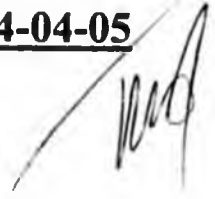


**SB**

**126**



Changes made by the CS to original version \G

1. Page 1, line 9:  
Delete "acquire ownership of,"
  
2. Page 3, line 6:  
Insert ",on the site," after stock
  
3. Page 3, line 7:  
Delete "on the site"

24-LS0597\F  
Utermohle  
4/4/05

**CS FOR SENATE BILL NO. 126(RES)**

**IN THE LEGISLATURE OF THE STATE OF ALASKA**

**TWENTY-FOURTH LEGISLATURE - FIRST SESSION**

**BY THE SENATE RESOURCES COMMITTEE**

**Offered:  
Referred:**

**Sponsor(s): SENATOR STEDMAN**

**A BILL**

**FOR AN ACT ENTITLED**

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

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

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

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

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

9 delete language (2) except as provided in (f) of this section, harvest and, without  
10 further cultivation, sell an insignificant population that may be present at the  
11 aquatic farm site of a wild stock of a shellfish species intended to be cultured at  
12 the site [. A PERSON WHO HOLDS A PERMIT UNDER THIS SECTION MAY  
13 SELL OR OFFER TO SELL SHELLFISH STOCK TO THE DEPARTMENT OR TO  
14 AN AQUATIC FARM OR RELATED HATCHERY OUTSIDE OF THE STATE].

15 \* Sec. 2. AS 16.40.100(e) is amended to read:

1 (e) Upon the expiration or termination of a permit issued under this section, a  
2 person who holds a permit for an aquatic farming site where wild stocks of shellfish  
3 indigenous to the site are cultured shall, as a condition of the permit, restore the wild  
4 stock of shellfish, as consistent with sustained yield management of the wild stock, to  
5 the population level that existed on the site when the permit for the site was initially  
6 issued by the commissioner. A permit holder is not required to restore that  
7 portion of the wild stock of shellfish that was removed from an aquatic farming  
8 site by a common property fishery conducted after the issuance of the permit for  
9 the aquatic farming site.

10 \* Sec. 3. AS 16.40.100 is amended by adding a new subsection to read:

11 (f) If the wild stock of a shellfish species to be cultured at an aquatic farm site  
12 exceeds the amount determined by the department to be an insignificant population  
13 and if the commissioner determines in writing that removal from the site of that  
14 portion of the stock that exceeds an insignificant population would benefit the public  
15 and that removal of the stock by a person other than the permittee would unreasonably  
16 interfere with the operation of the aquatic farm, the commissioner may authorize the  
17 permittee to remove and sell the excess amount of the wild stock from the site, if the  
18 permittee pays reasonable compensation, as defined by the department, to the  
19 department for the harvest and sale of the excess wild stock. The department shall  
20 deposit the money received under this subsection into the general fund. The  
21 legislature may appropriate the money received under this section to the department  
22 for shellfish management and enhancement.

23 \* Sec. 4. AS 16.40.105 is amended to read:

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

26 (1) the physical and biological characteristics of the proposed farm or  
27 hatchery location must be suitable for the farming or the shellfish or aquatic plant  
28 proposed;

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

31 (3) the proposed farm or hatchery may not significantly affect

1 fisheries, wildlife, or their habitats in an adverse manner; [AND]

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

②

insert  
delete

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

7 \* Sec. 5. AS 16.40 is amended by adding a new section to read:

8 **Sec. 16.40.155. Records and reports confidential.** Records required by  
9 statute or by a regulation adopted by the department concerning aquatic farm stocks or  
10 production, prices, and harvests of aquatic farm products and wild stocks, and annual  
11 statistical reports of individual aquatic farms or hatcheries required by statute or by a  
12 regulation adopted by the department are confidential and may not be released by the  
13 department, except that the department may release the records and reports

14 (1) to the Department of Revenue and the Department of Natural  
15 Resources to assist the departments in carrying out their respective statutory  
16 responsibilities;

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

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

20 (4) regarding cumulative annual harvests of wild stocks at individual  
21 aquatic farm sites.

22 \* Sec. 6. AS 16.40.199 is amended by adding a new paragraph to read:

23 (9) "insignificant population" means a population of shellfish that, in  
24 the determination of the commissioner, would not attract and support a commercial  
25 fishery for that species of shellfish and the harvest and sale of the shellfish would not  
26 result in significant alteration in traditional fisheries or other existing uses of fish and  
27 wildlife resources if the population were included within an aquatic farm site.

28 \* Sec. 7. The uncodified law of the State of Alaska is amended by adding a new section to  
29 read:

30 **APPLICABILITY.** Until expiration or termination of the permit, AS 16.40.105,  
31 added by sec. 4 of this Act, does not apply to an aquatic farm permit issued under

- 1 AS 16.40.100 before the effective date of this Act.
- 2 \* Sec. 8. This Act takes effect July 1, 2005.

SENATE BILL NO. 126

IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY SENATOR STEDMAN

Introduced: 3/2/05  
Referred: Judiciary, Resources

A BILL

FOR AN ACT ENTITLED

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

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13 UNDER THIS SECTION MAY SELL OR OFFER TO SELL SHELLFISH STOCK  
14 TO THE DEPARTMENT OR TO AN AQUATIC FARM OR RELATED  
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*delete*

①

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 31 alterations in traditional fisheries or other existing uses of fish and wildlife resources;

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

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

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

2

delete &  
insert 8

ON THE SITE,

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- 1 added by sec. 4 of this Act, does not apply to an aquatic farm permit issued under
- 2 AS 16.40.100 before the effective date of this Act.
- 3 \* Sec. 8. This Act takes effect July 1, 2005.

# The National Sea Grant Law Center

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## No Exclusive Rights to Harvest Wild Alaskan Shellfish

*Alaska Trademark Shellfish, LLC, et. al. v. State of Alaska*, 2004 Alas. LEXIS 51, (Alaska April 16 2004).

*Jason Savarese, J.D.*

The Supreme Court of Alaska recently held that the Alaska Aquatic Farming Act and its operator stock acquisition permit provisions did not give exclusive rights to geoduck farmers seeking to harvest and sell pre-permit, wild shellfish found on their farms.

### Background

Alaska's Aquatic Farming Act requires a permit in order to open an aquatic farm in the state, and the Alaska Department of Fish and Game (the Department) has authority over permit issuance decisions. The Department indicated to some potential shellfish farmers that those receiving permits would have the right to harvest all existing wild shellfish on their farm when the permits were issued. Alaska Trademark Shellfish, LLC, (ATS) and other farmers applied for aquatic farm permits from the Alaska Department of Fish and Game. ATS wanted to farm a type of slow-growing shellfish of considerable size, with high market value, known as geoducks. The Department considered the permit requests, and conditionally approved them, upon the farmers' development of a way to differentiate between "common property geoducks already in the farmers' waters, and the new clams they intended to grow.

The concern expressed by the Department's condition was that farmers might have a higher-than-necessary density of pre-permit geoducks on their farm, and that these should remain an Alaskan common property resource for "other uses." ATS objected to the condition, and offered some alternatives. The Department rejected the alternatives, and relayed to ATS the general principles the Department would use in deciding ATS's permit applications. These included limiting the use of pre-permit geoducks to "brood stock or for active cultivation." These principles were later proposed and officially adopted as regulations in the Alaska Administrative Code. ATS claimed the condition attached to the clam permits would preclude any geoduck farming, and ATS demanded their applications be approved without condition. The Department denied their permit applications.

### The Lawsuit

ATS appealed the Department's decision to the superior court, putting forth two claims. First, ATS claimed that the Department was in violation of the Alaskan Aquatic Farming Act, by requiring the farmer seeking to open a shellfish farm to maintain pre-permit shellfish as common use property. In addition, ATS asserted an estoppel charge against the Department, since it had assured potential farmers that once a permit was obtained, any existing, wild geoducks would be harvestable. The superior court upheld the Department's decision.

Reasoning its decision on a constitutional basis, the superior court found that the "real question" was not whether the legislature intended to allow [stock acquisition permit] holders to harvest wild stock, but whether the legislature is permitted to do so.<sup>2</sup> The judge held that the state constitution's "common use" clause barred ATS from having the exclusive right to harvest wild geoducks. ATS appealed the decision to the Supreme Court of Alaska.

