problematic under the Alaska constitution than are shore fishery leases for set gillnet sites.

C. EXCLUSIVE RIGHTS TO THE FISHERY RESOURCE. Based on the foregoing discussion it would appear that the state has the authority to structure a limited access system for aquaculture and to grant permission to use submerged lands for aquaculture without violating the equal access clauses of the Alaska Constitution. However, a system that would combine limited access to aquaculture with exclusive rights to use common property resources present on state submerged lands would appear to pose significant issues in regard to the establishment of a valid program for on-bottom aquatic farming.

The Alaska Supreme Court has provided some guidance as to what issues must be addressed when the state grants exclusive or near exclusive use of a common property resource within a specific area of land to individuals. Previously, big game guides had been able to receive authority from the state for exclusive or near exclusive use of specified areas to provide guide services.<sup>7</sup> The Alaska Supreme Court found that the exclusive guide areas and joint use guide areas violated the common use clause because the manner in which the program was structured gave individual guides special rights to guide hunts for big game in those areas. Owsichek v. State Guide Licensing and Control Board, 763 P.2d 488 (Alaska 1988). Exclusive guide areas and joint use areas allowed one or more guides to use a specified area for big game guiding purposes and to exclude other guides from the area. The exclusive guide areas and joint use areas were invalid because the areas were granted primarily on use, occupancy, and investment, established guides were favored at the expense of new entrants into the profession, the use of a guide

---

<sup>7</sup> Use of game resources by persons other than guides was not affected by the establishment of exclusive guide areas and joint use guide areas.

area was not limited in duration, and the guide areas were transferable as though they were property of the guide. *Id.* at 496-97. These characteristics of the exclusive guide areas and the joint use areas were too much like the royal grants of exclusive hunting rights made by the English kings that the common use clause was intended to prevent.<sup>8</sup>

The *Owsichek* court did not provide much guidance as to how the state could structure the exclusive guide areas to satisfy the common use clause, short of a constitutional amendment. In dicta, the court mentioned that the guide areas were wholly unlike leases and exclusive concession contracts on state land which conferred constitutionally valid rights to use state land. Such leases and concessions were valid because they had a limited duration and were subject to competitive bidding procedures and valuable consideration. *Id.* at 497. The *Owsichek* court implied that the guide areas might be constitutional if the areas had more of the characteristics of land leases and concession contracts. *Id.* at 498. Unfortunately, the comparison of the guide areas with state leases and concession contracts is not particularly helpful because the land leases and concession contracts mentioned by the court, unlike the guide areas, were not subject to the common use clause of the Alaska Constitution. It was the violation of the common use clause by limiting access of big game guides to game that made the guide areas unconstitutional.

At present, there is no real guidance from the Alaska Supreme Court as to how to overcome the obstacles posed to on-bottom aquaculture activities by the common use and no exclusive right of fishery clauses. Apparently short term leases and reasonable compensation for the use of the land and the common property resources present on or in the land seem to be important elements necessary to satisfy the Alaska Constitution, but it is not clear that these elements alone would be sufficient to validly authorize exclusive use of common property resources as part of an on-bottom aquaculture program.

II. PUBLIC TRUST DOCTRINE. The public trust doctrine is a specific principle of common law relating to the duty of the state to protect public use of tide and submerged lands and resources present on or above such lands. The principle derives from the authority of the English kings to protect public use of tidelands. That authority passed to the states upon the separation of the states from England. Elements of the public trust doctrine are similar to the public trust management principles for fish, wildlife, and water incorporated into the Alaska Constitution but the public trust doctrine is a distinct legal principle with its own history and effect.

Patents and leases to tide or submerged lands do not convey an absolute or exclusive right to use the lands. All patents and leases to tide and submerged lands are subject to

---

<sup>8</sup> The issuance of leases to submerged lands that also conveyed the right to exclusive use of common property resources present on those lands would also have the characteristics of those royal grants that the court found to be prohibited by the open access provisions of the Alaska Constitution.

common law, constitutional, and statutory provisions that reserve rights for the public to use the lands for certain purposes. Under the common law public trust doctrine, any conveyance of tide or submerged land is made subject to a continuing public easement for purposes of navigation, commerce, and fishery, except under specific circumstances where the state clearly and expressly waives these public rights in order to promote another public purpose.

The Alaska Supreme Court recognized the public trust doctrine in a case involving a dispute between a set gillnet fisherman and an owner of tidelands. CWC Fisheries, Inc. v. Bunker, 775 P.2d 1115 (Alaska 1988). CWC Fisheries, which had received a patent to tide land, sought to exclude a set gillnet fisherman from fishing on its tide land. The court relied on the common use clause of the Alaska Constitution, which reserves public access to fish resources of the state, to find that the state had never waived the right of public access to tide land when it granted patents to tide land and thus the public trust doctrine applied to grants of tide lands by the state. The court then went on to find that the public trust doctrine protected the fisherman's right to use privately owned tide lands for fishing. The court concluded by stating that the tide lands

were conveyed subject to the public's right to utilize those tidelands for purposes of navigation, commerce, and fishery. While patent holders are free to make such use of their property as will not unreasonably interfere with these continuing public easements, they are prohibited from any general attempt to exclude the public from the property by virtue of their title.

Id. at 1121. The holding of this case is equally applicable to state grants of patents to submerged land and to state leases of tide or submerged land.

Unless the state has clearly intended to waive the rights of the public under the public trust doctrine, a lease of state tide or submerged lands for on-bottom aquatic farming would be subject to the right of the public to use the land and the water above the land for navigation, commerce, and fishing. In issuing leases for on-bottom aquaculture activities, the state must seek to achieve the best interests of the state by balancing public use of the lease site and private use of the land for aquaculture.

The legal principles applicable to cases involving the public trust doctrine, such as CWC Fisheries, are similar to those applied in cases invoking public trust principles in regard to fish and wildlife. The principles underlying these two kinds of cases has not been combined into a single unified public trust doctrine applicable to submerged lands and to fish and wildlife, but the judicial development of a unified public trust doctrine is foreseeable. In Alaska, the supreme court has recognized the existence of a public trust in regard to fish and wildlife in a number of cases. Owsichuk v. Guide Licensing and Control Board, 763 P.2d 488 (Alaska 1988); McDowell v. State, 785 P.2d 1 (Alaska 1989); Gilbert v. State, 803 P.2d 391 (Alaska 1990); Pullen v. Ulmer, 923 P.2d 54 (Alaska 1996); Brooks v. Wright, 971 P.2d 1025 (Alaska 1999). Under the public trust

principles applicable to state management of fish and wildlife resources, it may well be that the state may not casually or incidentally divest itself of ownership of common property fish and wildlife resources. In order to convey ownership of common property resources to private interests, the state probably would have to make a conscious, deliberate, and express decision to convert those resources to private use or ownership.

