

ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672

10157 ADMINISTRATIVE REGULATION REVIEW

2



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## Administrative Regulation Review Committee

### AGENDA

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

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

**\*This Hearing will be teleconferenced**



# Administrative Regulation Review Committee

## SIGN-IN

### Subject of Meeting

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

Official Business

Date: Feb. 01, 2001

PLEASE PRINT

Pg 1 of \_\_\_\_\_

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



**SITE: Seward LIO**

**COMMITTEE:**

Admin. Reg. Review

**DATE: 2/01/2001**

**SUBJECT OF MEETING:**

Shellfish Regulations

**UPDATE #:**



# PLEASE SIGN IN

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**NAME**

**ADDRESS (MAILING & ZIP)**

**REPRESENTING**

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

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









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



\* Requires Acrobat Reader

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

### REPORT CONCLUSIONS

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

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

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

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

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

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

## FINDINGS AND RECOMMENDATIONS

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



\* Requires Acrobat Reader



October 23, 2000

Members of the Legislative Budget  
and Audit Committee:

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

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

October 23, 2000

Audit Control Number  
11-30002-01

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

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

Pat Davidson, CPA  
Legislative Auditor

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## OBJECTIVES, SCOPE, AND METHODOLOGY

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

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

### Objectives

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

### Scope and Methodology

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

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

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

Toward that end, we reviewed the following documents:

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

We also interviewed the following individuals:

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

## ORGANIZATION AND FUNCTION

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

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

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

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

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

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

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

#### Mariculture Oversight and Assistance

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

## BACKGROUND INFORMATION

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

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

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

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

### Critical habitat area management plans developed from Alaska Statute

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

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

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

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

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

The initial aquatic farm sites involved suspension-type operations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

up demand for such permits when the application window was reopened in January 1999. At that time DNR received more than 40 applications<sup>1</sup> for aquatic farming leases.

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

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

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

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

or

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

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

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

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

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

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

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

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## REPORT CONCLUSIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Inconsistent with the requirements of AFA.

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

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

**Exhibit 1**

**AFA Establishes Four Criteria for Issuance of an Aquatic Farm Permit**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Operational viability of the Qutekcak Shellfish Hatchery has been jeopardized

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

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

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

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

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

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

## FINDINGS AND RECOMMENDATIONS

### Recommendation No. 1

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

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

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

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

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

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

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

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

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

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

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

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

## Exhibit 2

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

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

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

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

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

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

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

#### Recommendation No. 2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Recommendation No. 3

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

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

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

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

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

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

#### Recommendation No. 4

##### DFG should foster staff awareness of potential conflicts of interest.

Certain staff members with an apparent potential conflict of interest reviewed authorizations of geoduck and littleneck clam farm sites operating permit applications. These conflicts involved financial and personal interests<sup>6</sup> that could have been adversely affected by approval of the permits.

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

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

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

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

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

#### Recommendation No. 5

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

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

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

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

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

# STATE OF ALASKA

## DEPARTMENT OF FISH AND GAME

*Office of the Commissioner*

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December 28, 2000

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

Dear Ms. Davidson:

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

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

### Use of Common Property Resources

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

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

#### On-bottom Farming in Kachemak Bay Critical Habitat Area

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

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

#### Efforts by DFG to Implement AFA

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

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

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

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

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

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

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

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

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

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

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

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

### Misinterpretation of State Law

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

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

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

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

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

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

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

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

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

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

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

#### Comparison of Commercial Dive Fishery and Aquatic Farming Not Valid

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

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

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

#### DFG Policies Do Not Jeopardize Shellfish Hatchery

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

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

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

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

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

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

#### DFG Inconsistencies

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

#### Permitting of on-bottom farming

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

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

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

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

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

#### Promotion of aquatic farming

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

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

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

#### Recommendation No. 1:

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

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

#### Recommendation No. 2:

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

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

Recommendation No. 3:

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

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

Recommendation No. 4:

DFG should foster staff awareness of potential conflicts of interest.