The Supreme Court heard ATS's arguments that the superior court had misapplied the common use clause in the Alaska Constitution and the public use doctrine in not allowing farmers to harvest existing geoduck stocks on the property. ATS claimed that wild geoducks would qualify as "farmed" shellfish under the statutory definition of "stock," and that the stock acquisition permit statute allows the harvesting of wild geoducks to make such farming viable. ATS also reiterated its estoppel assertion against the Department.

### Alaska Trademark Shellfish's Arguments

ATS explained that the Aquatic Farming Act's statutory definition of "stock" as those "intended for for...further growth or propagation"<sup>3</sup> included wild geoducks, since some growth would occur between the time the permit was issued and the time of harvesting. The Court found this argument to be without merit, and stated that an actual intent to "use" the wild clams "for" further growth was required.<sup>4</sup> Allowing the clams to continue their natural growth is not enough to bring wild geoducks under the "stocks" statutory definition.

ATS argued that the stock acquisition permit statute commanded the Department to issue such a permit if "wild stock is necessary to meet the initial needs of farm or hatchery stock."<sup>5</sup> In their view, for commercial geoduck farming to succeed, wild, pre-permit geoducks would have to be harvested. This argument proved unpersuasive, as the Court pointed out the statute only addressed the farm's need for stock, not for "general startup needs."<sup>6</sup>

Thus, the statute did not give the farmers a right to harvest wild, existing geoducks on the property. With regard to the estoppel claim, the Court declined to rule on the disputed meaning of statements made by the Department before permit applications were filed. The justices simply found, under a "totality of the circumstances test", that estoppel was not appropriate. The Alaskan Court decided the case without considering the Alaska Constitution's common use clause and the public use doctrine.

### Conclusion

The Supreme Court of Alaska held that the Alaska Aquatic Farming Act does not give the Alaska Department of Fish and Game the power to authorize aquatic farmers to harvest and sell wild geoduck stocks growing on their property. The Court pointed out a section of the Aquatic Farming Act which specifically allows the Department's commissioner to "attach conditions to a permit issued under the statute that are necessary to protect natural fish and wildlife resources."<sup>7</sup> The Court went on to hold that the statute governing operation permits does not include an implied right to take wild shellfish. The decision did not reach the issue of whether the grant of such an exclusive right would violate the Alaska Constitution. The decision of the Department of Fish and Game to deny Alaska Trademark Shellfish geoduck farming permit application was upheld.

### Endnotes

1. Alaska Admin. Code tit. 41, §240 (2003).
2. *Alaska Trademark Shellfish, LLC, et. al. v. State of Alaska, et. al.*, 2004 Alas. LEXIS 51, at \*8 (April 16, 2004).
3. Alaska Stat. § 16.40.199(8) (2003).
4. *Alaska Trademark Shellfish*, 2004 Alas. LEXIS 51, at \*19.
5. Alaska Stat. § 16.40.120(f) (2003).
6. *Alaska Trademark Shellfish*, 2004 Alas. LEXIS 51, at \*20.
7. Alaska Stat. § 16.40.100(c) (2003).

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THE SUPREME COURT OF THE STATE OF ALASKA

ALASKA TRADEMARK	)	
SHELLFISH, LLC, and GARY	)	Supreme Court No. S-10308
ZAUGG, LANCE PIHLMAN,	)	
STEPHEN LaCROIX, RYAN	)	Superior Court No.
MORIN, and KURT MORIN,	)	IKE-00-211 CI
	)	
Appellants,	)	
	)	
v.	)	<u>OPINION</u>
	)	
STATE OF ALASKA, ALASKA	)	[No. 5795 - April 16, 2004]
DEPARTMENT OF FISH AND	)	
GAME, COMMISSIONER FRANK	)	
RUE, DOUG MECUM, SCOTT	)	
MARSHALL, and JOHN DOES 1-10,	)	
	)	
Appellees.	)	
	)	

Appeal from the Superior Court of the State of Alaska,  
 First Judicial District at Ketchikan, Michael A. Thompson,  
 Judge.

Appearances: Bruce B. Weyhrauch, Juneau, for  
 Appellants. Stephen LaCroix, pro se, Ketchikan. Blaine H.  
 Hollis, Assistant Attorney General, and Bruce M. Botelho,  
 Attorney General, Juneau, for Appellee.

Before: Fabe, Chief Justice, Matthews, Eastaugh, Bryner,  
 and Carpeneti, Justices.

BRYNER, Justice.

## **I. INTRODUCTION**

This case requires us to determine whether Alaska law gives shellfish farmers the exclusive right to harvest wild stocks already growing on their farm sites. Several applicants asked the Alaska Department of Fish and Game for aquatic farm permits allowing them to grow and commercially harvest geoduck clams in Alaska waters. When the Department of Fish and Game declined to give them exclusive rights to the wild geoducks on their proposed farm sites, the applicants appealed to the superior court. The superior court upheld the department's decision, concluding that the Alaska Constitution bars the department from giving geoduck farmers exclusive rights to commercially harvestable stocks already on their farms. The applicants filed this appeal. We affirm the superior court's ruling but rest our decision on narrower grounds, holding that, no matter what the constitution might permit, the department lacked statutory authority to give aquatic farmers exclusive rights to the existing wild stocks.

## **II. FACTS AND PROCEEDINGS**

Alaska's Aquatic Farming Act<sup>1</sup> sets out procedures for obtaining permits to start aquatic farms in Alaska waters. The act puts the Department of Fish and Game in charge of the permitting process, which includes the issuance of a coastal zone consistency certification, an aquatic farm lease, a special area permit, an aquatic farm operation permit, and a stock acquisition permit. In the case at issue here, Alaska Trademark Shellfish, LLC, applied to the Department of Fish and Game for aquatic farm permits to allow the company to raise geoducks — an unusually large, slow-growing species of clam that commands high market prices — on several

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<sup>1</sup> AS 16.40.100-.199.

proposed farm sites in Southeastern Alaska waters; at about the same time, several other applicants requested permits in various different locations. In prior communications with prospective shellfish farmers, the department had suggested that applicants who received permits would be given the right to take all wild stocks already on their farms when the permits were issued. Thus, in the present case, most of the applicants proposed to harvest and sell the wild geoducks already growing on their selected sites.

After reviewing the applications, the department notified the applicants that it would conditionally approve their permits: each applicant would be required to develop a practical method of distinguishing their farmed geoducks from the wild, "common property," geoducks already on their property; and each applicant would have to agree to use their proposed method when they started farming. The department explained that it believed these conditions to be necessary "[b]ecause the density of geoducks on your site may exceed that necessary to provide seed stock for propagation." Specifically, the department stated, "it is likely that a portion of the wild geoducks at your proposed sites would remain a common property resource, which should be made available for other uses." The department asserted that the Aquatic Farming Act allowed aquatic farmers to take wild resources from their sites only if they were issued a stock acquisition permit under AS 16.40.120, which, in the department's view, allowed farmers to use existing stocks solely to "further growth" and for "propagation." According to the department, allowing aquatic farmers a broader right to harvest standing stocks might violate the Alaska Constitution:

It is important to clarify that an aquatic farm permit does not, in itself, give a farmer the exclusive right to harvest, for a commercial purpose, the wild fishery resources that are located at the farm site. A contrary

conclusion is inconsistent with the laws that govern aquatic farming, and it may contradict the Alaska Constitution's prohibition against exclusive rights in fisheries.