III. SUSTAINED YIELD PRINCIPLES. Under art. VIII, sec. 4 of the Alaska Constitution, the state is to manage its renewable natural resources in accordance with sustained yield principles.<sup>9</sup> Under sustained yield principles, it is not desirable to deplete the brood stock or productive portion of a biological resource. When the brood stock is depleted, the productivity of the resource and the yield from the resource is reduced. When ownership of on-bottom aquatic resources present on the site of an aquatic farm is conveyed to private ownership, the ability of the common property aquatic resources to continue to produce a sustainable yield for common use is reduced. Thus the conveyance of state aquatic resources to private ownership impinges on sustained yield management of common property resources.

The Alaska Constitution does allow the state to vary from sustained yield principles as necessary to provide for preferences among beneficial uses. The state may well be able to accord a preference to the private ownership of on-bottom aquatic resources rather than the continued state management of those resources as common property resources. However, in order to provide for the private ownership of common property resources in a manner consistent with the sustained yield clause the most defensible course of action for the state is for it to make an affirmative decision that, in the case of on-bottom aquaculture, private ownership of the resource is the preferred use of the resource and in the best interest of the state.

The Alaska Supreme Court has not had an occasion to address the implications of the sustained yield clause in a situation such as that posed by on-bottom aquatic farming of common property resources so it is not certain how the court will construe the interplay between the requirement for sustained yield management and the power of the state to make preferences among beneficial uses.

A recent Alaska Supreme Court decision addressed issues associated with wild shellfish stocks present on on-bottom aquatic farming and hatchery sites. Alaska Trademark Shellfish, LLC. v. State of Alaska, Department of Fish and Game, Alaska Supreme Court, Case No. S-10308, Opinion No. 5795, April 16, 2004. The court determined that the Department of Fish and Game did not have the statutory authority to grant wild stocks of shellfish to aquatic farm and hatchery permit holders. The new provisions contained in the draft Senate Committee Substitute generally address the issues raised by the Supreme Court by giving the necessary authority to the Department of Fish and Game. The Supreme Court did not address the constitutional issues surrounding a grant of world stocks to a private aquatic farm or hatchery. However, the superior court which heard the

---

<sup>9</sup> See, Footnote 4, above.

Representative Bill Williams

May 4, 2004

Page 9

case did find that the granting of private rights to, or ownership of, more than an insignificant population of a wild stock of shellfish violated the common use sections of the Alaska Constitution and possibly violated the sustained yield section of the Alaska Constitution. Alaska Trademark Shellfish, LLC. v. State of Alaska, Department of Fish and Game, Alaska Superior Court, First Judicial District, Ketchikan, Case No. 1KE-00-211 CI, Memorandum of Decision, July 10, 2001. The Department of Law has taken the position that the granting of any common property resource to exclusive use, even an insignificant population, was a violation of the common use section of the Alaska Constitution. There is support for the position of the Department of Law on this issue.

If I may be of further assistance, please advise.

GU:lmb

04-139.lmb

Enclosure



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

their applications for aquatic farm operation permits pursuant to AS 16.40.100. Plaintiffs claim that these conditions make it impossible to successfully operate aquatic farms, and request that this Court order ADF&G to issue them the appropriate permits and enjoin ADF&G from attaching further conditions.

THE OBJECT

The geoduck (*panoplea generosa*) is a mollusk of the class *Lamellibranchia* (or *Pelecypoda*). It is a bivalve – literally “two door” in the Latin – a clam. But what a clam it is. This creature inhabits the Pacific Northwest coast of American at least into the waters of Southeast Alaska. It ranges from the intertidal zone into waters as deep as 250 feet, although in Southeastern Alaska they are most commonly found in 15 to 39 feet of water. The geoduck can reportedly live up to 150 years reaching a weight of 20 pounds. It should reach harvestable size in five or more years in Alaskan waters.

The geoduck reproduces in the standard mollusk fashion, broadcasting its seed into the ambient water column to mix with those of its breed. After a brief free floating period it settles into a sandy or muddy bottom and begins to burrow, using its “foot.” The syphon, really intake and outlet tubes joined, extends above the substrate and processes seawater through the animal where edible bits are extracted and the waste expelled. The animal digs progressively lower as it grows to a maximum of three feet below the surface where the syphon emerges. To capture the creature one must duplicate

Exc. 90

**Alaska Court System**

1  
2 this effort to reach the main body. Thus the reputed origin of the name geoduck from the  
3 Nisqually Indian dialect "gwe - duk", meaning to "dig-deep."

4  
5           Apparently little use was made historically of this food resource by the  
6 native peoples due to the technological problems of getting at them. The same  
7 difficulties and little interest kept them safe from human predation even as the problems  
8 of underwater harvesting were overcome, until it was realized that the geoducks close  
9 relative on the western coast of the Pacific was held to be a delicacy. Prices of seven or  
10 more dollars per pound piqued the interest of the fishing industry so that the Asian  
11 demand might be satisfied. By 1980, the commercial fishery had expanded into  
Southeastern Alaska. By 1999, the fishery had expanded enough to encourage the State  
12 to impose limited entry - to a maximum of 104 participants. (20 AAC 05.320(i)).

13  
14           One other way of participating in and benefiting from the market for  
15 geoducks is by husbandry - growing them in tidy rows like so many turnips, and picking  
16 them en masse before seeding another crop with spat now available from hatchery  
17 operators. This technique had been successful with other shellfish including oysters, and  
18 most recently, littleneck clams. Plaintiff entrepreneurs hoped to accomplish exactly this  
19 with their applications.

20  
21           Aquaculture, or "fish farming", in Alaska is very much a developing  
22 concept. While the utilization of hatcheries to promote wild stocks dates back many  
23 decades, some of the more modern techniques are scarcely more than science fiction to  
24 the uninitiated. In the proposed geoduck farms, sections of pipe are buried in the sea  
25

### Alaska Court System

Memorandum of Decision

Alaska Trademark Shellfish et al. v. State of Alaska et al., Case No.

