

ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672

10158 ADMINISTRATIVE REGULATION REVIEW

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## **5 AAC 41.220 AQUATIC FARM AND SHELLFISH HATCHERY OPERATION PERMIT APPLICATIONS.**

### **Overview**

Much of the draft regulation pertaining to applications is un-necessarily detailed. To include all application details in regulation will result in a long, difficult and costly process when even small changes are necessary. The extensive application requirements will create a tremendous burden not only on the applicant to produce the information, but also on the department to evaluate the information. This is a time when ADF&G should be streamlining in all areas, not creating huge amounts of paper to be passed between reviewers. If Alaska is to promote an aquatic farm industry, reasonable and workable regulations are needed. Most of this draft is neither.

Further, we recommend ADF&G draft a site plan with the information required in (c)(6)(A)-(P). The map would be so cluttered with detail that it would be incomprehensible. The requirements are so excessive that several site plans would be necessary to convey the information.

Finally, and most significant perhaps, where does ADF&G get the authority to promulgate regulations covering DNR, DEC and DGC responsibilities? If the other agencies wish to revise application forms, they will have to ask ADF&G to revise its regulations. In addition to exceeding its authority in drafting regulations for other agency responsibilities, this approach would effectively make ADF&G the lead regulatory agency in the siting process, replacing DNR.

### **Recommendation:**

Delete the entire section and replace with the following: "Applicants 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."

### **Subsection (c)(6)(B)**

Subsection (B) is covered sufficiently on other sections. (N) and (M) cover species distribution and mapping of the area intended for use. (10) requires a photograph of the area to be used. ADF&G personnel have stated that photographs alone should be sufficient to judge the biological make up of a beach.

How does the exact location of barnacles or mussels on a beach aid in the consideration of an application? This is unnecessary detail that will add significantly to the amount of time involved in preparing and reviewing applications.

**Recommendation:** Delete

**Subsection (c)(6)(D)**

The applicant should disclose the location of the culture gear and what general type of gear is to be used: floating gear or on-bottom gear. Any information beyond this is more detail than ADF&G needs. ADF&G has no expertise to judge the various gear types available to the grower. Whether the farmers chose square nets or round lantern nets or wire mesh trays, is individual choice and nobody profits by ADF&G overview of this choice.

**Recommendation:**

Replace with the following: "(D) the type of culture gear (whether floating or on-bottom) and location, and configuration of culture gear and support structures proposed for use in the farming or hatchery operations;"

**Subsection (c)(6)(E)**

Any site in coastal Alaska water has potential for use in aquaculture. Even relatively open water such as Frederick Sound could be utilized if the proper gear and culture species is chosen. Who is better to make these decisions than the applicant? ADF&G has no expertise by which to judge a particular mariculture site base upon meteorological or sea conditions.

**Recommendation:** Delete

**Subsection (c)(6)(G)**

A requirement to fix the location to the nearest hundredth of a minute will require many applicants to purchase expensive GPS equipment or upgrade existing equipment. Since most of these parcels are located in very remote areas where there are few conflicts, it's difficult to justify this exact a location. Why does ADF&G require such specificity when DNR is willing to lease a parcel of tidelands with less?

**Recommendation:**

Make ADF&G site location requirements consistent with ADNR.

**Subsection (c)(6)(H)**

This is an excessive burden on the applicant. What other developments are required to determine legal ownership of all land within ½ mile on either side? That means land ownership along at least 1 mile of beach. Ownership of many miles of beach would have to be researched if the application was in an area with multiple islands. The

land ownership immediately adjacent to the proposed development must be determined. However, other landowners can protect their interests by joining in the public process.

**Recommendation:**

Delete and replace with the following: "(H) the names and addresses of upland property owners adjacent to the proposed site and the location of their property in relationship to the site;"

**Subsection (c)(6)(I)**

Any proposed mariculture use should not interfere with current uses. However, past uses are generally unknown and irrelevant. Current activities in the area should be identified, but not necessarily considered as being incompatible with aquatic farming.

**Recommendation:**

Delete and replace with: "(I) the location and type of all known present human uses of marine resources and adjacent uplands, and on the proposed site, including commercial fishing, personal and subsistence use, and recreation;"

**Subsection (c)(6)(L)**

The use of process and domestic water (sanitary purposes) is regulated by ADEC. This is outside of ADF&G jurisdiction, duplicate regulation is not needed.

**Recommendation:** Delete.

**Subsection (c)(6)(M) and (N)**

Sections (M), (N) and parts of (B) should be combined and simplified. What exactly does ADF&G need to know to protect habitat? The suggested detail in these three sections is overwhelming.

**Recommendation:**

Delete. Re-write, combining the elements of (B), (M) and (N) as follows:  
"an overview of major marine biotic communities of the site, including:  
(1) a general description of the area of interest with accompanying photographs labeling physical and biological features,  
(2) a biomass estimate of the species of interest,  
(3) description of the major "non-target" species, and  
(4) an overhead map showing the culture area and identifying areas that cannot be used for culture purposes (mud/eelgrass, large rock etc.). Also note the relative area which will not be used for culture activities due to unsuitable habitat

**Subsection (c)(7)(A)**

This section may sound easy enough for a beach area. However, multiple cross sectional drawings for multiple sites within a lease would be repetitive without contributing new information. Cross sectional drawings should be limited to no more than a representative drawings.

**Recommendation:**

Delete and replace with the following: "support structures or facilities, such as suspended culture gear and anchoring systems necessary to conduct the proposed activities, limited to a representative drawing of each different system;"

**Subsection (c)(7)(B)**

Seabed mapping of the physical and biological features could be dauntingly expensive task for any lease. Limiting cross section views to no more than two will provide much detail into site development plans. One depth reading per acre and a general description of bottom type (rock, mud, sand) will adequately describe the area and provide insight into biological features.

**Recommendation:**

Delete and replace with the following: "not more than one water depth per acre, taken at MLW, and a description of the bottom type (rock, cobble, mud, sand)."

**Subsection (c)(10)**

**Recommendation:** Delete. This requirement is covered in section (6)(N), above.

**Subsection (c)(12)**

ADF&G must recognize the experimental nature of mariculture in Alaska. Even after years of oyster farming, most growers continue to change procedures to improve production. If the above development plan is required, it must be accepted as a goal, rather than as a blueprint. There should no threat of losing a permit if the goals of the plan are not achieved within five years. Perhaps the grower should be allowed to revise the development plan at the end of each year.

**Recommendation:**

This is a problem that needs further discussion. Allow plan revision at the end of each calendar year with no threat of loss of permit if conditions are not met.

**Subsection (c)(12)**

A business plan contains proprietary information to be used by the business owner and the investors. It is not public information. It is highly unusual for a government agency to have access to such information. Furthermore, the information within a business plan for an aquatic farm would contain specific aquaculture and financial information. At this time, ADF&G does not have the expertise to evaluate either type of information.

**Recommendation:** Delete.

**Subsection (c)(14)**

As discussed earlier, aquafarming in Alaska is highly experimental. This line alone could eliminate the farming of all species not currently cultured in Alaska. As new species are cultured, technical and operational problems will be discovered, so will solutions. Until have extensive aqua-farm activity with each species of interest, there is no possible way to "document" operational and technical feasibility of proposed aquafarms.

**Recommendation:** Delete.

**Subsection (c)(15)B)**

The definitions of productivity contained in 5 AAC 41.400 are not obtainable and do not meet the intent of the aquatic farm act. These shortcomings are addressed later in this document. References to this term must be removed.

**Recommendation:**

Delete and replace with the following: "a description of the culture practices to be utilized;"

**Subsection (c)(15)(C)**

This section is impractical. The rate of productivity of a particular area is an unknown quantity requiring extensive research to determine. Therefore, increased productivity cannot be determined without several years of growth studies under variable conditions. In addition, ADF&G lacks the statutory authority to impose requirements that a farmer demonstrate increases in productivity.

**Recommendation:** Delete.

**Subsection (c)(16)**

This section is ambiguous as to intent. If "wild stock" refers to individuals of the same species of those being cultured, no stock differentiation is needed. To operate an aquafarm in an efficient manner, any wild stock present or settling on the farmed site must become the property of the farm, as envisioned by AS 16.40.120.

To protect the public interest, a section could be added to require the aquatic farm operator to leave stock on the lease area at the end of the lease period, in the same number as was present at the beginning of the lease period. To attempt differentiation between wild and enhance stock is not only impossible, but makes no sense.

If the intent is to leave wild stock on a beach for public access, the concept is totally unworkable. The whole idea in selection of a farm site is to avoid areas used by the public for subsistence or personal use. If we wish to establish an aquatic farm industry, we need reasonable, workable regulations. This section is neither.