The applicants responded that they found the department's conditions of approval to be unreasonable. They proposed several alternative arrangements. After holding a teleconference to discuss these and other options, the department sent the applicants a letter summarizing the general principles that it proposed to use to "guide the department's actions on your pending permit applications."<sup>2</sup> For present purposes, the most important principle was that the department would permit the applicants to use existing geoducks only for brood stock or for active cultivation:

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

The applicants replied that the department's proposal to condition approval of their applications on these principles would preclude them from operating successfully. They demanded an unconditional decision on their pending applications. In response, the Commissioner of Fish and Game issued a final decision

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<sup>2</sup> The department eventually circulated these general principles as proposed regulations and ultimately adopted them. 5 Alaska Administrative Code (AAC) 41.240 (2003). The validity of the current regulations is not at issue here.

denying the permits, ruling that the applicants had no right to claim wild geoducks already on their proposed sites:

The practical difficulties of choosing to operate an aquatic farm where there [is] an abundance of wild stocks of geoducks do[] not provide a basis for circumventing state law with regard to a common property resource. An aquatic farmer cannot, under state law, harvest wild geoducks that [the applicant] has done nothing to cultivate under the auspices of an aquatic farm permit. The Alaska Constitution and statutes that govern aquatic farm operational permits prohibit the harvest of standing stocks of wild geoducks, unless the farmer has a valid stock acquisition permit (which can be obtained under limited circumstances) or if the farmer has cultivated the wild geoducks.

The applicants appealed the commissioner's decision to the superior court, insisting that the department had violated the Aquatic Farming Act by conditioning their farm operation permits on their willingness to make wild geoduck stocks available for common use. Alternatively, the applicants argued, the department should be estopped from prohibiting them from harvesting their standing stocks, since its earlier communications had promised that all successful applicants for shellfish farming permits would automatically receive the right to harvest wild stock.

Superior Court Judge Michael A. Thompson affirmed the commissioner's ruling, relying on a constitutional theory. Finding that "[t]he real question . . . is not whether the legislature intended to allow [stock acquisition permit] holders to harvest wild stock, but whether the legislature is *permitted* to do so," Judge Thompson passed over the disputed statutory issues, ruling instead that the Alaska

Constitution's common use clause<sup>3</sup> precluded the department from giving geoduck farmers exclusive harvest rights to any commercially significant wild geoduck stocks.

The applicants appeal this decision.

### III. DISCUSSION

#### A. Standard of Review

In resolving administrative appeals from decisions issued by the superior court as an intermediate appellate tribunal, we review the administrative agency's decision directly.<sup>4</sup> We apply our independent judgment to decide questions of law involving statutory and constitutional interpretation.<sup>5</sup>

#### B. Parties' Arguments

The applicants challenge the superior court's ruling that the Alaska Constitution's common-use clause forbids giving newly permitted geoduck farmers harvest rights to geoduck stocks already growing on their farms. They maintain that the superior court misunderstood the relationship between the Alaska Constitution's common-use clause and no-exclusive-right clause.<sup>6</sup> Pointing to cases like *State v.*

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<sup>3</sup> Alaska Const. art. VIII, § 3.

<sup>4</sup> *Alaska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1231 (Alaska 2003).

<sup>5</sup> *State Commercial Fisheries Entry Comm'n v. Carlson*, 65 P.3d 851, 858 (Alaska 2003).

<sup>6</sup> Alaska Const. art. VIII, §§ 3, 15.

*Ostrosky*,<sup>7</sup> *Owsichek v. State*,<sup>8</sup> *CWC Fisheries v. Bunker*,<sup>9</sup> and *McDowell v. State*,<sup>10</sup> the applicants insist that the common-use clause and public trust doctrine do not prevent the department from giving standing stocks to aquatic shellfish farmers. Alternatively, the applicants argue, estoppel bars the department from denying their applications.

The state counters by arguing that the court's constitutional analysis was sound. Alternatively, renewing the statutory arguments that the superior court declined to decide, the state asserts that the Aquatic Farming Act does not give the department authority to grant exclusive standing-stock rights to the applicants.

**C. Procedural Objections to a Decision on Statutory Grounds**

The applicants raise a procedural objection to the state's statutory argument. They maintain that the state cannot properly rely on this theory, since the superior court declined to decide it and since the theory is not raised in the applicant's statement of points on appeal. The applicants urge us to confine our review to the constitutional issue decided below. Alternatively, they ask us to allow supplemental briefing if we reach the statutory issue.

But the trial court's choice of a particular legal theory does not define the scope of our appellate review. An appellate court may uphold the trial court's judgment on any legal theory supported by the record — even one that the trial court

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<sup>7</sup> 667 P.2d 1184 (Alaska 1983).

<sup>8</sup> 763 P.2d 488 (Alaska 1988).

<sup>9</sup> 755 P.2d 1115 (Alaska 1988).

<sup>10</sup> 785 P.2d 1 (Alaska 1989).

expressly rejects.<sup>11</sup> Here, the state's brief discusses a statutory point that it properly raised in the superior court. Both parties briefed and argued the point below. Although the superior court elected to rest its ruling on constitutional grounds, we have often recognized that appeals should ordinarily not be decided on constitutional

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<sup>11</sup> As we held in *Ransom v. Haner*, one of our earliest cases, it is a rule of law that an appellee may urge, and the appellate court should consider in defense of a decree or judgment any matter appearing in the record, even if rejected below and even if appellee's argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.

362 P.2d 282, 285 (Alaska 1961). Our subsequent cases have consistently recognized and applied this rule. See, e.g., *Dixon v. Pouncy*, 979 P.2d 520, 525 n.6 (Alaska 1999); *Pering Strait Sch. Dist. v. RLI Ins. Co.*, 873 P.2d 1292, 1295 (Alaska 1994); *Municipality of Anchorage v. Higgins*, 754 P.2d 745, 748 (Alaska 1988); *McGee v. State*, 614 P.2d 800, 806 n.10 (Alaska 1980); *Carlson v. State*, 598 P.2d 969, 973 (Alaska 1979); *Pistro v. State*, 590 P.2d 884, 888 n.13 (Alaska 1979); *Stordahl v. Gov't Employees Ins. Co.*, 564 P.2d 63, 67 n.16 (Alaska 1977).

grounds when narrower grounds are available.<sup>12</sup> Given these circumstances, we reject the applicants' procedural objections. We thus turn to the statutory issues.

#### D. Relevant Statutory Framework

The Aquatic Farming Act authorizes the Department of Fish and Game to issue permits for aquatic farming; conversely, the act prohibits aquatic farming

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<sup>12</sup> This principle of abstention is not unique to Alaska. See *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) ("It is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345-49 (1936) (establishing that constitutional questions should be avoided if there are narrower grounds for making a decision). Alaska's appellate courts have often invoked this principle. See, e.g., *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 594 n.18 (Alaska 1990) (civil rules constitute sufficient device for controlling discovery harassment, thus decline to reach broader constitutional issue); *State v. F/V Baranof*, 677 P.2d 1245, 1255 (Alaska 1984) (since owners were afforded due process, need not address constitutionality of statute); *Zerbe v. State*, 578 P.2d 597, 598 (Alaska 1978) (because of disposition of first point on appeal, need not address constitutional issue), *overruled on other grounds by Stephens v. State, Dep't of Revenue*, 746 P.2d 908 (Alaska 1987); *Puller v. Municipality of Anchorage*, 574 P.2d 1285, 1288 (Alaska 1978) (in light of construction of statute, do not reach constitutional issues); *State v. City of Anchorage*, 513 P.2d 1104, 1112 (Alaska 1973) (interpretation of statute makes it unnecessary to reach constitutional issue), *overruled on other grounds by State v. Alex*, 646 P.2d 203 (Alaska 1982); *Anniskette v. State*, 489 P.2d 1012, 1016 (Alaska 1971) (since conduct protected by constitution, do not reach broader question of statute's constitutionality); *Perry v. State*, 429 P.2d 249, 251-52 (Alaska 1967) (should not pass on constitutional issue unless determination essential to decision of case); *Robins v. Municipality of Anchorage*, 711 P.2d 550, 552 (Alaska App. 1985) (need not decide constitutional issue, since probable cause for arrest existed prior to giving breath test); *State v. Williams*, 653 P.2d 1067, 1069 (Alaska App. 1982) (do not reach constitutional issue since case can be resolved by applying Alaska Rules of Criminal Procedure), *aff'd in part*, 681 P.2d 313 (Alaska 1984).

except as permitted.<sup>13</sup> The act authorizes the department to issue two distinct kinds of permits: permits to operate aquatic farms and permits to acquire stock for aquatic farms.<sup>14</sup>

### 1. Operation Permits

Alaska Statute 16.40.100 describes the first kind of permit, an operation permit, providing, "A person may not, without a permit from the commissioner,

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<sup>13</sup> At the times relevant to this case, AS 16.40.100 provided:

(a) A person may not, without a permit from the commissioner, construct or operate

(1) an aquatic farm; or

(2) a hatchery for the purpose of supplying aquatic plants or shellfish to an aquatic farm.