Page 3 of 20

Exc. 91

THE  
FOLLOWING  
DOCUMENT(S)  
ARE  
POOR  
ORIGINAL  
COPIES

1  
2 floor, each charged with a juvenile geoduck; five or more years pass while the area is  
3 tended for predators, etc.; whereupon divers using hoses flush away the soil to expose  
4 and harvest the marketable clams. These same techniques are currently used to harvest  
5 the wild clams, although their distribution is anything but tidy.  
6

### 7 THE STUMBLING BLOCK

8 In 1999, Plaintiffs submitted applications to the Alaska Department of  
9 Fish and Game (ADF&G) for aquatic farm operation permits. In a letter dated April 19,  
10 2000, ADF&G Commissioner Frank Rue notified the Zaugg plaintiffs of ADF&G's  
11 intent to approve their permit applications, subject to two conditions:

- 12 1. For each proposed farm site, describe in writing to  
13 ADF&G a method for distinguishing (or segregating) wild,  
14 common property geoducks from cultivated, farmed  
15 geoducks. The method must allow practical access and  
16 commercial or personal use harvest of wild geoducks on  
17 each site that are not acquired through a stock acquisition  
18 permit. At the same time, the method must prevent  
19 excessive disturbance of cultivated, farmed geoducks by  
20 commercial access and harvesting.  
21 2. If ADF&G, in its discretion, determines that the  
22 method described in paragraph 1 will accomplish the  
23 requirements of that paragraph, you must agree, in a signed  
24 statement, to use that method on your farm site(s). Your  
25 signed statement and a detailed summary of approved  
method(s) will be attached and incorporated as conditions  
of your aquatic farm operation permit.

22 Plaintiffs responded to this letter by asserting, among other things, that —  
23 although some of the sites (those proposed by Gary Zaugg, Ryan Morin, and Kurt Morin)  
24 have no standing stocks of wild geoducks, while others (such as Steve LaCroix's site)  
25

### Alaska Court System

Memorandum of Decision

Alaska Trademark Shellfish et al. v. State of Alaska et al., Cas  
Page 4 of 20

Exc. 92

1  
2 have "no, very sporadic, or limited amounts" – these conditions make it impossible to  
3 successfully farm geoducks.<sup>2</sup> In a letter dated July 27, 2000, Rue notified Plaintiffs that  
4 their applications for aquatic farm operation permits were denied. Plaintiffs filed this  
5 appeal on August 25, 2000, and it was promptly consolidated with Alaska Trademark  
6 Shellfish's (ATS) action.  
7

8 As amicus, the association of geoduck divers<sup>3</sup> has outlined their  
9 opposition to the appellants' design to stake, occupy, clear, and plant existing wild  
10 geoduck beds. Joining with them are the City of Craig, Alaska. In opposition, joined  
11 with appellants are the Pacific Coast Shellfish Growers Association and the Alaska  
12 Shellfish Growers Association, both eponymous entities naturally allied with shellfish  
13 farmers; the City of Seward, home to the hatchery most affected; and the Qutekcak  
14 Shellfish Hatchery, a business with the major stake in providing the seed for the proposed  
15 "farms."  
16

#### 17 STANDARD OF REVIEW

18 Issues of law arising from an agency proceeding are reviewed *de novo*  
19 when agency expertise is not involved. Tesoro Alaska Petroleum Co. v. Kenai Pipe Line  
20

21  
22 <sup>2</sup> Zaugg's affidavit (filed 12-08-00) does not explain how ADF&G's proposed conditions interfere with  
23 his ability to successfully farm geoducks, but merely states that he "disagreed with Mr. Rues [sic] statutory  
24 interpretations," and that "it appeared to me that the ADF&G 'general principle' was to change the rights  
25 that I would obtain under an operational permit," (those rights being, apparently, the right to harvest  
standing stock of wild geoducks – which, according to ADF&G's July 27, 2000 letter denying Zaugg's  
permit application, do not exist on his proposed site – or prevent others from doing so).

<sup>3</sup> Southeast Alaska Regional Dive Fisheries Association.

#### Alaska Court System

Memorandum of Decision

Alaska Trademark Shellfish et al. v. State of Alaska et al., Ca: Exc. 93

Page 5 of 20

1  
2 Co., 746 P.2d 896, 903 (Alaska 1987). The issues here deal with statutory construction,  
3 constitutional law, and whether ADF&G acted "unreasonably" and/or "arbitrarily."<sup>4</sup>  
4 None of these issues require agency expertise to resolve; this administrative decision is  
5 therefore reviewed *de novo*.  
6

### 7 8 ANALYSIS

9 Plaintiffs contend that (1) ADF&G's proposed conditions are  
10 unreasonable and arbitrary, (2) ADF&G is estopped from prohibiting Plaintiffs from  
11 harvesting standing stock on their proposed sites for the purpose of funding their  
12 enterprise, (3) ADF&G violated Alaska law by not issuing Plaintiffs aquatic farm  
13 operation permits within five days, and (4) ADF&G violated Alaska law by placing  
14 "unlawful and unreasonable" conditions on Plaintiffs' operation permits.  
15

16 ADF&G responds by asserting that Article VII of the Alaska Constitution  
17 bars it from granting Plaintiffs exclusive rights to harvest wild geoducks, and that its  
18 proposed conditions are neither unlawful nor unreasonable.

### 19 Constitutional Issues

#### 20 The "No Exclusive Right of Fishery" Provision

21 Article VII, Section 15 of the Alaska Constitution provides:

22  
23 <sup>4</sup> ADF&G asserts that its decision "involves complex matters or fundamental policy determinations"  
24 regarding the "management of fisheries and fish and wildlife resources" such that an abuse of discretion  
25 standard should be applied by the court rather than a substitution of judgment standard. While it is true that  
the issues in this case affect the management of wildlife resources, this court's decision will be based not

### Alaska Court System

Memorandum of Decision

Alaska Trademark Shellfish et al. v. State of Alaska et al., Case No. 1KE-00-211 CI

Page 6 of 20

Exc. 94

1  
2  
3 No exclusive right or special privilege of fishery shall be  
4 created or authorized in the natural waters of the State.  
5 This section does not restrict the power of the State to limit  
6 entry into any fishery for purposes of resource  
7 conservation, to prevent economic distress among  
8 fishermen and those dependent upon them for a livelihood  
9 and to promote the efficient development of aquaculture in  
10 the State.

11  
12 Plaintiffs point to the "efficient development of aquaculture" exception in  
13 support of their claim that the legislature intended to allow stock acquisition permit  
14 (SAP) holders to harvest wild stock for the purpose of financing aquatic farming  
15 ventures.<sup>5</sup> They arrive at this conclusion by citing AS 16.40.120(f):

16 Except as provided in (d) of this section or in a regulation  
17 adopted under (e) of this sections, the commissioner shall  
18 issue a permit if

- 19 (1) wild stock is necessary to meet the initial  
20 needs of farm or hatchery stock;
- 21 (2) there are technological limitations on the  
22 propagation of culture stock for the species  
23 sought;
- 24 (3) wild stock is not fully utilized by commercial,  
25 sport, personal use, or subsistence fisheries; or
- (4) wild stock is needed to maintain the gene pool  
of a hatchery or aquatic farm.