**Recommendation:** Delete.

**Subsection (c)(17)**

This line is too open ended, which allows the department to require applicants to submit large amounts of additional data, under the threat of closing the application process if the applicant does not immediately comply. In the past, this request for additional information has been very general in nature, at times indicating an ignorance of the original application. "Other information" must be limited to "rounding out" information requested on the original application. If possible, the requests should be simple enough to be requested and answered during a phone call.

**Recommendation:**

Delete and replace with the following: "(17) other information may be required by the department to provide details more fully explaining the information in the original application."

## 5 AAC 41.230 ADDITIONAL INFORMATION

### Subsection (a)

Additional information requests need to be concise and intended only to complete originally requested information. Thirty days is often inadequate time for an applicant to respond for several reasons: (1) many aquatic farm applicants live in remote locations with weekly mail service, resulting in mail delays; (2) gathering site specific information may require waiting for particular tidal stages delaying information gathering by up to two weeks; and (3) the applicant may have to contact ADF&G staff for information and clarification. When ADF&G staffers are not available (on vacation, away or other business) contact with staff can take several weeks. This is a particular problem with aquatic farm applications, which are generally handled by only a few individuals.

**Recommendation:** Delete "30" and replace with "60."

### Subsection (b)

This section allows ADF&G to terminate the application for insufficient information. The application process should remain open as long as the applicant is communicating with the department. Lack of sufficient information may be due to lack of concise, relevant questions. Also consider; this is a multi-agency permit. Will the other agencies be willing to ignore the work they have completed on an application, allowing ADF&G to unilaterally remove an application from consideration? The application process must remain open as long as the applicant is making a good faith effort to respond to ADF&G concerns.

### **Recommendation:**

Delete and replace with the following: "(b) An aquatic farm application will remain under consideration as long as the applicant maintains a good faith effort to comply with agency requests. The application shall be terminated only with the compliance of all agencies involved in the application."

## **5 AAC 41.240. REVIEW AND DETERMINATION.**

### **Overview**

This is an extremely troubling section of the proposed regulations in which the department clearly violates the intent and letter of the aquatic farm act. This proposed regulation would have ADF&G assume the authority and duties of two other state agencies, impose restrictions on aquatic farmers that far exceed the scope of state law, would elevate a single use of state owned waters to a preferred status over all other activities, and impose siting restrictions which would ensure that no new aquatic farms could be permitted.

### **Subsection (a):**

This sentence structures the entire following section of regulations to run directly contrary to the authorizing statute AS 16.40.105. The findings and policy section of the 1988 aquatic farm act established a state policy to "...encourage the establishment and responsible growth of an aquatic farming industry..." This positive approach was institutionalized by structuring the statutes in a positive manner directing ADF&G to issue permits rather looking for ways of denying them. For example, AS 16.40.105 says the commissioner "shall issue permits..." Section (a) violates the positive construction by saying the "commissioner shall not issue an aquatic farm or shellfish hatchery operation permit..."

### **Subsection (b) (1):**

Who is the department possesses the expertise to determine whether a particular site is unsuitable for the proposed species or gear? [Subsections (A) & (B)] No one currently on staff and the fiscal note fails to identify funding for new, qualified personnel.

What section of law provides ADF&G authority to manage water quality related issues as contained in (C)? The appears to be a DEC function, and does not belong under ADF&G responsibilities.

What is a "high abundance of predators or competitors..."? If a farmer proposes to locate a farm in a bay with many starfish, shouldn't that be his or her decision? If they want to struggle with the higher cost of labor involved in defouling, that appears to be a business decision and not a legitimate agency concern.

Subsection (F) appears to cede state authority in favor of federal agencies. This runs contrary to the oft-stated positions of the State of Alaska.

What is meant by (G)? What about a farm covering a small bight? The current language does not provide much guidance for decision-making.

### **Subsection (b) (2):**

The Department of Natural Resources (DNR) is responsible for the management of state lands and determining land use conflicts for aquatic farms. This entire section

would put ADF&G squarely in conflict with DNR's statutory role, and need to be stricken from the proposed regulations.

Additionally, (A) directly conflicts with AS 16.40.110 (2) which states that aquatic farms "may not require significant alterations in traditional fisheries" and (3) which says proposed farms "may not significantly affect fisheries..." The proposed wording in (A) clearly would prevent farms from being located in sites utilized by commercial fishing operations even if there are no conflicts or adverse impacts. Since farms could be located in areas supporting other uses of marine waters, as long as the operations don't "significantly alter" the use, the language would effectively elevate commercial fishing to a preferred user group.

(B) goes even further by providing a **potential future use** of a dive fisheries resource with a preference over aquatic farming. This concept clearly conflicts with 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." [Emphasis added.]

#### **Subsection (b) (3):**

This section also would put ADF&G in the position of making land use management decisions in direct conflict with DNR's statutory authority.

In addition, (A) contains terms that would effectively prohibit aquatic farms from being located along nearly all of Alaska's long coastline. The clause "disrupt or adversely affect" could be interpreted to mean very small disruptions. If lantern nets in the water cause schools of herring to alter swimming patterns, the gear could be described as "disrupting" the "milling" patterns of the species. Certainly, a reviewer could find that the use of a skiff that causes a flock of ducks to fly away is a "disruption." We believe this section is the "killer clause" that will provide ADF&G reviewers with justification to reject all aquatic farming proposals and violates the spirit if not the letter of the aquatic farm act.

#### **Subsection (b) (4):**

(A) would effectively prohibit growers from experimenting with unproven species and restrict aquatic farming in Alaska to Pacific oysters. Indigenous Alaska shellfish species now under the initial stages of development in Alaska have no proven track record of success in aquaculture operations and farmers would not be able to "demonstrate or document the success..." of the proposed species. Our understanding of species such as littleneck clams, purple-hinged rock scallops, geoducks and cockles are sketchy at best.

(B) could prevent farmers from diversifying into new species, such as purple-hinged rock scallops or geoducks. What is the purpose of the restriction? The proposed language suggests a farmer might have to conduct expensive surveys to find indigenous populations of rock scallops if ADF&G knowledge of the resource is limited? What is the biological concern?

What is the purpose of (C)? Is it to determine how the farmer can comply with permit conditions imposed under 5 AAC 41.250(a)(1)? We believe it is impossible for a

suspended culture farm to meet the proposed requirement. While it is possible to extrapolate growth and survival rates from planting and harvest data, it is not practical to expect a commercial farming operation to provide the type of detailed scientific research that would be required to meet the terms of 5 AAC 41.250(a)(1).

**Subsection (d):**

What is the intended effect? What if an applicants believes the department erred and simply wants reconsideration of a denial? Can the commissioner's denial be appealed to an administrative hearing officer?

**Recommendation**

This section should be replaced with language simply referencing AS 16.40.105. The statutory language is clear, concise and requires very little clarification.

## **5 AAC 41.245 HARVEST OF WILD RESOURCES**

### **Overview**

The section is inconsistent with AS 16.40.120 which only restricts initial acquisition of wild stocks and does not provide ADF&G with authority to control stocks once they come under control of the farmer. Once the farmer assumes control of a site, the stocks become the private property of the farmer, as stated clearly in AS 16.40.120 (g).

### **Subsection (b)**

This section is very unclear and appears in conflict with proposed language in 5 AAC 41.250 and 5 AAC 41.400. Enhancement is described in (b) as increases in the biomass, while 5 AAC 41.250 (a)(1) will require that a farmer "enhance the productivity of the cultured species." 5 AAC.400 (3) defines aquatic farming as utilizing methods that "increase the productivity of the species..." and (9) defines "enhancing the productivity" as expanding the biomass "by increasing its survival or growth rates." You can increase the biomass of a stock by simply allowing under-sized shellfish to reach market-size, but that would satisfy the requirements of the latter sections of the regulations.

In addition, how does a farmer demonstrate the increases came from the application of aquatic farming techniques as opposed to wild growth rates? Our knowledge of the biology of the animals currently under culture or proposed for on-bottom aquatic farming is very limited. For example, recent experience in growing littleneck clams in the EVOS study appears to contradict long-held notions of littleneck clam growth rates and aging methods.

The exception for "seed stock" also is confusing. 5 AAC 41.400 (19) describes seed stock as "larval, first settlement, or spat stages" of shellfish. For littleneck clams, this could mean 9 mm (considered the minimum size for outplanting) or 18 mm (the maximum size generally produced in FLUPSYs)? How about the clams between this "spat" size and the 38 mm legally harvestable under commercial fishing regulations?

The language clearly violates AS 16.40.120 (g): "Aquatic plants and shellfish acquired under a permit issued under this section become the property of the permit holder and are no longer a public or common resource." How can ADF&G continue to control the use of the shellfish obtained under a stock acquisition permit if it is private property?