(b) A permit issued under this section authorizes the permittee, subject to the conditions of AS 16.40.100 — 16.40.199 and AS 17.20, to acquire, purchase, offer to purchase, transfer, possess, sell, and offer to sell stock and aquatic farm products that are used or reared at the hatchery or aquatic farm. A person who holds a permit under this section may sell or offer to sell shellfish stock to the department or to an aquatic farm or related hatchery outside of the state.

(c) The commissioner may attach conditions to a permit issued under this section that are necessary to protect natural fish and wildlife resources.

(d) Notwithstanding other provisions of law, the commissioner may not issue a permit under this section for the farming of, or hatchery operations involving, Atlantic salmon.

<sup>14</sup> See AS 16.40.100 and AS 16.40.120.

construct or operate . . . an aquatic farm.”<sup>15</sup> An operation permit issued under this section allows aquatic farmers to acquire and sell “stock and aquatic farm products that are used or reared at the hatchery or aquatic farm.”<sup>16</sup> The act assigns precise meanings to the terms “aquatic farm product” and “stock”:

“aquatic farm product” means an aquatic plant or shellfish, or part of an aquatic plant or shellfish, that is propagated, farmed, or cultivated in an aquatic farm and sold or offered for sale;

....

“stock” means live aquatic plants or shellfish acquired, collected, possessed, or intended for use by a hatchery or aquatic farm for the purpose of further growth or propagation.<sup>17</sup>

In deciding whether to issue an operation permit under section .100, the department must consider four criteria:

- (1) the physical and biological characteristics of the proposed farm or hatchery location must be suitable for the farming or the shellfish or aquatic plant proposed;
- (2) the proposed farm or hatchery may not require significant alterations in traditional fisheries or other existing uses of fish and wildlife resources;
- (3) the proposed farm or hatchery may not significantly affect fisheries, wildlife, or their habitats in an adverse manner; and

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<sup>15</sup> AS 16.40.100(a)(1).

<sup>16</sup> See AS 16.40.100(b). Moreover, with respect to operating permits, AS 16.40.100(c) gives the department broad discretion to “attach conditions to a permit . . . that are necessary to protect natural fish and wildlife resources.”

<sup>17</sup> AS 16.40.199(2), (8).

(4) the proposed farm or hatchery plans and staffing plans must demonstrate technical and operational feasibility.<sup>18)</sup>

## 2. Stock Acquisition Permits

Alaska Statute 16.40.120 describes the second kind of permit required for aquatic farming, an "aquatic stock acquisition" permit. Section .120 provides that "[a] person may not acquire aquatic plants or shellfish from wild stock in the state for the purpose of supplying stock to an aquatic farm or hatchery required to have a permit under AS 16.40.100 unless the person holds an acquisition permit."<sup>19</sup> An aquatic stock acquisition permit enables permit holders to acquire wild stock, but only "for the purposes of supplying stock . . . to an aquatic farm or hatchery required to have [an operating] permit under AS 16.40.100 . . . [or to] the department."<sup>20</sup> Any wild shellfish acquired under a stock acquisition permit "become the property of the permit holder and are no longer a public or common resource."<sup>21</sup>

### E. Department's Authority To Authorize Harvest of Wild Stocks

The state asserts that these statutes leave the department no authority to grant shellfish farmers a right to harvest and sell the wild geoducks already populating their farm sites. The state's argument has merit.

The act describes only two ways for the department to give — and for aquatic farmers to receive — access to wild geoduck stocks: through an operation permit issued under AS 16.40.100 or through a stock acquisition permit issued under

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<sup>18</sup> AS 16.40.105.

<sup>19</sup> AS 16.40.120(a).

<sup>20</sup> AS 16.40.120(b).

<sup>21</sup> AS 16.40.120(g).

AS 16.40.120. If the applicants have any claim to the wild stocks on their proposed sites, then, their claims must arise under these provisions.

The operation permit statute, AS 16.40.100, neither states nor implies that a right to harvest and sell wild stocks arises from an operation permit. It allows farmers to acquire and sell aquatic farm products and stock only when the products or stock are "used or reared at the hatchery or aquatic farm."<sup>22</sup> By requiring all aquatic "farm products" and "stock" acquired or sold by an aquatic farm to be "used or reared at" the farm, this provision precludes harvesting unfarmed, wild geoduck stock for the purpose of sale. Similarly, no right to harvest wild geoducks for general commercial purposes emerges under the stock acquisition permit statute, AS 16.40.120. As we have seen, stock acquisition permits issued under this section only allow their holders to acquire wild stock for limited purposes: to supply stock to the department or to a licensed aquatic hatchery or farm.<sup>23</sup>

In arguing their case before the department, the applicants proposed several theories for finding that a stock acquisition permit would authorize harvesting and selling the wild geoduck stocks on their sites. For example, pointing to the act's definition of "stock," which would only encompass geoducks that were "intended for use . . . for . . . further growth or propagation,"<sup>24</sup> the applicants suggested that the wild geoducks they intended to harvest and sell would qualify as stock covered by their acquisition permits because the geoducks would undergo "further growth" between the time the permits were issued and the time the harvest and sale occurred. Yet by

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<sup>22</sup> AS 16.40.100(b).

<sup>23</sup> AS 16.40.120(b).

<sup>24</sup> AS 16.40.199(8).

requiring stock to be “intended for use for further growth or propagation,” the statutory definition of “stock” demands something more than passive growth. Its express terms command an intent to “use” the wild stock “for” further growth. These purposive words unmistakably signal an intended use that will produce growth through action — an active “use” of the stock by the farmer “for” promoting its further growth. A mere waiting period between issuance of a permit and commercial harvest would not meet this definition.

The applicants also claimed a right to harvest existing geoduck stocks under another provision of the stock acquisition permit statute, AS 16.40.120(f). This provision directs the department to issue a stock acquisition permit if “wild stock is necessary to meet the initial needs of farm or hatchery stock.” Contending that commercially harvesting wild stocks is necessary to make geoduck farming a viable enterprise, the applicants reasoned that subsection .120(f) would allow them to receive permits to harvest wild geoduck stocks. Thus, in the applicants’ view, the department acted unlawfully in proposing to condition their permits on their willingness to surrender existing geoduck stocks.

But this argument disregards the specific terms of AS 16.40.120(f). Subsection .120(f) authorizes the department to issue acquisition permits for wild stock when necessary to meet a farm’s “initial needs of farm . . . stock.” Hence, this provision does not address a farm’s general startup needs; it only addresses a farm’s initial needs for “stock.” A “stock,” as discussed above, may only be used “for further growth or propagation.”<sup>25</sup> Here the applicants’ proposal to harvest and sell

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<sup>25</sup> *Id.*

wild geoducks from their sites and to plow their earnings back into their farms has no direct relation to their initial needs for farm stock.

Nor do the applicants' arguments fare any better under the statutory provision governing operation permits, AS 16.40.100. As already explained in discussing the relevant statutory framework, an operation permit issued under section .100 does not generally authorize geoduck farmers to sell wild geoduck stocks; instead, it only permits them to acquire or sell "stock" and "aquatic farm products" if they "are used or reared at the . . . aquatic farm." Although the applicants maintained below that their proposed harvest and sale of wild geoducks would amount to a "use" under subsection .100(b), their argument strains the statute's plain meaning beyond plausible limits. Moreover, the argument disregards the need to interpret subsection .100(b)'s references to "stock" and "aquatic farm products" in light of AS 16.40.199's provisions defining those terms: to qualify as salable "stock," a wild geoduck would have to be "intended for use by [an] . . . aquatic farm *for the purpose of further growth or propagation*"; and to qualify as "a farm product," the geoduck would have to be "propagated, farmed, or cultivated in an aquatic farm."<sup>26</sup>

In short, no provision of the aquatic farming act empowers the department to grant — or entitles the holder of an operation or stock acquisition permit to claim — exclusive rights to harvest and sell existing wild geoduck stocks. We thus conclude that the commissioner properly denied the disputed applications. Our reliance on this statutory ground makes it unnecessary to decide whether the Alaska Constitution would be violated by giving geoduck farmers exclusive rights to existing wild stocks.