19 Plaintiffs go on to note that "stock" is defined as "live aquatic plants of  
20 shellfish acquired, collected, possessed, or intended for use by a hatchery or aquatic farm  
21

22 on policy considerations but strictly upon principles of statutory construction, constitutional provisions, and  
23 legislative intent – areas in which ADF&G has no more expertise than does this court.

24 <sup>5</sup> Plaintiffs cite Ch. 145, SLA 1988, Sec. 1, in which the expressed legislative intent is to "encourage the  
25 establishment and responsible growth of an aquatic farming industry in the state." Plaintiffs contend that  
this clearly shows that the legislature "meant for the farmers to be able to systematically clear land suitable  
for geoducks for replanting, and to sell the harvested wild stock for money to improve the farms' viability."

### Alaska Court System

Memorandum of Decision

Alaska Trademark Shellfish et al. v. State of Alaska et al., Case No. 1KE-00-211 CI

Page 7 of 20

Exc. 95

1  
2 for the purpose of further growth or propagation” under AS 16.40.199(8), and that AS  
3 16.40.100(b) authorizes the holder of an aquatic farm operation permit to sell stock that is  
4 “used or reared at the hatchery or aquatic farm.”  
5

6 Plaintiffs then argue that “harvest of the wild stock ‘is necessary’  
7 [pursuant to AS 16.40.120(f)(1)] to both clear the land for later planting and for money to  
8 make the farms more viable.” It may be arguable that preparing the land for later  
9 planting “is necessary to meet the initial needs of farm...stock” (arguable because it is not  
10 obvious whether cultivated geoducks can grow alongside wild geoducks), but Plaintiffs’  
11 assertion fails to consider that the latter purpose, at least, is not satisfactory under AS  
12 16.40.120(f)(1), which looks to “the initial needs of farm or hatchery *stock*,” not the  
13 initial need for investors to raise capital.

14 Plaintiffs also argue that the wild geoducks they wish to harvest are  
15 “stock” under AS 16.40.199(8) because they will undergo “further growth” in the time  
16 between issuance of the SAP and harvest. Such a reading of the statute renders it  
17 essentially meaningless, however. If that is all the “further growth” required, then there  
18 need be nothing more to “aquatic farming” than acquiring a few permits and harvesting  
19 whatever happens to be growing on the designated site.  
20

21 Finally, Plaintiffs assert that they are authorized to sell their harvested  
22 geoducks pursuant to AS 16.40.100(b), which permits the sale of stock that is “used or  
23 reared at the hatchery or aquatic farm.” According to Plaintiffs, selling is a permissible  
24 “use” of stock. Taking this argument at face value, Plaintiffs are claiming that AS  
25

### Alaska Court System

Memorandum of Decision

Alaska Trademark Shellfish et al. v. State of Alaska et al., Case No. 1KE-00-211 CI  
Page 8 of 20

1  
2 16.40.100(b) authorizes them to sell stock that is “[sold] or reared at the hatchery or  
3 aquatic farm.” It would be difficult to conceive of a more circular argument.  
4

5 The real question, however, is not whether the legislature intended to  
6 allow SAP permit holders to harvest wild stock, but whether the legislature is *permitted*  
7 to do so. The Alaska Supreme Court has never interpreted the meaning of the  
8 “aquaculture” exception in Section 15, but it appears on its face that the exception applies  
9 only to the “no exclusive right of fishery” clause. There is also the “common use” clause  
10 of Section 3 (and the “sustained yield” clause of Section 4, as well) to consider.

11 Alaska's "Common Use" Clause

12 Article VIII, Section 3 of the Alaska Constitution provides: “Wherever  
13 occurring in their natural state, fish, wildlife, and waters are reserved to the people or  
14 common use.” (emphasis added). This “common use” clause was intended to permit the  
15 broadest possible access to and use of state waters by the general public. It has been  
16 stated: “The common use clause necessarily contemplates that resources will remain in  
17 the public domain, and will not be ceded to private ownership. Since the right of  
18 common use is guaranteed expressly by the constitution, it must be viewed as a highly  
19 important interest running to each person within the state.” State v. Ostrosky, 667 P.2d  
20 1184, 1196 (Alaska 1983).  
21

22 To understand that thrust of Article VIII, Section 3, it is useful to review  
23 the history of fisheries management prior to statehood. After all, this section of the  
24 Constitution was, by all accounts, the ultimate answer to the fish trap controversy of the  
25

**Alaska Court System**

Memorandum of Decision

Alaska Trademark Shellfish et al. v. State of Alaska et al., Case No. IKE-00-211 CI

Page 9 of 20

Exc. 97

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1930's through statehood. These traps were highly efficient mechanisms designed for, and capable of, capturing practically an entire "run" of salmon destined for one or more spawning streams. They were, at least by the 1950's, owned or controlled by a handful of out-of-state interests and the subject of great controversy among the residents of the then Territory of Alaska.<sup>6</sup> Despite their abolition in British Columbia and regions southward these instruments continued to deplete salmon populations in a most unpopular way. In 1948 the people voted 19,712 to 2,624 to abolish the traps – to no avail.<sup>7</sup> By the time statehood was imminent the issue was hardly debatable and traps were in fact abolished by Ordinance No. 3 contemporaneously with the ratification of the State's Constitution.

The strong feelings of the people of Alaska with respect to its natural bounty; fish, wildlife, timber and other renewable resources were thus expressed in Article VIII, Section 3, prohibiting interference with common access; and Section 4, requiring management for sustained yield. Section 15, "No Exclusive Right of Fishery" added in 1972, tempered somewhat the more libertarian "common of piscary" view to permit limited entry and aquaculture. Nonetheless, ownership of wild fishery populations has remained in common. The ownership of farmed populations has been approved by the executive and the courts but not when the cultivated population was by design a substitute for a naturally occurring one. In other words, a salmon hatchery could not be constructed at the mouth of a producing anadromous stream, the wild run supplanted, and

<sup>6</sup> In 1944, 396 of 434 traps (91%), were owned by non-residents.

**Alaska Court System**

1  
2 the introduced farmed run vested in the operator. This is essentially what Plaintiffs hope  
3 to accomplish.