### **Recommendation:**

Subsection (b) violates AS 16.40.120 (g) and must be stricken in its entirety. It should be replaced with the clear statutory language clarifying ownership and control of resources obtained under a stock acquisition permit.

## **5 AAC 41.250. PERMIT CONDITIONS.**

### **Overview**

This section provides ADF&G with broad, intrusive authority over aquatic farm activities. Some of the provisions appear to provide the department with authority beyond the enabling statutes, and provide for a permit that is not in sync with DNR 10-year lease terms.

Many of the conditions listed in the section exceed the scope envisioned by the enabling statutes. AS 16.40.100 (c) states: "The commissioner may attach conditions to a permit issued under this section that are necessary to protect natural fish and wildlife resources."

### **Subsection (a)(1)**

The language "enhance the productivity of the cultured species" creates a requirement that is impossible for any type of aquatic farm to meet, particularly suspended culture operations. The definitions section says "enhance the productivity" means "to increase the abundance or total biomass of a species, by increasing its survival or growth rates."

Does this mean the farmer would have to exceed oyster growth and survival rates over natural production or farmers located in other regions, such as Washington, British Columbia or Louisiana? In the case of littleneck clams or geoducks, does this mean increases over the natural production at that particular site? If so, does that mean the farmer would have to conduct long-term growth studies at the site prior to commencing farming operations?

We believe the commissioner lacks the authority to impose this new condition on aquatic farm permits. The condition does not comply with AS 16.40.100 (c), which states: "The commissioner may attach conditions to a permit issued under this section that are necessary to protect natural fish and wildlife resources."

Please provide citations of enabling statutes and explanations of the interpretation to impose these new measurements. Also we believe the conditions are not consistent with commonly understood biological principles. Please provide an explanation of the scientific basis for this measurement.

### **Recommendation:**

Replace existing language with: (1) "utilize animal husbandry techniques designed to enhance the biomass of the cultured species on the farm site, including, but not limited to, planting of seedstock, predator controls, reduction of competitors, control of densities, and rotational harvesting;"

**Subsection (a)(2)**

Control of activities on land leased from the State of Alaska is a function of DNR. Please provide citations for ADF&G's authority to assume these responsibilities.

**Recommendation:** Delete.

**Subsection (a)(3)**

Does this mean that a farmer cannot purchase and process wild geoducks from licensed divers if he is growing a few hundred geoducks on a plot three miles away from the processing facility? Is this a disease concern? If so, please clarify by adding references to spatial separation.

Or, is it an enforcement concern? What is the rationale? If it is an enforcement concern, this language is discriminatory against aquatic farmers. Other processors commonly intermingle products from many different areas and sources.

**Subsection (a)(4)**

Signage requirements certainly will add to the visual impacts of aquatic farming and raises potential problems with upland owners. Has the section been discussed with the US Forest Service, Native Corporations, DNR and other upland owners? This seems to be more of a DNR concern. If the signs must be visible from outside site boundaries, multiple signs may be required, adding to adverse visual impacts.

Will the signage be required in the tidelands or uplands at a beach site? What about longline sites? Do we have to build floats just to support the signs?

Farmers already are required to post signs on their processing facilities.

**Recommendation:** Delete.

**Subsections (a)(5)-(6)**

This language conflicts with AS 16.40.105 which states aquatic farms "may not require significant alterations in traditional fisheries or other existing uses of fish and wildlife resources..." 5 AAC 41.400 (1) defines "adversely affect" as meaning "that an activity will diminish the abundance, diversity, or productivity of fish and wildlife..." The language "diminish the abundance" is a much different measurement than "significant alterations," and would put farmers in jeopardy of minor impacts.

**Recommendation:**

Replace "adversely" with "significantly" affecting in both subsections.

**Subsection (a)(7)**

Does "disposition of incidental species" mean we have to report the disposal of mussels, barnacles, and staggering array of other incidental marine species hauled up in lantern nets?

**Subsection (a)(8)**

Does "prevent injury or death to predators or incidental species" mean the farmer will be held liable for killing barnacles, mussels and starfish?

**Recommendation:** Delete.

**Subsection (a)(9)**

The inclusion of "any" suggests ADF&G will not allow even the smallest impact from nets and other predator control devices.

**Recommendation:** Delete "any."

**Subsection (b)**

This puts the ADF&G operational permits out of synch with the 10-year leases, which could present significant conflicts. If ADF&G fails to issue a new operational permit halfway through the life of a ten-year lease, the farm put out of business might be inclined to sue ADF&G.

The proposed regulations will make the issuance of the operational permit much more difficult. ADF&G already is far behind on handling the permitting duties for existing farms. In fact, most existing farms do not have current operating permits and some of these have operated for years with lapsed permits. How is ADF&G going to handle the increased workload?

There is no biological, financial or operational rationale for the short life of the permits. The farm has to submit ten-year development and operational plans. It makes no sense to require the farmer to plan ten years ahead when ADF&G is going to require five-year "prove-up" tests.

**Recommendation:** Delete "five" and replace with "ten."

**Subsection (c)**

This provision could put every farm in jeopardy for relatively minor, site-specific impacts, and is in conflict with AS 16.40.105 which says aquatic farms "may not significantly affect fisheries, wildlife, or their habitats in an adverse manner..." This is a much different standard than "adversely affecting" which your proposed language in 5 AAC 41.400 defines as meaning "an activity will diminish the abundance, diversity or productivity of fish and wildlife..."

The provision would diminish the protections now provided by statute to the point of non-existence, effectively removing a fundamental protection granted by state law. If this new standard persists, despite the conflict with enabling statutes, farmers should at least be provided a formal hearing process where evidence is presented and contested.

**Recommendation:**

This section should be rewritten to conform with AS 16.40.105 by replacing "adversely" with "significantly," and provide the farmer with an administrative hearing on an ADF&G finding of significant adverse impacts. The finding should contain a factual basis and the farmer should be able to present evidence to counter the finding.

**Subsection (d)**

This provision does not provide the permit holder with any due process. ADF&G should be required to provide a factual basis for revocation, and provide the farmer with the chance to present a defense. Can the decision to revoke a permit be appealed under the APA? Or, is the farmer's only recourse the legal system? The revocation of a permit puts the farmer out of business, and there should be an appeals process available to those who cannot afford to hire an attorney.

Under these regulations, an oyster farm in business for ten years could be in jeopardy if commercial crab pots are stored on a hardening beach or set next to a longline. The clause "is not complying with conditions set forth in this regulation" implies a permit can be revoked for the smallest of infractions, while the statutes talk about "significant impacts..."

**Recommendation:** Delete.

## **5 AAC 41.280. PERMIT RENEWAL AND TRANSFER.**

### **Overview**

This section puts all existing aquatic farms in jeopardy by making them subject to the new regulations; few, if any, existing farms would be issued a permit under the new criteria contained in the proposed regulations. Every renewal or transfer would place the farmer in jeopardy because of new standards for project impacts. ASGA believes the new standards violate existing law. In addition, the transfer process envisioned here would be unnecessarily difficult and time-consuming.

There also appears to be some tension between the proposed language and AS 16.40.110 (b)-(c), which focuses upon disease issues and compliance with the development plan on-file in ADF&G. (c) specifies that the "person to whom the permit is transferred may use the permit only for the purposes for which the permit was authorized to be used by the transferor, and subject to the same conditions and limitations." Simply put, the enabling statute does not authorize the reconsideration of criteria imposed for the initial siting of an aquatic farm during renewals and transfers.

### **Recommendation:**

This section will require significant revision. The best solution may be to revert to existing language with (d) rewritten as follows: "(d) In order to transfer an aquatic farm operation permit, the permittee must submit to the commissioner a letter of transfer and an application prescribed by the department. This submission must be accompanied by a letter from the proposed permittee agreeing to comply with the terms of conditions attached to the active operation permit."

### **Subsection (a)**

Why should a farmer be required to submit a lengthy multiagency application for renewal or transfer of an operating permit? This will require unnecessary work on the part of the farmer, and presumably will trigger unnecessary paper-shuffling by ADF&G reviewers. Since the permit only has a five-year life, the farmer will in effect be subject to two application processes for every ten-year lease.

Why should the farmer be responsible for initiating the renewal process for the operational permit? This should be an ADF&G responsibility.

Three months is an extraordinarily long period of time to process a transfer of an operational permit. DNR completed the transfer of a lease this summer in one week. Why does ADF&G need three months to act upon an operational permit?

### **Subsection (b)**

A permittee should not have to prepare one of the lengthy, detailed multi-agency applications for renewals or transfers. These are designed to facilitate initial siting decisions and are not appropriate for subsequent actions such as operation permit

renewals or transfers. Renewals should be initiated by ADF&G and should not require application by the farmer.