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

Recommendation No. 5:

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

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

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

Sincerely,

Frank Rue  
Commissioner

Pat Davidson

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December 28, 2000

Drafted by Kevin Brooks  
CO Log Item #7501

cc: Doug Mecum  
Ken Taylor  
Division of Administration  
Shawn Hunstock

# STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES  
OFFICE OF THE COMMISSIONER

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December 21, 2000

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Ref: Audit Control No 11-30002-01

Dear Ms. Davidson:

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

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

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

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

Sincerely,

Carol Carroll  
Director

Cc: Pat Pourchot  
Bob Loeffler  
Nancy Welch  
Kim Kruse

January 4, 2001

Members of the Legislative Budget  
and Audit Committee

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

Pat Davidson, CPA  
Legislative Auditor

5 AAC 41.200 is amended to read:

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

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

5 AAC 41.210 is repealed:

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

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

5 AAC 41.220 is repealed and readopted to read:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Authority: AS 16.05.050 AS 16.40.100 AS 16.40.160  
AS 16.05.092

5 AAC 41 is repealed and readopted to read:

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

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

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

5 AAC 41.240 is repealed and readopted to read:

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

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

(1) the proposed site:

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

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

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

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

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

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

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

(2) the proposed site is

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

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

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

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

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

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

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

(3) the proposed site or facility

(A) will disrupt or adversely affect

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

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

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

(iv) salmon milling, spawning, or rearing;

(v) maintenance of kelp or eelgrass beds;

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

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

(viii) harbor seal rookeries

(B) is within

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

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

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

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

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

AAC 95.

(4) the applicant cannot

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

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

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

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

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

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

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

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

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

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

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

Authority: AS 16.05.050 AS 16.40.105 AS 16.40.160

5 AAC 41.250 is repealed and readopted to read:

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

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

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

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

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

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

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

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

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

Authority: AS 16.05.050 AS 16.40.100 AS 16.40.160  
AS 16.05.092

5 AAC 41.260 is repealed and reenacted to read:

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

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

Authority: AS 16.05.050 AS 16.40.100 AS 16.40.160

AS 16.05.092

AS 16.40.150

5 AAC 41.270 is repealed and readopted to read:

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

Authority: AS 16.05.050

AS 16.40.100

AS 16.40.160

AS 16.05.092

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

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

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

Authority: AS 16.05.050 AS 16.40.100 AS 16.40.160  
AS 16.05.292

5 AAC 41.280 is repealed and readopted to read:

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

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

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

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

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

Authority: AS 16.05.050 AS 16.40.100 AS 16.40.110

AS 16.05.092 AS 16.40.105 AS 16.40.160

[AS 16.05.340 (b)]

5 AAC 41.290 is repealed and readopted to read:

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

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

(5) when the wild stock will be collected;

(6) the purpose for which the wild stock will be used;

(7) the names of the vessel and its operator(s) if other than the persons conducting the collections,

(8) the kind of gear and the methods to be used for acquiring the wild stock;

(9) the location from which the wild stock will be taken; and

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

(11) other information that may be required by the department.

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

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

(1) give reasonable notice to the department before engaging in collection activities.

(2) report the results of wild stock collection activity to the department;

(3) submit samples of wild stock collected to the state fish pathology laboratory to establish a disease history of the wild stock collected, prior to the transfer of the wild stock to an aquatic farm or shellfish hatchery;

(4) give reasonable notice to the department before transferring wild stock to an aquatic farm or shellfish hatchery; and

(5) comply with 5 AAC 41.245 prior to the harvest of enhanced wild stock.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 AAC 41.300 is repealed:

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

Authority: AS 16.40.140

5 AAC 41.400 is repealed and readopted to read:

**5 AAC 41.400. DEFINITIONS.**

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

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

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

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

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

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

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

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

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

(10) "established use" means;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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**5 AAC 41.200 APPLICABILITY OF REGULATIONS**

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

**Recommendation:** Delete references to shellfish hatcheries.