4 Plaintiffs contend that their proposed farm sites are akin to set net leases  
5 for salmon fishing, and that a 1963 Attorney General's Opinion settles any question as to  
6 the constitutionality of such leases. In short, Plaintiffs claim that "the farm site lease is a  
7 property interest which, by its nature, leads to the farmer having sole access to the wild  
8 stocks."<sup>8</sup> There are several problems with this view.

9  
10 First, the validity of the Attorney General's Opinion (J-66-538-82; 1982  
11 Westlaw 43670) is called into question by CWD Fisheries, Inc. v. Bunker, 755 P.2d 1115  
12 (Alaska 1988). That case involved a commercial set net fisherman who allegedly  
13 trespassed on tidelands that had been conveyed to a commercial fishing operation. In  
14 affirming the lower court's dismissal of CWS's claim, the Alaska Supreme Court said:

15  
16 While we have never had prior occasion to apply the public  
17 trust doctrine to tidelands in Alaska, those modern courts  
18 which have considered its application have generally held  
19 that any attempted conveyance of tidelands by the state  
20 which fails to meet the *Illinois Central* criteria<sup>9</sup> for passing  
21 title free of the public trust will pass only "naked title to the  
22 soil," subject to continuing public trust "easements" for  
23 purposes of navigation, commerce, and fishery. (cites  
24 omitted). The grantee may "assert a vested right to the  
25 servient estate (the right of use subject to the trust)," (cites

7 See The State of Alaska, Gruening, Random House, 1954.

8 Appellants' reply brief, page 21 (02-12-01).

9 "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace." Illinois Central Railroad Co. v. Illinois, 146 U.S. 387, 453 (1892).

### Alaska Court System

Memorandum of Decision

Alaska Trademark Shellfish et al. v. State of Alaska et al., Case No. IKE-00-211 CI

Page 11 of 20

Exc. 99

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

omitted) but may not enjoin any member of the public from utilizing the property for public trust purposes. Id. at 1118.

Furthermore, the Court added in a footnote:

We need not decide at this time whether a fee simple tideland conveyance which satisfied the strictures of *Illinois Central* would nonetheless run afoul of article VIII, section 3 [the "common use" clause]. Id. at 1120, fn. 10.

The Alaska Supreme Court elaborated on this concern in Owsichek v. State, 763 P.2d 488 (Alaska 1988), when it held that grants of exclusive rights to harvest natural resources listed in the common use clause (fish, wildlife and waters) should be subjected to close scrutiny. In holding that the state's assignment of exclusive guide areas in which only the designated guide could lead hunts was unconstitutional, the Court observed:

In a discussion about fishing in lakes, the Constitutional Convention underscored its intent that the public retain broad access to fish, wildlife and water resources, and that these resources not be the subject of private grants...[t]he Convention made it clear that only fish in small private ponds may be owned free of the public's right of access. (cite omitted.) This confirms the view of the common use clause and the public trust expressed in *CWC Fisheries v. Bunker*, 755 P.2d 1115 (Alaska 1988), holding that a grant of a fee interest in tidelands remains impressed with a public trust easement. It also reinforces our conclusion that grants of exclusive rights to harvest natural resources listed in the common use clause should be subjected to close scrutiny. Id. at 494.

In light of these cases, Plaintiffs' reliance on a four-decades old Attorney General's Opinion may be misplaced. It seems clear that ADF&G's refusal to grant

**Alaska Court System**

1  
2 Plaintiffs the exclusionary right to harvest all of the wild geoducks located on their  
3 proposed farm sites is not only permissible, but constitutionally mandated. Plaintiffs'  
4 permit to farm must remain "impressed with a public trust easement" allowing others,  
5 including commercial fishermen, access to any significant population of wild geoducks  
6 growing there.  
7

8 The "Sustained Yield" Provision

9 Although ADF&G does not appear to base its arguments on it, the  
10 Southeast Alaska Regional Dive Fisheries Association (SARDFA) points out that Article  
11 VIII, Section 4 of the Alaska Constitution also poses a problem for Plaintiffs. That  
12 section reads:

13 Sustained Yield. Fish, forests, wildlife, grasslands, and all  
14 other replenishable resources belonging to the State shall be  
15 utilized, developed, and maintained on the sustained yield  
16 principle, subject to preferences among beneficial uses.

17 According to SARDFA, the maximum sustainable harvest for geoducks is  
18 only 2% per year, while 10% of the total known harvestable amount of geoducks are  
19 located within Plaintiffs' proposed farm sites. If SARDFA's numbers are correct, —  
20 Plaintiffs' expressed intent to harvest this entire amount of stock in a short period of time  
21 is incompatible with the sustained yield clause.

22 The balance with Article VIII, Sections 3 and 4 intended by the people in  
23 enacting Section 15, must be struck in a way that will allow aquaculture's development to  
24 be efficiently promoted (to paraphrase the proviso). The regulations growing from this  
25

**Alaska Court System**

Memorandum of Decision

Alaska Trademark Shellfish et al. v. State of Alaska et al., Case No. 1KE-00-211 CI

Page 13 of 20

Exc. 101

1  
2 controversy have now gone into effect. (5 AAC 41.200 – 400, effective June 19, 2001).  
3  
4 These regulations resolve a number of Plaintiffs' concerns on their face: e.g. term of  
5 permits will be 10 years, rather than 5. The stock acquisition issue is however still  
6 unworkable, thwarting Section 15. 5 AAC 41.290(b) limits acquisition in a manner that  
7 would prohibit the former from making any profitable use of existing geoducks on the  
8 site no matter how few might live there; (e) meanwhile seems to protect only  
9 "established" (i.e. ongoing) uses by other fishers; (f) comes right to the point disallowing  
10 existing wild stock to be used to financially bootstrap the "farm". The Court, although  
11 anxious to avoid a trespass into the executive prerogative of policymaking, reads the  
12 potentially conflicting requirements of common use and promotion of aquaculture to  
13 protect only significant populations of wild geoducks. To hold otherwise would  
14 essentially prohibit the goal of aquaculture. Any site with no geoducks is likely so for a  
15 reason, even if not readily discernable by current science. On the other hand, a site with  
16 some geoduck population may promise, with good husbandry, the increase envisioned by  
17 Section 15. A site with many geoducks, such as might attract the existing divers industry  
18 must be protected for that potential "common" use. The regulations must permit farming  
19 on sites suitable for but not presently supporting significant populations. The meaning of  
20 "significant" and methods by which that status might be ascertained are best left to the  
21 expertise of the Department.  
22

23           The current absence of this leeway in the regulations is unreasonable. The  
24 process of regulation is to take a 'hard look' at the problems confronting the regulator  
25