The information listed in this section is contained in ADF&G files. Annual reports are required of each permittee and ADF&G approval is necessary for all new species. This is redundant, unnecessary paperwork.

**Recommendation:** Delete.

**Subsection (c)**

Does this mean an operation permit will not be renewed if the farmer got his annual report in late? How about if SARDFFA wants to conduct sea cucumber surveys at a farmsite? What if a crab fishermen discovers crab are attracted by the defouling at a longline site and sets pots around the perimeter?

These might seem like pretty small issues, but they are large enough to cause loss of an operation permit under this language.

Will this section interfere with a permittee's ability to appoint an "acting agent" with authority to handle permitting issues? If so, the section should be amended to add a provision providing for an "acting agent."

**Recommendation:** Delete.

**Subsection (d)**

The language amounts to a reconsideration of initial siting criteria and conflicts with AS 16.40.110.

**Recommendation:** Delete.

**Subsection (e)**

This section will block renewals or transfers when ADF&G determines the operation of a farm is "adversely affecting fisheries, wildlife or their habitat..." As discussed earlier, this standard could include very minor impacts, contrary to the statutory standard (AS 16.40.105) of "significant alteration."

**Recommendation:** Delete "adversely" and insert "significantly."

## **5 AAC 41.290 AQUATIC STOCK ACQUISITION PERMIT.**

### **Overview**

The section appears in substantial conflict with AS 16.40.120. This section of law clearly was intended to provide aquatic farmers with access to "surplus" wild stocks for a broad range of uses in aquatic farming operations, but the proposed regulations severely limits access to these resources.

AS 16.40.120 (f) requires ADF&G to issue a stock acquisition permit if "(1) wild stock is necessary to meet the initial needs of farm or hatchery stock..." One of the most important needs of a clam farmer is to gain control over the plot of ground and stocks under cultivation. Every aquaculture or agriculture expert we've been able to query has strongly responded that it is virtually impossible for clam farmers to be successful unless they have complete control over the crop under cultivation. By retaining control over a portion of the stocks in the ground, the department will interfere with the farmer's need to gain control over the land leased from the state for aquatic farming.

Another way to view the dilemma facing aquatic farmers in these restrictions is to consider what similar conditions would do if imposed upon a grazing lease. Suppose the state told the lessee that they could plant new grass on the site, but they had to leave the native grass in place and their livestock could only eat the planted grass. How could the rancher distinguish between the native and planted grass? Would the planted seeds even produce if scattered among the well-established wild grass?

### **Subsection (a)**

Writing the details of an application form in regulation is a bad idea as even minor changes to the form will require re-writing the regulations. This would be costly and time-consuming.

### **Recommendation:**

Delete all language after: "An applicant shall apply for an aquatic stock acquisition permit on a form provided by the department."

### **Subsection (b)**

This section restricts the farmer's ability to obtain control of all "standing stocks" on a farmsite, and would restrict the use of wild stocks to far more narrow purposes than envisioned by AS 16.40.120.

**Recommendation:** Delete.

### **Subsection (c)(5)**

The proposed language in 5 AAC 41.245 violates AS 16.40.120 (g), which provides the farmer with property rights to all stocks acquired under a stock acquisition

permit. How can the department maintain control over a stock that is the private property of the farmer? Besides, the proposed conditions imposed by 5 AAC 41.245 are virtually impossible for farmers to meet.

**Recommendation:** Delete.

**Subsection (f)**

Availability of seed stock from a hatchery source is not a criteria articulated in AS 16.40.10. Where is the enabling language for this restriction? Likewise, the proposed restriction upon acquiring stocks to finance farming operations was not based upon the language contained in that section of law. Would this prohibit the farmer from selling "standing stocks" on a leased farmsite? Please provide citations and an explanation of enabling statutes.

**Recommendation:** Delete.

**Subsection (g)(1)**

Just because a regulatory management plan has been adopted doesn't mean the species is fully utilized. This should not be a part of the criteria.

**Recommendation:** Delete.

## **5 AAC 41.295. TRANSFER PERMITS.**

### **Overview:**

This section of the regulations largely institutionalizes long-standing practices regarding the movement of aquatic farm stocks, but codification does raise questions of fairness and equity.

When asked about the most significant disease problems facing Alaska's marine species, ADF&G's chief fish pathologist cited the lack of controls over resources harvested in the commercial fisheries. Specifically, Dr. Ted Meyer listed concerns about the holding of live fish in the marine environment by commercial fishermen. Dr. Meyers confirmed that the spread of bitter crab disease in Southeast was accelerated by unregulated practices in the crab fisheries. Dr. Meyers also said that a review of pathology records reveals that there have been very few disease problems identified in aquatic farm stocks.

This background begs the question of why isn't the commercial fishing industry subject to similar disease and genetics restrictions? Why are we being regulated when the risk appears to be negligible, and why are the higher risk commercial fisheries unregulated?

### **Subsection (a)**

Transfers between adjoining farms would be affected by this language. Why should a transfer of 100 feet from one farm to an adjoining farm fall under these restrictions? We believe that spatial separation should be included.

### **Recommendation:**

Insert the following language: "Shell or aquatic plant transport permits are not required for transfers between locations of less than five miles apart."

### **Subsection (f)(2)**

While quarantine is SOP in hatcheries, this provision is impossible for aquatic farmers to meet. No stocks can be "cultured under total quarantine" in an unenclosed farming environment. This is possible only in upland tank operations.

**Recommendation:** Delete.

## LEGISLATIVE INFORMATION OFFICE

Email: Ketchikan\_LIO@legis.state.ak.us

50 Front St., Suite 203  
Ketchikan, Alaska 99901

Phone: (907) 225-9675  
Fax: (907) 225-8546

Senator Robin Taylor  
State Capitol  
Juneau, AK 99801

Re: ADF&G Mariculture Meeting, 01/08/01.

SenatorTaylor,

I am writing this letter in response to your request for information regarding the Fish and Game Mariculture meeting which took place on January 8<sup>th</sup>, 2001 at 6:30pm. Please be advised that my recall of these events is not clear enough to provide you with exact quotes from individuals, or even the exact sequence of the events.

I received a telephone call on the morning of January 8<sup>th</sup> from a constituent requesting that Ketchikan be added as a site for the ADF&G Mariculture Regulation Review hearing. Pursuant to this call, I contacted the Legislative Information Office in Juneau and our site was added.

As the meeting began that evening there were 4 people in the Ketchikan LIO to attend the meeting. There were three individuals with ties to the Mariculture industry, and the fourth was a reporter from the Ketchikan Daily News. The meeting was held at the Fish & Game office in Anchorage and chaired by Ken Imamura.

Mr. Imamura started off by welcoming the audience and stating the purpose of the meeting. He followed by noting that they (ADF&G) would be taking testimony via teleconference from Seward and Cordova. Since he had not mentioned Ketchikan as a site, I waited for a pause, introduced myself and informed the chair that I had 3 people that would like to testify in the meeting. At this point Ms. Shannon O'Fallon broke in and told me that the Department would not be taking testimony from our site because the meeting had not been 'noticed' in our community. In the pause that followed her response the Information Officer from Homer came online and said that she had people from Halibut Cove that called and wanted to dial in and wanted to testify as well. Ms. O'Fallon denied her request.

A short time passed during which the people at my office looked to me for a solution to the problem. They felt that they were being denied the opportunity to testify in a public hearing. Eventually, Mr. Imamura came online and announced that all testimony would be heard from all locations as time allowed.

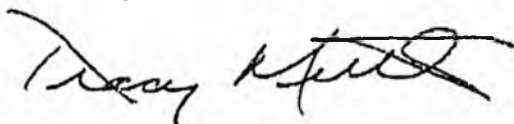
The participants from Ketchikan were allowed to testify at approximately 9:15 pm, and were the final testifiers.

As the meeting wrapped up, the constituents told me flatly that they were shocked by the behavior and attitude of Ms. O'Fallon and that they had never heard an official of the state address the public with such disrespect.

They were referring to statements made by Ms. O'Fallon as the meeting began, statements she made during a break when they (the Anchorage site) failed to mute their microphone, and statements she made during their testimony.

During the break I heard Ms. O'Fallon make derisive statements about the constituents in Ketchikan and the Legislative Information Offices. She managed to do this in one sentence. As noted above, she made some of these statements during a break when their site failed to mute their microphone.

Sincerely,

A handwritten signature in black ink, appearing to read "Tracy Mettler". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Tracy Mettler  
Ketchikan LIO

DRAFT

## Overall Themes of Proposed Regulations

### Shift from Positive Structure to Negative

These regulations are antagonistic and appear designed to prevent the development of the aquatic farm industry. They certainly appear to violate the spirit of the aquatic farm act, which includes the following finding:

"It is the policy of the state to encourage the establishment and responsible growth of an aquatic farming industry in the state..."