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<sup>26</sup> AS 16.40.199(2) and (8).

## F. Estoppel

A final point of equity remains to be considered. The applicants assert that the department should be estopped from denying them the exclusive right to harvest wild geoducks because it repeatedly assured them that they would acquire the right with their permits. Although the department vigorously disputes the applicants' interpretation of its prior communications, we need not decide the dispute as to the meaning of the department's statements. We have previously recognized that private parties may invoke estoppel against the state in certain exceptional cases.<sup>27</sup> But when a party's request for estoppel would require the government to take unlawful or otherwise unauthorized action, we have carefully restricted the defense's use to circumstances in which the balance of equities manifestly favors the requesting party and estoppel is necessary to avoid further injustice.<sup>28</sup> Considering the totality of the circumstances here, although the department's prior representations have understandably caused considerable disappointment, we cannot say that the equities weigh heavily in the applicants' favor; nor do we see any compelling need to invoke estoppel as a means to prevent waste or avoid injustice.<sup>29</sup>

Thus, even assuming that the applicants reasonably interpreted the department's prior representations as unequivocal promises, we conclude that the

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<sup>27</sup> See, e.g., *State v. Schnell*, 8 P.3d 351, 356 (Alaska 2000); *Wassink v. Hawkins*, 763 P.2d 971, 975 (Alaska 1988).

<sup>28</sup> *Municipality of Anchorage v. Schneider*, 685 P.2d 94, 98 (Alaska 1984) (reinstating otherwise unlawful building permit by estoppel against Municipality when warranted by strong equities and necessary to avoid injustice).

<sup>29</sup> We find the applicants' reliance on *State v. Schnell* unavailing, since our ruling there simply approved an application of estoppel to temper the state's otherwise lawful disciplinary action against a licensee. 8 P.3d at 356.

balance of the equities would fall well short of justifying an order compelling the state to issue permits for exclusive fishing rights that the legislature has not authorized it to grant.<sup>30</sup>

#### **IV. CONCLUSION**

For these reasons, we **AFFIRM** the department's decision denying the disputed applications for aquatic farming permits.

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<sup>30</sup> In reaching this conclusion, we note that the applicants have advanced no claims for narrower forms of equitable relief such as money damages tailored to compensate them for direct costs actually sustained as a result of their reliance on the department's prior representations; they have demanded only the unqualified right to hold the state to its alleged promises to grant exclusive harvest rights.

AMENDMENT NUMBER 1

Offered in the Senate Resources Committee

By Senator Stedman

To CSSB 126(RES):

Page 1, Line 1: Delete entire line and insert: "An Act relating to aquatic plant and shellfish farming; and providing for an effective date."

**SB 126 Packet**

- Sponsor Statement: 1 page
- Sectional Analysis: 2 pages
- Fact Sheet: 1 page
- 3-03-05 ADF&G Letter: 1 page
- Support Letter: South East Alaska Regional Dive Fishers Ass'n.: 3 pages
- 3-15-05 Support Letter: ASGA: 2 pages
- Agreement Letter & Compromise: ASGA & SARDFSA: 3 pages
- SB 186: 4 pages
- #1 Fiscal Note: ADF&G: 3-21-05: 1 page

# ALASKA STATE LEGISLATURE

## SESSION

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Senator Bert Stedman@legis.state.ak.us



## INTERIM

50 Front Street  
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SENATOR BERT STEDMAN

## SPONSOR STATEMENT

### SB 126

**“An Act relating to aquatic farming; and providing for an effective date.”**

Senate Bill 126 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.

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 significant populations of wild geoducks on their proposed farm sites. Since then, the Southeast Alaska Regional Dive Fisheries Association (SARDF), 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. Section 1 of SB 126 amends the Aquatic Farming Act to allow shellfish farmers to own, harvest and sell “insignificant populations” of wild shellfish stocks on their aquatic farm sites.

The Department of Fish and Game is conducting a commercial dive fishery on designated mariculture sites, to remove the commercially significant population of wild geoducks from these small areas. This fishery is open to all commercial geoduck divers in Southeast Alaska. Section 2 of SB126 makes it clear that the aquatic farmers will not have to replace the shellfish that are harvested in this common property fishery.

SB 126 gives the Department the authority, when it determines it would be beneficial to do so, to let shellfish farmers remove all but an “insignificant population” of wild stock from their sites themselves and pay “reasonable compensation, as defined by the department,” to ADF&G.

The bill codifies the requirement that proposed farm sites can only get permits if there is an “insignificant population” of the shellfish species to be cultured there. It makes records and reports concerning aquaculture confidential, except in certain circumstances. In addition, SB 126 defines an “insignificant population” as one that would not support a commercial fishery.

Senate Bill 126 is supported by the Southeast Alaska Regional Dive Fisheries Association, the Alaskan Shellfish Growers' Association and the Alaska Department of Fish and Game.

*Contact: Tim Barry, Aide to Senator Bert Stedman at (907) 465-3873*

#### DISTRICT A

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Pelican • Elfin Cove • Port Alexander • Saxman • Meyers Chuck • Thorne Bay • Coffman Cove • Hollis

# LEGAL SERVICES

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

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State Capitol  
Juneau, Alaska 99801-1182  
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## MEMORANDUM

March 8, 2005

**SUBJECT:** Sectional summary of SB 126; An Act relating to aquatic farming  
(Work Order No. 24-LS0597\G)

**TO:** Senator Bert Stedman  
Attn: Tim Barry

**FROM:** George Uternohl   
Legislative Counsel

You have requested a sectional summary of SB 126; an Act 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 authorizes the permit holder to acquire ownership of, harvest, and sell wild shellfish from an aquatic farm site if the wild shellfish is present in an insignificant population and the wild shellfish is of the same species of shellfish that is intended to be cultured at the site.

Section 2 of the bill amends AS 16.40.100(e) to provide a limited exception from the requirement that an aquatic farm permit holder restore wild shellfish populations to the levels that existed on the site at the time that the permit was initially issued, so that the permit holder is not required to restore that portion of a wild shellfish population that was removed from the site by a common property fishery.

Section 3 of the bill amends AS 16.40.100 by adding a new subsection (f) to provide that the commissioner of fish and game may authorize an aquatic farm permit holder, under certain circumstances, to remove and sell excess wild shellfish from an aquatic farm site if the population of the wild shellfish species is more than an insignificant population. The permit holder is to pay reasonable compensation to the Department of Fish and Game for the harvest and sale of the excess wild shellfish. The money received by the department is to be deposited into the general fund and may be appropriated to the department for shellfish management and enhancement.

Section 4 of the bill amends AS 16.40.105 by adding a new paragraph to provide that, in addition to the existing criteria for issuance of an aquatic farm permit, the commissioner of fish and game may not issue a permit for a proposed farm site if the site contains more

Senator Bert Stedman

March 8, 2005

Page 2

than an insignificant population of a wild stock of a shellfish species intended to be cultured on the site.

Section 5 of the bill amends AS 16.40 by adding a new section (Sec. 16.40.155) to provide that, except under certain circumstances, records and reports submitted by aquatic farm and hatchery permit holders are confidential.

Section 6 of the bill amends AS 16.40.199 by adding a definition of "insignificant population."

Section 7 of the bill provides that AS 16.40.105, as amended by sec. 4 of the bill, does not apply to aquatic farm permits issued before the effective date of this bill.

Section 8 of the bill provides that this bill takes effect July 1, 2005.

GU:med

05-161.med



# Alaska State Legislature

Senate Majority Web: [www.akrepublicans.org](http://www.akrepublicans.org)

Sponsor: Senator Bert Stedman  
Current Version: SB 126  
Contact: Tim Barry, 465-3873

## Fact Sheet for: Senate Bill 126

**Short Title:** DIVE FISHERY MANAGEMENT ASSESSMENT

### Summary:

- Amends state Aquatic Farming Act so shellfish farms can harvest "insignificant" numbers of wild geoducks within aquatic fish farm areas.
- Permits Alaska Department of Fish & Game to hold commercial geoduck dive fisheries within shellfish farm areas.
- Prevents shellfish farmers from replacing wild geoduck stocks harvested during commercial dive opening.