### Alaska Court System

Memorandum of Decision

Alaska Trademark Shellfish et al. v. State of Alaska et al., Case No. 1KE-00-211 CI

Page 14 of 20

Exc. 102

1  
2 and the regulated, and to reason a method by which both can conform themselves to  
3 fulfill the underlying laws, requirements and goals. During this process the Department  
4 failed to find the seemingly obvious answer to the site selection controversy, and  
5 arbitrarily crafted a policy and regulations sure to thwart the Plaintiffs and Section 15.  
6 See Interior of Alaska Airboat Association, Inc. v. State of Alaska, Board of Game, 18  
7 P.3d 686 (Alaska 2001).  
8

9 ADF&G's Permit Renewal Policy

10 ADF&G appears to take the position that AS 43.76.200(b) establishes a  
11 "traditional fishery" or "other existing use" of wildlife resources pursuant to AS  
12 16.40.105(2), insofar as it permits bioassessment surveys to be conducted that may lead  
13 to subsequent commercial harvest of those wildlife resources. Therefore, according to  
14 ADF&G, if – at the time an aquatic farm operation permit is renewed – there is an aquatic  
15 farm in "an area that has been identified in an operating plan developed under AS  
16 43.76.200(b), as an area for which a bioassessment survey and subsequent commercial  
17 harvest will be conducted...[the] aquatic farm would necessarily create a significant  
18 alteration of a traditional fishery or existing use and, therefore, would create a conflict  
19 under AS 16.40.105(2)."<sup>10</sup>  
20

21 This seems to be a rather creative (and unfair) interpretation of the phrase  
22 "existing use." Plaintiffs more accurately describe it as "merely potential commercial  
23 fishing." ADF&G seems to be taking the position that because there is a regional dive  
24  
25

**Alaska Court System**

Memorandum of Decision

Alaska Trademark Shellfish et al. v. State of Alaska et al., Case No. 1KE-00-211 CI

Page 15 of 20

Exc. 103

fishery development association already in existence, the association has "dibs" on all of the geoducks (or, more specifically, on all of the underwater real estate that *supports* geoducks – whether anyone has fished there in the past or not) in Southeast Alaska.<sup>11</sup>

ADF&G also claim that its interpretations of "significant alteration," "traditional fisheries," and "existing use" are not ripe for judicial review, because even if these interpretations are erroneous that fact would not further the Plaintiffs' cause. To the contrary, as this Court has found that ADF&G's interpretations are unreasonable, then Plaintiffs were well within their rights to reject ADF&G's "conditional approval" of their permit applications. While it is true that Plaintiffs have not yet suffered any actual harm as a result of ADF&G's claim that renewal of their aquatic farm operation permits will be subject to "significant alteration" analysis at some later time, they *have* been harmed to the extent that their rights to pursue a business opportunity have been "chilled."

This conundrum can be cured by the implementation of the aforementioned assessment or census of the proposed farms to issue that no significant population of wild geoducks, one that would now normally attract and support a dive

---

<sup>10</sup> Appellee's brief, page 13 (01-16-01).

<sup>11</sup> The department's primary concern with the farms that contained significant wild stocks of geoducks, was that they would preclude access to these large beds of wild geoducks by a *growing* diver fishery." (Appellee's brief, pages 21-22 [01-16-01, emphasis added]). "It would be inconsistent with the legislature's reluctance to displace existing users of wild resources if geoduck farming were allowed to thwart the *growth* or continuation of the diver fishery." (Id., page 24 [emphasis added]). It is clear from these statements and others that ADF&G believes it can choose to promote development of the commercial diver fishing industry over (indeed, at the expense of) aquatic farming. It should be obvious, however, that the "existing use" of a thing and reserving it for one's later "growth" are two entirely different concepts. (See also City of Craig's Brief as Amicus Curiae, page 8 [03-15-01]: "The geoduck fishery is a 'traditional fishery' in Southeast Alaska. Removing from the future growth of that fishery an enormous mass of the

1  
2 fishery exists. Areas with only incidental populations could be so certified to the benefit  
3 of farmers and without real loss to the divers.  
4

5 The "Five-Day Time Limit" Claim

6 Plaintiffs contend that ADF&G was required under 5 AAC 41.240(b) to  
7 act on Plaintiffs' aquatic farm operation permit applications within five days of the  
8 consistency determination by the Division of Governmental Coordination (DGC).  
9 ADF&G argues that the five-day time limit is directory rather than mandatory, and that  
10 no consequences should result from the Department's failure to comply.

11 ADF&G is correct. The five-day time limit is intended to serve primarily  
12 as a guideline for the orderly conduct of public business; minor deviations from the  
13 required timeframe will result in little, if any, prejudice to Plaintiffs. (In fact, Plaintiffs  
14 have failed to make any showing of prejudice resulting from the delay.) Therefore, it is  
15 directory rather than mandatory. City of Yakutat v. Ryman, 654 P.2d 785, 790 (Alaska  
16 1982).  
17

18 While strict compliance is required where an administrative regulation is  
19 mandatory, substantial compliance is sufficient – absent significant prejudice to the other  
20 party – where the regulation is merely directory. Copper River School District v. State,  
21 702 P.2d 625, 627 (Alaska 1985). Here, ADF&G approved Plaintiffs' applications,  
22 subject to constitutionally required conditions (at least with respect to the common use  
23 issues, if not ADF&G's permit renewal policy), three days late. Given the particularly  
24

25 wild stock in areas where the fishery will logically grow...constitutes a significant alteration of that

**Alaska Court System**

Memorandum of Decision

Alaska Trademark Shellfish et al. v. State of Alaska et al., Case No. 1KE-00-211 CI

Page 17 of 20

Exc. 105

1  
2 complicated nature of the issues involved, rigid adherence to the five-day time limit  
3 would be unreasonable.

4 Because ADF&G substantially complied with the requirements of 5 AAC  
5 41.240(b), and since Plaintiffs have not suffered significant prejudice as a result of the  
6 delay, no consequences should result from ADF&G's failure to comply perfectly.  
7

8  
9 *Is the Department of Fish and Game Estopped from Refusing to Issue*  
10 *Plaintiffs' Stock Acquisition Permits for Harvest of Wild Stock on Site for Sale?*

11 No. Courts may apply the doctrine of equitable estoppel against the state,  
12 even when the state acts as the sovereign. The Alaska Supreme Court has rarely applied  
13 estoppel to bar the state's exercise of its sovereign police powers, however, reasoning  
14 that where "a [government] acts for the good of its citizens rather than a narrow  
15 proprietary interest" estoppel would be unjust to the public. But the public interest does  
16 not altogether bar the application of estoppel against the state when it acts as sovereign.  
17 Rather, as the Court held in *Municipality of Anchorage v. Schenider*,<sup>12</sup> the public interest  
18 is best protected through careful application of the estoppel test itself, which weighs the  
19 prejudice to the public interest in each case. *State v. Schnell*, 9 P.3d 351, 355-56 (Alaska  
20 2000).