This shift from positive to negative is apparent by examining the following sections of the regulations and the state law they are designed to implement.

#### 5 AAC 41.240. REVIEW AND DETERMINATION:

"The commissioner shall not issue...an operational permit unless..."

"The commissioner will deny a permit if it is determined..."

Authorizing statute AS16.40.105:

"The commissioner shall issue permits..."

### Imposition of New Standards

New methods of measuring the impacts of aquatic farming operations would be imposed.

#### 5 AAC 41.280. PERMIT RENEWAL AND TRANSFER (e)

"If the commissioner determines that the operation...is adversely affecting fisheries, wildlife, or habitat and the adverse effects cannot be mitigated, its operation permit will not be renewed..."

#### 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..."

Authorizing statutes:

AS 16.40.110. Permit application, renewal and transfer. (b)

"An application for renewal or transfer must be accompanied by fees..., a report of disease history..., and evidence that satisfies the commissioner that the applicant has complied with the development plan..."

AS 16.40.105 (3):

"the proposed farm or hatchery may not significantly affect fisheries, wildlife, or their habitats in an adverse manner."

Significant to note is that the term "adversely affect" can mean a very minor impact, while the statute uses the modifier "significantly," which would set a higher threshold for measuring impacts.

### **ADF&G Lacks Statutory Authority**

ASGA believes ADF&G lacks the authority to promulgate many sections of the regulations. For example:

5 AAC 41.240. REVIEW AND DETERMINATION. (b) "The commissioner will deny a permit if it is determined that

(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 storage of a harvested product or gear;"

Authorizing statute: AS 16.40.105. Criteria for issuance of permits. (2)(A)

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

And, how about (B) which would veto any site in an area identified by SARDFa for surveys of geoducks, urchins or sea cucumbers? How can the site of a potential new, future fishery be considered a "traditional fishery or other existing use?"

### **Unreasonable, Unobtainable Standards Set**

The farmer would be required to become scientists and conduct research projects, rather than running businesses to comply with portions of the proposed regulations. Consider this examples:

5AAC41.250. PERMIT CONDITIONS. (a)

"The commissioner may attach conditions to an aquatic farm...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..."

5AAC41.400. (9)

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

How can a suspended culture farm meet such a condition? What are we going to measure the success of growing Pacific oysters against? Aquaculture practices in Australia? China? Great Britain? Or, do we need to go back to "natural" beaches in Japan? What are the growth and survival rates for littleneck clams? How about geoducks? Do we need to investigate a site for years to develop site-specific benchmark growth and survival rates?

### **Existing Operations Jeopardized**

Unlike all past regulations imposed upon aquatic farmers in Alaska, these regulations fail to include provisions that ensure existing operations would not be affected. These sweeping new regulations apply to all farming operations as operational permits are renewed. This means farms developed prior to the new rules must reactively meet the new conditions.

In addition to the lack of so-called "grandfather rights," the proposed regulations would put every farm in jeopardy each time a permit is renewed or transferred. AS 16.40.105 sets out the criteria for initial selection of aquatic farming and hatchery sites, and it is not designed as a continuing gauntlet down which every farm must run each time an operation permit is renewed.

### **Jurisdictional Issues**

The regulations would put ADF&G in the position of assuming authority vested in other agencies, specifically DNR, DEC and DGC. What provides ADF&G with the authority to require these other agencies to comply with the terms of a multi-agency application published in ADF&G regulations? What happens when the other agencies wish to change questions asked in the aquatic farm site application? Why should DNR have to request that ADF&G amend its regulations when DNR, which has the statutory responsibility of managing state lands, needs to change its section of the application? When did ADF&G get the authority to make land-use management or water quality decisions, such as those contained in 5AAC41.240?

### **Private Property Rights Nullified**

The proposed language would have the effect of nullifying property rights granted by state law.

#### **5AAC41.245. HARVEST OF WILD RESOURCES.**

Subsection (a) says the farmer must obtain a stock acquisition permit for naturally occurring wild stocks. (b) says:

"An aquatic farm operator who has obtained a stock acquisition permit for the purposes 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 the use of aquatic farming practices."

#### **AS 16.40.120. Aquatic stock acquisition permits. (g)**

"Aquatic plants and shellfish acquired under a permit issued under this section become the property of the permit holder and are no longer a public or common resource."

How can ADF&G continue to exert control over the stocks if they are the private property of the farmer? The proposed language is clearly in conflict with the authorizing statute and has the effect of nullifying property rights.

### **Cumbersome, Expensive Management System Created**

The regulations are extremely cumbersome and detailed and may require frequent amendment. For example, 5 AAC 41.220 incorporates the minutiae of the multi-agency application spread over six pages of the proposed regulations. Other agencies we contacted say generally regulations simply state applications will be submitted on a form prescribed by the department, and that putting the details in regulation will require frequent and costly amendments.

ADF&G lacks the expertise and staffing to carry out the requirements of these regulations. The review and oversight requirements of these regulations will overwhelm the existing staff of ADF&G and the fiscal note is grossly inadequate. ADF&G's mariculture staff is overwhelmed with its current responsibilities, and couldn't begin to assume the additional responsibilities created by the regulations. For example, very few, if any, existing farms now have current operation permits, and the department appears to be falling farther behind in its ongoing responsibilities. The fiscal note is too small to provide any relief to the current one-person staff.

### **Hatcheries Treated as Farms**

The regulations would have hatcheries applying under the same application as aquatic farms even though most would be land-based facilities and the impacts are vastly different than farming operations. In addition hatcheries would be managed under virtually the same rules as farms despite the major differences between the activities. Land-based hatcheries should be utilizing separate application forms and should be managed under rules applicable to their operations.

### **Regulations Fail to Even Mention Aquatic Plants**

While the statutes clearly authorize the farming of aquatic plants, the regulations fail to even address kelp farming. While the regulations may be broad enough to encompass the farming of plants, the language addressing hatcheries all say very specifically "shellfish hatcheries." The apparent oversight may lead to new problems down the road.



## Letter To The Editor

January 19, 2001

The issue of aquatic farming as recently presented by Alaska Department of Fish & Game Commissioner, Frank Rue, deserves some reasonable clarification.

Aquatic farmers statewide were offended by Mr. Rue's insinuating statement that farmers for clams were proposing to operate fisheries under the guise of aquatic farms, simply to harvest wild stocks. The members of our company, Alaska Trademark Shellfish, have made a huge personal investment, both in terms of time and money, by developing a comprehensive plan for clam culture in Southeast Alaska. We have studied husbandry techniques in Canada and Washington State, visited hatcheries and active farms in both places in our pursuit to bring this exciting opportunity to Alaska.

Our company secured a five year Alaska Science and Technology Foundation Grant in a sincere effort to develop geoduck aquaculture. The grant provided for the development of a husbandry manual for "SubTidal Geoduck Aquaculture in Southeast Alaska, and provided for a long term supply of brood stock to the state's new shellfish hatchery. The goal of the grant was to develop a commercial supply of geoduck seed stock and a husbandry manual that could be used by all Alaskans. Despite the fact our grant has been suspended for over a year, due to ADF&G's refusal to issue our operational permits, we continue to supply brood stock to the hatchery Pro Bono. When Mr. Rue implies that, we and others, have no intention of farming, we are truly offended.

At the state's new shellfish hatchery in Seward, staff are preparing to dump millions of valuable clam seed, due to ADF&G's refusal to issue aquatic farm operational permits.

Mr. Rue states that the Aquatic Farm Act did not contemplate "On Bottom" clam farming. This statement is simply not true, clam farming was and "is" a major part of the Aquatic Farm Act. I would suggest that Mr. Rue go back and get a historical perspective from former ADF&G staff and others who developed the law. The truth is clam farming has been going on in Alaska for years, as it does today. Many of us have enjoyed native little neck clam at several of our local restaurants provided by Alaskan clam farms for many years.

Mr. Rue claims that several geoduck farmers who have filed suit against the state have over \$5 million worth of natural stock on there sites. Again the state is contradicting it's own information. When ADF&G did their site evaluations of all the geoduck sites they

came up an estimated total bio-mass of 800,000lbs. The ex-vessel price in Alaska for geoducks during the 2000-2001 season was \$1.10 per lb. There is currently a 20 million pounds bio-mass of geoduck clams allocated to the current capture fishery, yet Alaskans receive very little benefit from this fishery.