### Benefits:

- Creates a win-win situation for shellfish farmers, commercial dive fishermen and the state.
- Settles a long running legal dispute regarding wild geoduck stocks within shellfish farm areas.

### Background:

- In April 2004, the Alaska Supreme Court ruled the Aquatic Farming Act prevents shellfish farmers from having exclusive rights to wild geoduck stocks within their farm area. A deal was struck between the Alaska Department of Fish & Game, the Alaskan Shellfish Growers Association and the Alaska Regional Dive Fisheries Association that allows shellfish farmers to harvest an "insignificant" amount of wild geoducks located within farm areas. The department will also hold commercial geoduck dive fish openings inside shellfish farm areas. SB 126 also prevents shellfish farmers from having to replace wild stocks of geoducks.

# STATE OF ALASKA

FRANK H. MURKOWSKI  
GOVERNOR

DEPARTMENT OF FISH AND GAME  
OFFICE OF THE COMMISSIONER

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

March 3, 2005

The Honorable Bert Stedman  
Alaska State Legislature  
Room 30; State Capitol  
Juneau, AK 99801

Dear Senator Stedman:

Thank you for introducing S.B. 126 on behalf of the Southeast Alaska Regional Dive Fisheries Association and the Alaska Shellfish Growers Association. As you know, passage of this legislation carries significant implications for the success of Alaska's mariculture industry.

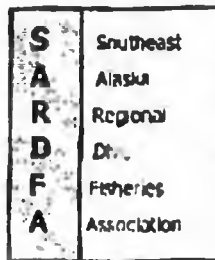
Under the previous administration, Alaska's mariculture industry was largely ignored. The industry, which was constantly at odds with the Alaska Department of Fish and Game (ADF&G) over regulatory matters, was unable to get the support that it needed from the Governor's office to move forward. As the introduction of S.B. 126 demonstrates, this is no longer the case. The Murkowski Administration strongly supports Alaska's mariculture industry, in part, because it provides promising economic development opportunities for Alaska's fishermen and coastal communities. Over the last two years, ADF&G has been working cooperatively with the industry on a regulatory scheme that will foster the growth of the industry.

However, ADF&G's regulatory work and the industry's ability to develop have recently been slowed by a series of court rulings. The first of these, in the Superior Court, found that the state is required to provide access to insignificant amounts of naturally occurring shellfish to aquatic farmers. The most recent ruling by the Alaska Supreme Court found that existing statutes prevent ADF&G from allocating any naturally occurring stocks to aquatic farmers who are developing new sites, except for use as brood stock.

As you have recognized through the introduction of S.B. 126, in order for this industry to be successful, aquatic farmers should have the opportunity to plant crops where some level of natural stocks already occur. Therefore, ADF&G strongly supports the expeditious passage of S.B. 126 in order to clarify that ADF&G may indeed allocate "insignificant" numbers of wild stocks of shellfish to aquatic farmers. Thank you once again for your support on this matter.

Sincerely,

  
Wayne Regelin  
Acting Commissioner



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

Alic Derker, Executive Director  
Box 2130, Wrangell, AK 99929  
Ph: 907-874-3110; Fax: 907-874-4270  
Info@sardfa.org  
www.sardfa.org

Co-Chairs of the House Fisheries Committee  
Representative Gabrielle LeDoux  
Representative Bill Thomas

March 16, 2005

**RE: Support for HB 198 / SB 126 – Aquatic Farming**

Dear Representatives LeDoux and Thomas,

I am writing on behalf of the Southeast Alaska Regional Dive Fisheries Association (SARDFA) to support HB 198 / SB 126, companion bills related to aquatic farming. SARDFA is a non-profit, economic development corporation whose mission is to develop, expand and enhance new and existing dive fisheries in Southeast Alaska. SARDFA's Board of Directors represents the commercial harvest divers, processors, and communities of Southeast. Currently, three dive fisheries exist in Southeast: sea urchins (80 permit holders), sea cucumbers (330 permit holders), and geoducks (80 permit holders).

Over the past six years, there has been a deep controversy over which group has the right to harvest the wild stocks of geoducks on farm sites: farmers or fishermen. Judge Thompson ruled that insignificant wild geoducks could be taken by farmers, and significant stocks, or those that would "attract and support a dive fishery", could be taken by the common property dive fishery.

Last April, the Alaska Supreme Court upheld the Thompson ruling, but further stated "the department lacked statutory authority to give aquatic farmers exclusive rights to the existing wild stocks". Since then, ***SARDFA has worked with the State and the farmers to compromise on an acceptable implementation of the Courts' rulings. HB 198 / SB 126 are the result of that work.***

HB 198 / SB 126 are necessary for three reasons. First, this legislation will give the department the statutory authority to allow aquatic farmers to harvest insignificant wild stocks on sites. Second, this legislation will end confusion for farmers, the department, and the courts regarding approval or denial of future farm applications. Third, this legislation will deal with the mess leftover by inconsistent decisions regarding the siting

of the current 20-30 geoduck farm permits by allowing farmers who have already planted on sites, which may contain more than an insignificant amount of wild stocks, to harvest those stocks and pay "reasonable compensation" to the state as a levy.

SARDFA understands the farmers also support this legislation, but would like to see the bill amended to specify the amount of "reasonable compensation" (Section 3, line 19). SARDFA does not believe it is necessary to set this "reasonable compensation", or levy, in statute. As the Department of Law has explained it, the State is approaching the development of this particular resource in a completely new way with this levy and SARDFA believes it would be more practical to allow flexibility to the Department of Fish and Game (ADF&G) to set the levy in regulations.

However, if the Legislature believes it is necessary to fix the levy in statute, **SARDFA strongly encourages the Legislature to set the levy as high as possible**. SARDFA believes the higher the levy is, the smaller the net profit to the farmer will be, and consequently the less incentive there will be to the farmer to poach wild geoducks from off of farm sites. Poaching of geoducks by licensed farms in remote areas of Alaska is a serious concern for SARDFA. Geoduck poaching has been a big problem for the State of WA, as a quick search on the Google web site will show you. Proper enforcement of farm site boundaries relative to the harvest of wild stock is highly unlikely for farmers operating 365 days per year. In other words, what's to stop a farmer from sliding down the beach a half mile from his farm site to harvest wild geoducks, making a substantial profit?

The Alaska Shellfish Growers' Association (ASGA) agreed to a compromise with SARDFA last spring. Part of that compromise states: "In the event a site contains more than 12,000 pounds (of geoducks), the farmers would be allowed to harvest everything, but the net proceeds from anything over the cap (12,000) 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" (see attached compromise). Although this agreement does not state the exact rate of levy, the essence of the agreement is that there should be **no net profit** by farmers on wild stocks that are considered significant, or common property resource.

Farmers have suggested setting the levy at 30% of the average ex-vessel value (or price paid to fishermen) during the most recent commercial fishery. However, farmers are not fishermen. Farmers are a combination of fishermen and processors, and will receive a price similar to the first wholesale value that processors in the geoduck fishery receive. Therefore, if the levy is based on the ex-vessel value, the rate should be higher to reflect the difference between the values.

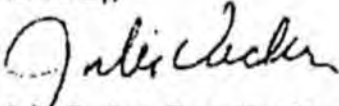
In comparison, the last geoduck auction held by the State of Washington (WA) on January 6, 2005, saw high bidders pay the State of WA an average of \$6.61 per pound for the right to harvest wild geoducks. If an average first wholesale value for live geoducks was approximately \$8 per pound, the "compensation" paid to the State of WA for wild geoducks would be 82.6% of the first wholesale value. SARDFA recommends setting the levy at 80% of the average ex-vessel value of the most recent commercial

fishery, which is one step below the wholesale value and would properly allow for fluctuations in the market.

The most important concept to remember when discussing the rate of levy is that a higher rate will give less incentive to farmers to poach geoducks.

Thank you for your time and consideration. SARDFA supports passage of this bill in its current form.