21 In this case, Plaintiffs have asserted a sort-of "trickle down" public  
22 interest, theorizing that if they are allowed to harvest wild geoduck in order to finance  
23

---

24 fishery." [emphasis added]).  
25 <sup>12</sup> 685 P.2d 94 (Alaska 1984).

**Alaska Court System**

Memorandum of Decision

Alaska Trademark Shellfish et al. v. State of Alaska et al., Case No. IKE-00-211 CI

Page 18 of 20

Exc. 106

1  
2 Rather, as the Court held in *Municipality of Anchorage v. Schenider*,<sup>11</sup> the public interest  
3 is best protected through careful application of the estoppel test itself, which weighs the  
4 prejudice to the public interest in each case. *State v. Schnell*, 9 P.3d 351, 355-56 (Alaska  
5 2000).

6 In this case, Plaintiffs have asserted a sort of "trickle down" public  
7 interest, theorizing that if they are allowed to harvest wild geoduck in order to finance  
8 their aquatic farms, economic benefits will flow to others in the state as well. Even if this  
9 court accepts Plaintiffs' rationale, however, the Alaska Constitution (as discussed above)  
10 bars the kind of exclusive private harvesting Plaintiffs seek to engage in. No agency can  
11 be estopped from complying with the supreme law of the state.  
12

13  
14 *Did the Department of Fish and Game Coerce Plaintiffs to Accept Unlawful Conditions?*

15 As discussed above, it appears that ADF&G did attempt to coerce  
16 Plaintiffs into accepting an unlawful condition with regard to its permit renewal policy.  
17 However, Plaintiffs have suffered no harm as a result of this attempted coercion, because  
18 Plaintiffs also refused ADF&G's *lawful* condition with regard to harvest of wild stock on  
19 the proposed farm sites. Since no error attaches to this latter condition, and Plaintiffs'  
20 have clearly indicated that they would not have agreed to it even in the absence of the  
21 unlawful condition, Plaintiffs have suffered no injury as a result.  
22  
23  
24  
25

---

<sup>11</sup> 685 P.2d 94 (Alaska 1984).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

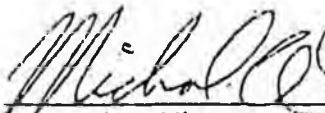
CONCLUSION

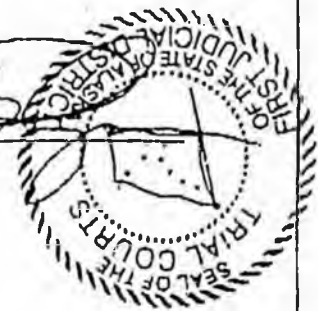
ADF&G's position is simple: Plaintiffs did not intend to engage (solely) in *bona fide* aquatic farming. Rather, "under the pretext of farming, [Plaintiffs] want to commercially fish wild geoducks, and be given an exclusive right to do so."<sup>12</sup> This the Alaska Constitution is loath to permit.

Although Section 15 of Article VIII contains an exception to its ban on exclusive rights of fishery for the "efficient development of aquaculture," Section 3 (and probably Section 4) still present barriers to Plaintiffs' proposed course of action. Nothing prevents Plaintiffs from obtaining title to some proposed farm sites and cultivating geoducks, but they cannot lay private claim to millions of dollars worth of public property. They will have to confine their activities to less desirable sites, without significant populations of wild geoducks.

With regard to ADF&G's permit renewal policy, however, the future growth of an industry is not an "existing use," and that ADF&G's policy is invalid to far as it attempts to condition permit renewal upon such future growth.

Dated at Ketchikan, Alaska this 10<sup>th</sup> day of July, 2001.

  
Michael A. Thompson  
Superior Court Judge



**Alaska Court System**

<sup>12</sup> Appellee's Brief, page 17 (01-16-01).

HAND DELIVERED

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ALASKA TRADEMARK SHELLFISH, LLC  
and GARY ZAUGG, LANCE PHILMAN,  
STEVEN LaCROIX, RYAN MORIN, and  
KURT MORING,

Appellants,

v.

STATE OF ALASKA, ALASKA  
DEPARTMENT OF FISH AND GAME,  
COMMISSIONER FRANK RUE, DOUG  
MECUM, SCOTT MARSHALL, and JOHN  
DOES 1-10,

Appellee.

RECEIVED

FEB 14 2002

Attorney Generals Office  
Juneau

Case No. S-0308  
Superior Court No.  
1KE-00-211 CI

AFFIDAVIT OF SERVICE

STATE OF ALASKA )  
 ) ss:  
FIRST JUDICIAL DISTRICT )

Bruce B. Weyhrauch, being first duly sworn upon oath, deposes and says:

1. On February 14, 2002 I served a copy of Appellant's Opening Brief by placing a copy in the court box located in the Dimond Courthouse on:

DATED this 14 day of February, 2002.

Bruce B. Weyhrauch  
Bruce B. Weyhrauch

SUBSCRIBED AND SWORN TO before me this 14th day of February, 2002.

STATE OF ALASKA  
OFFICIAL SEAL  
KEITHA J. KOLVIG  
NOTARY PUBLIC  
My Commission Expires 8:10:03



Keitha J. Kolvig  
Notary Public for Alaska

**A Joint Letter of Agreement between  
the Alaskan Shellfish Growers Association and  
the Southeast Alaska Regional Dive Fisheries Association**

**Dear Alaska Policymakers:**

The Alaskan Shellfish Growers Association (ASGA) and Southeast Alaska Regional Dive Fisheries Association (SARDFA) agree to the following package of statutory and regulatory changes to resolve long-standing controversies over how the state should deal with "standing stocks" of geoduck clams on aquatic farm sites.

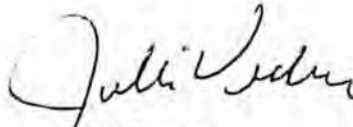
Both organizations are committed to supporting the implementation of the provisions of the agreement, including the passage of legislation and adoption of regulations.

We urge quick action in approving the legislation and adopting the regulations necessary to carry out the agreement.