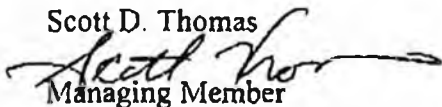
Its been more then 12 years since the Aquatic Farm Act was passed, and now ADF&G has convinced the Department of Law to challenge our own state law constitutionally. We believe the Attorney General's job is to enforce, and uphold the law despite the personal feeling of a few bureaucrats in one State agency.

What's really going on here is that the Alaska Department of Fish & Game is scrambling to pass regulation that will effectively put an end to shellfish farming in the state. This is being done in retaliation to law suits being brought against ADF&G by aquatic farmers, and a legislative audit that was conducted on ADF&G over their recent handling of aquatic farm applications. As one state mariculture expert recently said, "The proposed regulations essentially put a ban on shellfish farming in the state".

I do agree with Commissioner Rude, when he urges all Alaskans who have an interest in these issues to look past the rhetoric, and I agree we should all assist the "Industry" in continuing to develop the aquatic farming industry in a manner consistent with state law and good public policy.

For anyone looking for a fair and balanced perspective of the current aquatic farming issue in Alaska, the "Mariculture Audit" ~~that~~ will be released for public review on January 24, 2001. E-mail your request for a copy of the "Mariculture Audit" to the Alaska Division Of Legislative Audit: [legaudit@legis.state.ak.us](mailto:legaudit@legis.state.ak.us)

Scott D. Thomas



Managing Member

Alaska Trademark Shellfish, LLC

Ketchikan, AK

**Subject:** [Fwd: aquaculture]

**Date:** Fri, 19 Jan 2001 17:22:30 -0900

**From:** Representative Lesil McGuire <Representative\_Lesil\_McGuire@legis.state.ak.us>

**Organization:** Alaska State Legislature

**To:** Jim\_Pound@legis.state.ak.us, Sue\_Stancliff@legis.state.ak.us

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**Subject:** Re: aquaculture

**Date:** Fri, 19 Jan 2001 08:48:21 -0900

**From:** "Miof" <miof@gci.net>

**To:** <Representative\_Lesil\_McGuire@legis.state.ak.us>

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

**From:** Miof

**To:** [representative\\_lesil\\_mcguire@leg.state.ak.us](mailto:representative_lesil_mcguire@leg.state.ak.us)

**Cc:** [hartley@xyz.net](mailto:hartley@xyz.net) ; [rodger.painter](mailto:rodger.painter)

**Sent:** Thursday, January 18, 2001 3:48 PM

**Subject:** aquaculture

Dear Representative McGuire--

First off, I want to congratulate you on your election--although I am not one of your constituents, I was hoping that you would win the election--as you are a former student of mine. I am Marie Bader--when you had me for 8th grade PACT English I was Mrs. Richardson. Your class and you in particular were on of the high-lites of my 21-year teaching career. I am now "retired" although I truly have three full-time self-employed businesses going on. . . One of those is mariculture--specifically raising oysters and mussels in Kachemak Bay and being actively involved with the perennial problems of our regulatory agencies. This afternoon I am writing a letter which reflects the feelings of the other growers in Kachemak regarding the ADF&G's new draft regulation proposals. I will make sure that that letter is sent to you--Gary Seims, the president of our organization will sign it. However, right now I was prompted by others in our state organization to relay an incident regarding the Anchorage Hearing on those regulation proposals. The hearing was held at the F&G building on Raspberry Road, 6:30, on January 8th. It was a snowy, blowy night and my husband and I were a bit delayed by the road (5-8minutes max). When we arrived, the building was dark, and the door was locked. We questioned each other whether or not we had the right place, and were getting ready to leave and go to the Loussac. Then Ellen Simpson came down from the second floor--we banged on the door, she saw us, and let us in. . .apologizing for not having an attendant at the door as it was "after hours". During the meeting we learned that others, too, had been locked out--There was no sign on the door, nor any ADF&G person there to insure the door remained locked, but granting access for those attending the hearing. Ms. Simpson said the door-keeper had not arrived, but there were four--if not more--regulators there that certainly could have minded the door in ten-minute segments. I do NOT want to make a big deal out of this "over-sight"; however, this multi-year process of dealing with ADF&G has been continually peppered with this very attitude. I hope you will read the objections that our growers have voiced over these new regulatory proposals, and if EVER you want a historical perspective on this long saga, please do not hesitate to contact me. I would love to tutor to you once again!!! The mariculture industry is presently a tiny bright spot in environmentally-sound, coastal economic development. Please help us to move forward.

Sincerely,  
Marie Bader  
[miof@gci.net](mailto:miof@gci.net)  
907-345-1864

**MARIE BADER E-MAIL**

# Alaskan Shellfish Growers ASSOCIATION



January 18, 2001

**Dear Aquatic Farmer or Supporter:**

Regulations recently proposed by the Alaska Department of Fish and Game (ADF&G) essentially would mean an end to aquatic farming in Alaska. We are fighting these with everything in our arsenal, but we can't get any where without your active involvement and support.

We urge you to carefully read the proposed regulations and consider how they will affect your farming operation or ability to obtain new permits. Important to consider is that these new rules will apply to every farming operation, suspended culture oyster farms as well as on-bottom operations. Even existing oyster farms will have to meet the new definitions, siting criteria and other troubling provisions of the proposed regulations. We believe you will lose your farms if these regulations are adopted as proposed.

We need you to do the following:

- Send comments to ADF&G strongly opposing the regulations prior to the February 12, 2001, deadline. If you need help in identifying why the proposed regulations are so bad, please contact one of the following members of the ASGA board: Jon Agosti (224-5181 or qshatch@arctic.net); Jeff Hetrick (288-3667 or jjh@seward.net); Dave Chipman (424-5733 or hotelak@ptialaska.net); Tom Henderson (239-2222 or oysters57@aol.net); or myself (463-3600 or rodgerpainter@hotmail.com).
- Contact your local legislators to enlist their support in opposing the regulations.
- Send a contribution to ASGA to help fund our efforts to oppose the regulations, including support of existing lawsuits challenging ADF&G's authority to enact the primary thrust of the proposed regulations.

The latter may prove to be the most effective option at our disposal. The ASGA board of directors has come to the conclusion that ADF&G and the Department of Law, plan to push the regulations through the process with a minimum of change over any objections we may raise.

We have by no means pulled back in our efforts to fight through the regulatory and political process. We are seeking legislative support and involvement and a meeting with Governor Knowles, and the City of Seward is pressing Lt. Gov. Fran Ulmer. We also have requested a hearing by the Legislature's Regulation Review Committee to examine problems with the lack of adequate public involvement and review.

Next week, the Legislative Budget and Audit Committee is scheduled to release an audit of ADF&G's handling of the 1999 aquatic farm application process. The audit is expected to be critical

**AK SHELLFISH GROWERS ASSOC  
LETTER - MEMBERS & SUPPORTERS**

of the agency, and the Department of Law had tried to delay the release. An unfavorable audit may be a useful tool in attracting additional media coverage and to attract the attention of Governor Knowles.

Despite some positive signs, we are not confident of our ability to stop what appears to be a freight train screaming out of control through politics and a thorough critique of the proposed regulations. Legal actions challenging ADF&G's authority may well prove to be the only effective option.

One lawsuit is at a critical juncture is an appeal of ADF&G's rejection of applications for geoduck sites. The case in Ketchikan Superior Court consolidates separate lawsuits filed by two groups of geoduck applicants and is moving toward judgment. The outcome of the two cases will determine whether ADF&G has misinterpreted state law and exceeded its authority in enacting policies effectively denying the use of standing stocks in on-bottom aquatic farming operations.

If the challenge is unsuccessful or collapses for lack of funds, major portions of ADF&G's proposed regulations will be validated. There will be nothing we can do to change that outcome short of filing a new lawsuit and duplicating an enormous amount of legal groundwork that already has been laid.

Scott Thomas approached ASGA board of directors representing the plaintiffs in the consolidated lawsuits to appeal for support. Without industry contributions, it is clear the lawsuit may falter at the altar of justice, short of a final judgment, and ADF&G will prevail through default.

The ASGA board of directors feels so strongly about the need to continue forward with the challenge that we each donated \$500 from our own pockets. In addition, past ASGA president Bob Hartley and Ron Long, Qutekcak Shellfish Hatchery operations manager, each contributed \$500. The \$3,500 is being provided to the plaintiffs to help keep the lawsuit moving forward.


Thomas and other plaintiffs have promised to repay ASGA for the contributions if they prevail and attorney's fees or damages are awarded. If this occurs, ASGA, in turn, will ask each contributor if they want a refund or prefer to leave it in the Mariculture Support Fund to finance future legal battles.

We are appealing to the industry for additional contributions and will approach municipalities and other groups for support. The level of response from the industry will have a great deal of influence over our ability to attract other donors. The ASGA board will decide how to allocate the additional funds as the rest of the battle unfolds. The fund-raising is necessary because our investments and the future of the industry are at stake.