Sincerely,



Julie Decker, Executive Director

Members of:  
Southeast Conference  
United Fishermen of Alaska  
Pacific Coast Shellfish Growers' Assoc.  
Interstate Shellfish Sanitation Conference

Cc: Senator Bert Stedman  
Representative Jim Elkins  
Alan Austerman, Governor's Fisheries Policy Advisor  
Tim Barry, Aid to Senator Stedman  
Jim Van Horn, Chief of Staff, Rep. Elkins  
David Bedford, Deputy Commissioner, ADF&G  
Sarah Gilbertson, Legislative Liaison, ADF&G  
Rodger Painter, Vice-President, ASGA  
Mark Vinsel, Executive Director, UFA  
Bobby Thorstenson, President, UFA  
Board of Directors, SARDFA

# Alaskan Shellfish Growers ASSOCIATION



March 15, 2005

**Representative Jim Elkins  
Room 416  
State Capitol  
Juneau, AK 99801**

**Dear Representative Elkins:**

This letter is to provide a strong endorsement of House Bill 198 and your efforts to seek resolution of the long-standing controversy over the siting of geoduck clam farms in Alaska.

The Alaskan Shellfish Growers Association (ASGA) has been trying to resolve this bitter controversy for the past eight years as it spilled over into the court system, halls of the Capitol and front pages of local newspapers. The industry, state regulators, policymakers, commercial fishermen and the court system have invested innumerable hours wrestling with the difficult issues involved, and we're delighted at the opportunity to put the issue to bed.

Since a decision by the Alaska Supreme Court last spring, ASGA has been working closely with commercial fishermen and the Murkowski Administration to fashion a compromise acceptable to all parties. The result of this cooperative work is HB 198, which has support from farmers, commercial fishermen, Departments of Fish and Game and Law, and Governor Frank Murkowski. While there are many issues upon which we'll continue to disagree, we all support the concepts contained in HB198.

The Department of Law has determined that the legislation does adequately address the issues raised by the Alaska Supreme Court in its 2004 decision. Some of the details wisely are left to be fleshed out in regulation, but ASGA thinks there is one more issue that is best decided by the legislature: the amount of compensation a farmer should pay for harvest of "standing stocks" of wild geoduck clams on the farmsite.

The new section HB 198 adds to AS 16.40.100 is designed to allow farmers to remove "standing stocks" from the farmsite, and provides that the farmer must pay "reasonable compensation" for any "excess wild stock." While we think it is appropriate that harvest of these "excess wild stocks" would result in a tax on the farmer, ASGA believes the amount of "fair compensation" is a legislative prerogative and not a decision to be made by fisheries managers.

We are preparing a proposed amendment to set an extraction tax rate on harvests of "excess wild stocks" of geoduck clams at 30 percent of the price paid fishermen during the most recent commercial fishery. This tax would be added to the Fisheries Business Tax rate of three percent paid by other harvesters. This combined tax rate would exceed the amount the state collects on Prudhoe Bay oil, including severance taxes, royalties and corporate income tax, and is several times higher than the amount paid by other

Rodger Painter • P.O. Box 20704 Juneau, AK 99802-0704 • Phone: (907) 463-3600  
Fax: (907) 586-1097 • Cell: (907) 957-0704 • email: [rodgerpainter@hotmail.com](mailto:rodgerpainter@hotmail.com)

**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.

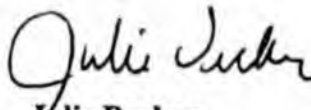
We urge quick action in approving the legislation and adopting the regulations necessary to carry out the agreement.

Sincerely,



**Rodger Painter**

**ASGA vice president**



**Julie Decker**

**SARDFA executive director**

# Alaskan Shellfish Growers ASSOCIATION



March 15, 2005

**Representative Jim Elkins  
Room 416  
State Capitol  
Juneau, AK 99801**

**Dear Representative Elkins:**

This letter is to provide a strong endorsement of House Bill 198 and your efforts to seek resolution of the long-standing controversy over the siting of geoduck clam farms in Alaska.

The Alaskan Shellfish Growers Association (ASGA) has been trying to resolve this bitter controversy for the past eight years as it spilled over into the court system, halls of the Capitol and front pages of local newspapers. The industry, state regulators, policymakers, commercial fishermen and the court system have invested innumerable hours wrestling with the difficult issues involved, and we're delighted at the opportunity to put the issue to bed.

Since a decision by the Alaska Supreme Court last spring, ASGA has been working closely with commercial fishermen and the Murkowski Administration to fashion a compromise acceptable to all parties. The result of this cooperative work is HB 198, which has support from farmers, commercial fishermen, Departments of Fish and Game and Law, and Governor Frank Murkowski. While there are many issues upon which we'll continue to disagree, we all support the concepts contained in HB198.

The Department of Law has determined that the legislation does adequately address the issues raised by the Alaska Supreme Court in its 2004 decision. Some of the details wisely are left to be fleshed out in regulation, but ASGA thinks there is one more issue that is best decided by the legislature: the amount of compensation a farmer should pay for harvest of "standing stocks" of wild geoduck clams on the farmsite.

The new section HB 198 adds to AS 16.40.100 is designed to allow farmers to remove "standing stocks" from the farmsite, and provides that the farmer must pay "reasonable compensation" for any "excess wild stock." While we think it is appropriate that harvest of these "excess wild stocks" would result in a tax on the farmer, ASGA believes the amount of "fair compensation" is a legislative prerogative and not a decision to be made by fisheries managers.

We are preparing a proposed amendment to set an extraction tax rate on harvests of "excess wild stocks" of geoduck clams at 30 percent of the price paid fishermen during the most recent commercial fishery. This tax would be added to the Fisheries Business Tax rate of three percent paid by other harvesters. This combined tax rate would exceed the amount the state collects on Prudhoe Bay oil, including severance taxes, royalties and corporate income tax, and is several times higher than the amount paid by other

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harvesters.

Important to keep in mind is that the tax would affect only those situations where fisheries managers misjudged the amount of standing stocks on new farmsites and that new survey techniques supported by fishermen and farmers would help improve significantly the accuracy of these estimates.

Thank you for this opportunity to resolve this long-standing controversy. The major parties in this dispute are fully committed to setting aside past differences and working together on economic development strategies for Southeast Alaska.



**Rodger Painter**  
**Vice President**

c.c. Julie Decker, SARDFA  
Alan Austerman  
David Bedford  
ASGA Board of Directors

**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.

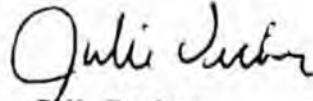
Both organizations are committed to supporting the implementation of the provisions of the agreement, including the passage of legislation and adoption of regulations.

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

## **Description of ASGA-SARDFA Compromise**

The Alaskan Shellfish Growers Association (ASGA) and Southeast Alaska Regional Divers Fisheries Association (SARDFA) 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.

## 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.

SENATE BILL NO. 126

IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY SENATOR STEDMAN

Introduced: 3/2/05  
Referred: Judiciary, Resources

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

9 (2) except as provided in (f) of this section, acquire ownership of,  
10 harvest, and, without further cultivation, sell an insignificant population that  
11 intended to be cultured at the site [. A PERSON WHO HOLDS A PERMIT  
12 UNDER THIS SECTION MAY SELL OR OFFER TO SELL SHELLFISH STOCK  
13 TO THE DEPARTMENT OR TO AN AQUATIC FARM OR RELATED  
14 HATCHERY OUTSIDE OF THE STATE].  
15

*Deleted*

ec. 2. AS 16.40.100(e) is amended to read:

(e) Upon the expiration or termination of a permit issued under this section, a person who holds a permit for an aquatic farming site where wild stocks of shellfish indigenous to the site are cultured shall, as a condition of the permit, restore the wild stock of shellfish, as consistent with sustained yield management of the wild stock, to the population level that existed on the site when the permit for the site was initially issued by the commissioner. A permit holder is not required to restore that portion of the wild stock of shellfish that was removed from an aquatic farming site by a common property fishery conducted after the issuance of the permit for the aquatic farming site.