Sincerely,



**Rodger Painter**  
ASGA vice president



**Julie Decker**  
SARDFA executive director

## SARDFA-ASGA Compromise

- 1. Insignificant populations of geoducks would be defined as 12,000 pounds or less.**

Legislation must provide ADF&G with the authority to allow farmers ability to harvest insignificant populations of wild stocks on farm sites. The language should be added to 16.40.100 Aquatic Farm and Hatchery Permits.

- 2. Harvest of standing stocks of geoducks would be limited to no more than 12,000 per farm site.**

This cap could be imposed by regulation as long as the language added to AS 16.40.100 gives ADF&G the ability to limit harvests by farmers.

- 3. In the event a site contains more than 12,000 pounds, the farmers would be allowed to harvest everything, but the net proceeds from anything over the cap would go to the state's general fund. In other words, the farmer would be allowed to harvest and sell the "overages," but would be required to give any sales proceeds over direct harvesting, transporting and processing expenses to the general fund.**

If net sales proceeds of overages are to flow into the state treasury, it will require some authorizing language in statute. While the funds could not be dedicated to support activities such as geoduck development programs, ASGA will work with SARDFA annually to ensure the legislature allocates the funds accordingly.

- 4. Surveys used to determine whether a proposed geoduck farm site contains 12,000 pounds of standing stocks would use a mid-point rather than lower bound estimate. This standard also should be applied to the commercial fishery.**

This is designed to increase the accuracy of the surveys and prevent the approval of sites with more than the 12,000-pound cap. This can be accomplished in regulation with no statutory changes necessary. However, it is uncertain whether ADF&G managers will agree to shift survey confidence levels for dive fishery management of geoducks. ADF&G deputy commissioner David Bedford did agree the department would work with SARDFA to study ways to improve survey accuracy.

- 5. Existing geoduck aquatic farm permit holders should be "grandfathered in, but should be held to the cap.**

The goal is to ensure existing permits would be valid, but permittees would be held to the 12,000-pound cap. Harvests that occurred prior to the legislation would not be counted toward the 12,000-pound limit.

## **Description of ASGA-SARDFFA Compromise**

The Alaskan Shellfish Growers Association (ASGA) and Southeast Alaska Regional Dive Fisheries Association (SARDFFA) have reached agreement on a package of statutory, regulatory and administrative actions to resolve the long-standing controversy of how to handle natural stocks of geoduck clams on new aquatic farm sites.

The agreement was reached in the wake of an Alaska Supreme Court decision that already has resulted in the closure of geoduck farming operations near Ketchikan and cast a legal cloud over most other existing littleneck and geoduck farming operations. Complicating the issue is that seed purchases by the closed geoduck operations are considered vital to the viability of the shellfish hatchery in Seward.

While this agreement was negotiated directly by divers and farmers, it also has been endorsed by the parties involved in the original lawsuit and the Murkowski Administration. Here are elements of the agreement.

### **How the "Standing Stock" Issue is Resolved**

The Supreme Court said current statutes do not provide the Alaska Department of Fish and Game clear authority to allocate any standing stocks of geoduck clams to aquatic farmers. While the decision was directed at geoducks, it has clear implications for other species, such as littleneck clams.

Statutes would be amended to allow aquatic farmers to select sites with "insignificant" amounts of wild stocks, essentially codifying an earlier superior court decision. This would be defined in statute as an amount less than what it would take to support a commercial fishery. ADF&G would further define what "insignificant" means in regulation.

### **How Existing Farms will be Affected**

Existing geoduck farms would be allowed to continue operations, but would have to meet the provisions of the new statute and accompanying regulations.

### **How the State Will Determine How Many Clams are on a Farm Site**

Population surveys will be conducted by the state or by the applicant with state oversight. The surveys will require a high confidence level to increase accuracy. The farmer will be required to pay for the surveys.

### **How Harvests of Standing Stocks will be Managed**

The agreement would define "insignificant" as less than 12,000 pounds of geoduck clams per farm site. Harvests by farmers would be "capped" at 12,000 pounds. If the amount of standing stocks exceeds the 12,000-pound cap, the farmer would be able to continue harvesting to clear the sites for future crops, but the "net proceeds" of such sales would go into the state general fund.

# SENATE COMMITTEE REPORT

DATE: 3/17/04

FURTHER: Finance

DATE TURNED  
IN TO OFFICE: 4/6/04

Labor and Commerce Committee considered HOUSE BILL NO. 341

## HB 341 DIVE FISHERY MANAGEMENT ASSESSMENT

"An Act relating to the dive fishery management assessment."

and recommends:

- be replaced with \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to \_\_\_\_\_ Committee

**Senate Bill:**  
 Same Title  
 New Title

**House Bill:**  
 Same Title  
 Technical Title Change  
 New Title w/ SCR # \_\_\_\_\_

**NEW FISCAL NOTE(S):**

Department	Date	Fiscal	Zero	Indet.	FN#

**PREVIOUS FISCAL NOTE(S):**

Department	Date	Fiscal	Zero	Indet.	FN#
REV	2/1/04		✓		#7

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	Do PASS	Do NOT PASS	No REC	AMEND
<i>Seekins</i> Ralph Seekins	✓			
<i>Davis</i> Betty Davis			X	
<i>French</i> [Signature]			X	
<i>G. Skens</i> [Signature]	X			
<i>Burde</i> CHAIR: [Signature]	✓			

SENATE FINANCE COMMITTEE

SIGN - IN

**HB 341-DIVE FISHERY MANAGEMENT ASSESSMENT**

NAME: TIM BARRY Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title:  Aide to Rep. Williams Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_

Do you wish to testify?  Yes  No  Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_

Do you wish to testify?  Yes  No  Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_

Do you wish to testify?  Yes  No  Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_

Do you wish to testify?  Yes  No  Respond To Questions

SENATE FINANCE COMMITTEE

SIGN-IN

HB 341-DIVE FISHERY MANAGEMENT ASSESSMENT

✓ NAME: TIM BARRY Subject/Bill No: HB 341  
Co./Dept./Title: AIDE TO REP. WILLIAMS Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify?  Yes  No  Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify?  Yes  No  Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify?  Yes  No  Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify?  Yes  No  Respond To Questions



SENATE FINANCE COMMITTEE

SIGN-IN

HB 341-DIVE FISHERY MANAGEMENT ASSESSMENT

NAME: Chuck Harlow Subject/Bill No: HB 341  
Co./Dept./Title: Revenue Phone: 2320  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify?  Yes  No  Respond To Questions

NAME: TIM BARRY Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: REP. WILLIAMS' OFFICE Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify?  Yes  No  Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify?  Yes  No  Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_  
Do you wish to testify?  Yes  No  Respond To Questions