These "Mariculture Support Fund" contributions will not be mingled with ASGA's general funds, and will be used solely for challenging ADF&G's authority to enact the proposed regulations. We will keep close track of all contributions and provide full accounting of all expenditures to the full membership.

We encourage you to do everything you can to oppose the regulations, including making a contribution. We hope your level of commitment matches ours.

Sincerely,

  
Rodger Painter  
Vice President

# Alaskan Shellfish Growers ASSOCIATION



*Bob Hartley*

January 18, 2001

Representative Lesil McGuire  
Chair, Regulation Review Committee  
Room 418, State Capitol  
Juneau, AK 99801-1182

Dear Rep. McGuire:

The Alaskan Shellfish Growers Association (ASGA), which represents shellfish growers throughout Alaska, requests the assistance of the Regulation Review Committee in examining whether the Alaska Department of Fish and Game and the Alaska Department of Law has short-circuited the public involvement process in the development of proposed aquatic farming regulations.

We request you consider the following:

- The director, deputy director and mariculture coordinator of ADF&G's Division of Commercial Fisheries Management and Development refused ASGA's repeated calls to discuss concepts to include in draft regulations in the six months prior to their release. The denials came despite language in a \$100,000 capital budget appropriation saying they would work with stakeholders throughout the process. ADF&G and ASGA jointly developed the CIP language.
- ADF&G published the regulations just prior to the holidays with the shortest comment period allowed by law. The 30-day comment period was to end January 18. The 25-pages of proposed regulations would replace about two pages of regulations, and would completely change the nature of the current aquatic farm regulatory structure.
- ADF&G mailed aquatic farmers copies of the proposed regulations. These were put into the U.S. postal system, which historically is backlogged with mail during the holiday season. Many farmers did not receive the notices until after the first of the year. Some failed to receive the notices prior to public hearings scheduled for Jan. 4 and Jan. 8.
- ASGA requested that Juneau be added as a teleconference site for the Jan. 4 hearing in Juneau and Jan. 8 hearing in Anchorage. The requests were denied.
- A group of interested Ketchikan citizens requested the local LJO provide a teleconference link to the Anchorage hearing. When the Ketchikan LJO called

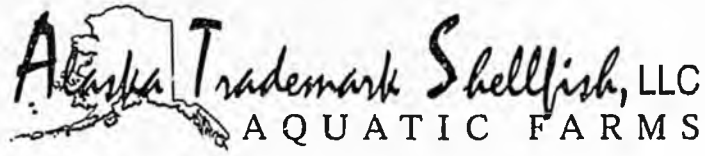
- into the hearing, assistant attorney general Shannon O'Fallon objected and attempted to exclude the site. When the LIO operator persisted and the public in Anchorage objected to the exclusion, Ms. O'Fallon relented. [See attached letter from Scott Thomas.]
- Several persons attending the Anchorage hearing found the doors locked shortly after the opening minutes of the hearing. No one responded to their knocks and calls. One couple was getting into their car when someone finally answered, and the other was turning away to leave when the doors were opened. {See attached letter from Marie Bader.}
  - ADF&G granted our request for additional time for public comments and added a hearing site in Juneau for Jan. 30. However, ADF&G and Department of Law officials refused to discuss any issues of substance related to the regulations, saying they were restrained from doing so by the Administrative Procedures Act. Since most other agencies generally are willing to discuss all issues related to proposed regulations throughout the process, ASGA has requested that the Department of Law provide specific citations of the APA supporting this position. We have yet to be provided an explanation.
  - Despite the additional comment period and the overwhelmingly negative public comments received to date, ADF&G has made it clear that it does not intend to revise the regulations. As verified in the attached email from Ken Imamura, ADF&G mariculture coordinator, ADF&G intends to deliver finished regulations to the Department of Law within seven calendar days of the close of the public comment period. This schedule will barely accommodate ADF&G's responsibility under the APA to summarize and respond to public comments in writing, let alone revise the proposed regulations.

As you can see from our comments, ADF&G and the Department of Law have given every indication that they are not interested in accommodating public involvement in the development of the regulations. I respectfully request you investigate the flawed process and hold committee hearings on the issue prior to the close of the public comment period on February 12, 2001. Thank you for considering this request.

Sincerely,



Rodger Painter



January 17, 2001

The Honorable Lesil McGuire  
Alaska House of Representatives  
State Capitol Building  
Juneau, Alaska 99801-1182

Dear Representative McGuire:

My name is Scott Thomas, I am a life long resident of Ketchikan and an aquatic farmer. We are writing you to address concerns that I and other farmers have over Draft Regulations being proposed by the Alaska Department of Fish & Game against the aquatic farming industry.

Our greatest concern is over the entire body and spirit of the draft regulations. Here we have a complete redraft of a few pages of aquatic farm regulations that now consisted of 25 pages. The regulations are poorly written, antagonistic, confusing and contradictory to the aquatic farm act. We believe the real purpose of these regulations is shut down the shellfish farming industry. As one state mariculture expert recently said, "The draft regulations essentially put a ban on shellfish farming in the state".

We believe the regulations are also in retaliation to law suits filed against the Alaska Department of Fish & Game by aquatic farmers, and a legislative audit that was conducted on the ADF&G over their recent handling of aquatic farm applications.

ADF&G is attempting to fast track these regulations with help from the Department of Law, all with minimal public input and no legislative oversight. The DOL has actually discouraging public input. At a recent public hearing on January 8, 2001, I and several other farmers were at our local LIO in Ketchikan to present public testimony. At that hearing the state's attorney, Shannon O'Fallon, said we could not participate or testify because we were not in compliance with the state's public hearing act. After some debate Mr. O'Fallon finally granted us the privilege to participate and testify. In Anchorage, farmers who wanted to testify at this hearing were met with locked doors at the building where the meeting was taking place.

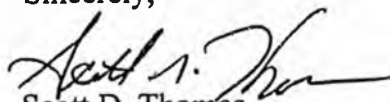
We also know that Shannon O'Fallon has recently met with staff from Legislative Budget and Audit and requested that they not release the mariculture audit for public review.

Office: 907-225-1171 • Fax: 907-225-1176 • e-mail: [atsduc@ptialaska.net](mailto:atsduc@ptialaska.net)  
945 Lincoln Street • Ketchikan, Alaska 99901

**SCOTT THOMAS LETTER  
FAXED 1/14 MAILED 1/17**

The state is fast tracking what we believe to be illegal regulation, discouraging public testimony and attempting to suppress public information. At this time we are requesting that your committee review the regulations and hold hearings for the benefit of the people of the state and the legislature.

Sincerely,

  
Scott D. Thomas

Managing Member  
Alaska Trademark Shellfish, LLC.

Cc: Rep. Joe Green  
Rep. John Harris  
Rep. Bill Williams  
Rep. Reggie Joule  
Rep. Mary Kapsner  
Rep. Beth Kerttula  
Rep. Norman Rokenberg  
Rep. Drew Scalzi  
Rep. Gary Stevens  
Sen. Dave Donley  
Sen. Lyman Hoffman  
Sen. Randy Phillips  
Sen. Gene Therriault  
Sen. John Torgerson  
Sen. Jerry Ward  
Sen. Gary Wilkens  
Sen. Robin Taylor  
Sen. Kim Elton  
Sen. Drue Pearce

**rodger painter**

---

**From:** Ken Imamura [Ken\_imamura@fishgame.state.ak.us]  
**Sent:** Thursday, January 11, 2001 3:42 PM  
**To:** Geron Bruce; Steven G Mcgee; Ray RaLonde; Jcn Agosti; Rodger Painter; Jackie Timothy; Guyla L Mcgrady; Michael J Ostasz  
**Subject:** Aquatic farm application workshops

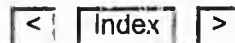
I realize that time is growing short, so I thought it might be better to suggest this now, rather than later. Comments on the draft regulations should be submitted by February 12 and the final proposed wording forwarded to the Dept of Law by the following Monday, February 19. At that time, everyone will have a better picture of what the submitted draft will include.

Would you be interested in participating in a workshop for prospective applicants to help them through the application forms, give them some perspectives on the available technology, and provide answers to questions applicants might have regarding any aspect of setting up an aquatic farm? We could schedule two-day seminars in late February or early March in Anchorage and in Juneau for presentations by DGC, ADEC, ADNR, and ADF&G on the specifics of the application form and the review process. Quetekcak Hatchery could provide insights into availability of seed stock of various species. ASGA could demonstrate what a farm needs in the way of gear, facilities, infrastructure, and logistics. Marine Advisory could provide technical or operations information. My hope is that we might be able to avoid some of the problems with applications we had in the last opening. I would propose using some of the Mariculture CIP provided by the Legislature last year to fund most of the costs of holding these workshops.