\* Sec. 3. AS 16.40.100 is amended by adding a new subsection to read:

(f) If the wild stock of a shellfish species to be cultured at an aquatic farm site exceeds the amount determined by the department to be an insignificant population and if the commissioner determines in writing that removal from the site of that portion of the stock that exceeds an insignificant population would benefit the public and that removal of the stock by a person other than the permittee would unreasonably interfere with the operation of the aquatic farm, the commissioner may authorize the permittee to remove and sell the excess amount of the wild stock from the site, if the permittee pays reasonable compensation, as defined by the department, to the department for the harvest and sale of the excess wild stock. The department shall deposit the money received under this subsection into the general fund. The legislature may appropriate the money received under this section to the department for shellfish management and enhancement.

\* Sec. 4. AS 16.40.105 is amended to read:

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

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

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

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

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

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

8 \* Sec. 5. AS 16.40 is amended by adding a new section to read:

9 **Sec. 16.40.155. Records and reports confidential.** Records required by  
10 statute or by a regulation adopted by the department concerning aquatic farm stocks or  
11 production, prices, and harvests of aquatic farm products and wild stocks, and annual  
12 statistical reports of individual aquatic farms or hatcheries required by statute or by a  
13 regulation adopted by the department are confidential and may not be released by the  
14 department, except that the department may release the records and reports

15 (1) to the Department of Revenue and the Department of Natural  
16 Resources to assist the departments in carrying out their respective statutory  
17 responsibilities;

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

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

21 (4) regarding cumulative annual harvests of wild stocks at individual  
22 aquatic farm sites.

23 \* Sec. 6. AS 16.40.199 is amended by adding a new paragraph to read:

24 (9) "insignificant population" mean a population of shellfish that, in  
25 the determination of the commissioner, would not attract and support a commercial  
26 fishery for that species of shellfish and the harvest and sale of the shellfish would not  
27 result in significant alteration in traditional fisheries or other existing uses of fish and  
28 wildlife resources if the population were included within an aquatic farm site.

29 \* Sec. 7. The uncodified law of the State of Alaska is amended by adding a new section to  
30 read:

31 **APPLICABILITY.** Until expiration or termination of the permit, AS 16.40.105.

1 added by sec. 4 of this Act, does not apply to an aquatic farm permit issued under  
2 AS 16.40.100 before the effective date of this Act.

3 \* Sec. 8. This Act takes effect July 1, 2005.

# FISCAL NOTE

**STATE OF ALASKA**  
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: SB 126  
 (S) Publish Date: 3/24/05

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Fish and Game  
 Title: An act relating to aquatic RDU: Commercial Fisheries  
and providing for an effective date Component: Fisheries Development  
 Sponsor: Senator Bert Stedman  
 Requester: Senate Judiciary Committee Component No: 1942

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

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

Estimate of any current year (FY2005) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

Prepared by: Sarah Gilbertson  
 Division: Legislative Liaison  
 Approved by: Acting Commissioner Wayne Regelin  
 Agency: Alaska Department of Fish & Game

Phone: 465-6137  
 Date/Time: 3/21/05 10:32 AM  
 Date: 3/21/2005

# FISCAL NOTE

**STATE OF ALASKA**  
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: SJR 16  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_  
 Title: "Supporting legislation before the United States Congress that reaffirms the right of the states..."  
 Sponsor: Senator Therriault  
 Requestor: Senate Resources  
 Dep: Affected: Legislature  
 BRU: Legislative Council  
 Component: Council and Subcommittees  
Session Expenses  
 Component No: 783

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
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<b>CHANGE IN REVENUES ( )</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
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**FUND SOURCE** (Thousands of Dollars)

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

Estimate of any current year (FY2004) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary.)

This legislation has zero fiscal impact on the Legislative Affairs Agency.

Prepared by: Karla Schofield, Deputy Director Phone 465-6626  
 Division: Administrative Services Date/Time 4/1/05 9:04 AM  
 Approved by: Pamela Varni, Executive Director Date 4/1/2005  
 Agency: Legislative Affairs Agency

**CS FOR HOUSE BILL NO. 198(RES)**  
**IN THE LEGISLATURE OF THE STATE OF ALASKA**  
**TWENTY-FOURTH LEGISLATURE - FIRST SESSION**

**BY THE HOUSE RESOURCES COMMITTEE**

**Offered: 4/1/05**  
**Referred: Rules**

**Sponsor(s): REPRESENTATIVE ELKINS**

**A BILL**

**FOR AN ACT ENTITLED**

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

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

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

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

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

9 (2) except as provided in (f) of this section, harvest and, without  
10 further cultivation, sell an insignificant population that may be present at the  
11 aquatic farm site of a wild stock of a shellfish species intended to be cultured at  
12 the site [. A PERSON WHO HOLDS A PERMIT UNDER THIS SECTION MAY  
13 SELL OR OFFER TO SELL SHELLFISH STOCK TO THE DEPARTMENT OR TO  
14 AN AQUATIC FARM OR RELATED HATCHERY OUTSIDE OF THE STATE].

15 **\* Sec. 2.** AS 16.40.100(c) is amended to read:

1 (c) Upon the expiration or termination of a permit issued under this section, a  
 2 person who holds a permit for an aquatic farming site where wild stocks of shellfish  
 3 indigenous to the site are cultured shall, as a condition of the permit, restore the wild  
 4 stock of shellfish, as consistent with sustained yield management of the wild stock, to  
 5 the population level that existed on the site when the permit for the site was initially  
 6 issued by the commissioner. A permit holder is not required to restore that  
 7 portion of the wild stock of shellfish that was removed from an aquatic farming  
 8 site by a common property fishery conducted after the issuance of the permit for  
 9 the aquatic farming site.

10 \* Sec. 3. AS 16.40.100 is amended by adding a new subsection, to read:

11 (f) If the wild stock of a shellfish species to be cultured at an aquatic farm site  
 12 exceeds the amount determined by the department to be an insignificant population  
 13 and if the commissioner determines in writing that removal from the site of that  
 14 portion of the stock that exceeds an insignificant population would benefit the public  
 15 and that removal of the stock by a person other than the permittee would unreasonably  
 16 interfere with the operation of the aquatic farm, the commissioner may authorize the  
 17 permittee to remove and sell the excess amount of the wild stock from the site, if the  
 18 permittee pays reasonable compensation, as defined by the department, to the  
 19 department for the harvest and sale of the excess wild stock. The department shall  
 20 deposit the money received under this subsection into the general fund. The  
 21 legislature may appropriate the money received under this section to the department  
 22 for shellfish management and enhancement.

23 \* Sec. 4. AS 16.40.105 is amended to read:

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

26 (1) the physical and biological characteristics of the proposed farm or  
 27 hatchery location must be suitable for the farming or the shellfish or aquatic plant  
 28 proposed;

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

31 (3) the proposed farm or hatchery may not significantly affect

1 fisheries, wildlife, or their habitats in an adverse manner; [AND]

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

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

7 \* Sec. 5. AS 16.40 is amended by adding a new section to read:

8 **Sec. 16.40.155. Records and reports confidential.** Records required by  
9 statute or by a regulation adopted by the department concerning aquatic farm stocks or  
10 production, prices, and harvests of aquatic farm products and wild stocks, and annual  
11 statistical reports of individual aquatic farms or hatcheries required by statute or by a  
12 regulation adopted by the department are confidential and may not be released by the  
13 department, except that the department may release the records and reports

14 (1) to the Department of Revenue and the Department of Natural  
15 Resources to assist the departments in carrying out their respective statutory  
16 responsibilities;

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

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

20 (4) regarding cumulative annual harvests of wild stocks at individual  
21 aquatic farm sites.

22 \* Sec. 6. AS 16.40.199 is amended by adding a new paragraph to read:

23 (9) "insignificant population" means a population of shellfish that, in  
24 the determination of the commissioner, would not attract and support a commercial  
25 fishery for that species of shellfish and the harvest and sale of the shellfish would not  
26 result in significant alteration in traditional fisheries or other existing uses of fish and  
27 wildlife resources if the population were included within an aquatic farm site.

28 \* Sec. 7. The uncodified law of the State of Alaska is amended by adding a new section to  
29 read:

30 **APPLICABILITY.** Until expiration or termination of the permit, AS 16.40.105,  
31 added by sec. 4 of this Act, does not apply to an aquatic farm permit issued under

- 1 AS 16.40.100 before the effective date of this Act.
- 2 \* **Sec. 8.** This Act takes effect July 1, 2005.