If you feel the agenda is too broad or cannot be brought together in about a month, please provide some input on when it might be best to hold such workshops. Please get back to me, even if it is to indicate that you are not interested.



Article last updated:  
Friday, January 12, 2001 6:16 AM MST



Print this Article E-Mail to a Friend Link to this Article

## Aquatic farm applicants sue state

The Associated Press

ANCHORAGE--A group of aquatic farm applicants has filed a lawsuit against the state charging that the Department of Fish and Game changed its policies preventing them from obtaining permits.

The lawsuit was filed in Ketchikan District Court by seven aquatic famers who claim that Fish and Game is preventing them from operating geoduck clam farms in southern Southeast Alaska. At issue is whether farm applicants are entitled to harvest geoducks already on their farm sites, Amy Miller of Coastalaska radio reported.

Scott Thomas, one of the plaintiffs, said some of the farmers intentionally chose sites that had populations of geoducks because the law requires it.

"What the Department of Fish and Game did, is after we applied for these permits, they went out and did surveys," Thomas said. "They wanted to see what was there. And they found that there was lots of Geoduck clams in some of these areas. And they said, 'this is a bunch of clams, and you guys are going to make a bunch of money, and we don't think that you guys should be able to do that.' And we said, 'well this is exactly what the law says we have to do.' We have to apply for areas that are suitable for the species that we are intending to cultivate."

What's more, Thomas said, Southeast has limited farming areas because for productive habitat a farm needs to be adjacent to a sandy beach. And much of the Alaska coastline is rocky.

According to the state attorney general's office, state law doesn't require that a proposed site have an existing stock.

"One of the criteria for reviewing applications is that you need to show that the site is suitable for farming, said Shannon O'Fallon, assistant attorney general. "Its true that if you've got geoducks that are growing there already its a pretty good indication that you might be able to grow geoducks there. However, we've had conversations with all the farmers and many if not all of them have said that having geoducks at a particular site is not the only indication of a successful site."

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# MARINE ADVISORY PROGRAM

UNIVERSITY OF ALASKA FAIRBANKS

SCHOOL OF FISHERIES AND OCEAN SCIENCES

2221 E. NORTHERN LIGHTS BLVD., #110  
ANCHORAGE, ALASKA 99508-4140  
PHONE: 907-274-9691  
FAX: 907-277-5242

January 12, 2001

Representative Lesil McGuire, Chair  
House Administrative Regulation Review  
Alaska House of Representatives  
State Capitol, Room 418  
Juneau, AK 99801-1182

Raymond RaLonde, Aquaculture Specialist  
Marine Advisory Program  
University of Alaska  
2221 E. Northern Lights Blvd. #110  
Anchorage, Alaska 99508

Subject: Aquatic Farm Regulations public hearing process

Dear Representative McGuire:

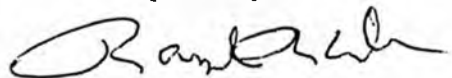
On January 8, 2001 I had the opportunity to testify at a public hearing regarding the recent draft Aquatic Farming regulations being proposed by the Alaska Department of Fish and Game. In attendance were citizens from Anchorage and scheduled teleconference sites at Homer, Seward, and Cordova. Ketchikan was patched in during the conference and was originally unscheduled to participate.

I have some concerns about irregularities of the hearing process and the requirements of hearing officers, Ken Imamura and Shannon O'Fallon to provide equal access in taking public testimony. Two specific points are:

1. Ketchikan was not scheduled to attend the teleconference. While I agree with the audience that attended the hearing in Anchorage, that Ketchikan should be able to make comments, I discovered the following day that citizens in Juneau were denied a request to participate. This process seems particularly unfair to allow one community to testify while disallowing another.
2. One participant, whose comments will be recorded in the hearing record, complained that the front door to the ADF&G office was locked at 6:35 while the hearing started at 6:30. As a result, we have no way of knowing if the locked door prevented people from testifying.

In the interest of obtaining adequate public testimony on this important topic, I request that this matter be investigated.

Respectfully,

A handwritten signature in black ink, appearing to read "Raymond RaLonde". The signature is fluid and cursive, with a large initial "R" and a long, sweeping tail.

Raymond RaLonde  
Aquaculture Specialist



**United States Department of Agriculture**

**Farm  
Service  
Agency**

**Alaska State FSA Office**

800 West Evergreen, Suite 216, Palmer, Alaska 99645-6539

Telephone: 907-761-7700 FAX: 907-761-7789

January 9, 2001

Representative John Harris  
State Capitol  
Juneau, Alaska 99801

**SUBJECT:** Proposed Alaska Department of Fish and Game (ADF&G) regulations on  
Mariculture

Dear Senator:

We have become aware of proposed regulations by the ADF&G that would make it extremely difficult for the farmers in the mariculture industry to continue operations. The regulatory jungle that these farmers have to negotiate presently is making the business difficult enough without adding more regulations. This creates unnecessary obstacles to a viable and growing industry. We have reviewed the proposed regulations, and feel that the requirements contained therein impose almost impossible demands upon new and existing producers. Also, the reasons for which a permit may be denied or terminated are so broad and vague that the commissioner could conceivably terminate all permits.

As you know, the farm loan program of the Farm Service Agency is designed to assist beginning farmers and other farmers in becoming successful owner operators of family sized farms. We believe mariculture farms fit very well into this program. We are supporting oyster operations located in Kachemak Bay, Prince William Sound, and Southeast Alaska. Therefore, we have a financial interest in this industry as well as a program interest.

We have observed mariculture operations grow from a novelty business, to a serious food production industry. The quality of the products, oysters, clams, scallops, and others that are grown in Alaska are unequaled anywhere else in the world. This is not just our claim, or the claim of the Alaska growers. Food industry distributors around the world are demanding these products. The lack of export presently is a function of the small size of the industry. Local demand is able to absorb the entire production. Expansion of present operations is very difficult due to the constraints placed upon the growers by existing regulations. Worldwide, shellfish production is expanding very rapidly and is hardly keeping up with the demand. Alaska has a tremendous opportunity to create a multimillion dollar industry that is not consumptive of resources and can coexist very well with all other used and the environment.

*An Equal Opportunity Employer*

**USDA LETTER**

It is our opinion that additional regulations are unneeded if the goal of state government is to insure that resources are protected and that all users have equal access. For example, if the ADF&G is concerned that the presence of a mariculture farm will detract from the natural beauty of the Alaska shoreline, they should consider the effect caused by one oyster/clam farm in Prince William Sound. This farm is a regular stop, and one of the most popular, for one of the ship cruise lines. The cruise line has indicated that this one stop is one of the more important selling points for the cruise, and the passengers do not feel that the existence of the farm detracts in any way from their experience. It is also our opinion that mariculture operations, where they are presently located and where they may potentially be located, have very little impact, if any, on commercial fishing, cultural practices, or wildlife including wild salmon and shorebirds.

We do not disagree that consultation with ADF&G should occur when regulation of the mariculture industry is considered. However, this significant expansion of regulation would seem to convey the attitude that the Alaska State Government does not want this industry. I do not believe, based on the governor's stated commitment to agricultural production, that this is the direction we want to go.

We would recommend that a mariculture board be established, similar to the fisheries board and the game board, that would have the authority to regulate this new and growing industry. The board should be comprised of members of the various agencies and growers. With this body established, regulations can be developed that will be based on sound information, discussed in an open forum, and implemented for the benefit of both the industry and the interests of other users.

We appreciate your efforts on behalf of the citizens of this great state and look forward to working with you and the appropriate agency personnel on this issue.

Sincerely,



Charles W. Thompson  
Farm Loan Chief

cc: Rep. Scott Ogan  
Rep. John Harris  
Governor Tony Knowles

# Online Public Notice

## State of Alaska Online

<a href="#">Home Page</a>	<a href="#">Go Back</a>			
<b>Submitted by</b>	<b>Date Modified</b>	<b>Ak Admin Journal</b>	<b>Attachments</b>	<b>Public (Web edit)</b>
Mary Stone/OOC/ADFG on 12/19/2000 at 08:53 AM	12/19/2000 08:54:39 AM	[not printed]	No files attached	

## Title 5 Of The Alaska Administrative Code, Aquatic Farming

**Category: Notices of Proposed Regulations**  
**Publish Date: 12/19/2000**

**Department: Fish & Game**  
**Location: Statewide**  
**Region: Statewide**

### Body of Notice:

The Commissioner of the Alaska Department of Fish and Game proposes to adopt regulation changes in Title 5 of the Alaska Administrative Code, dealing with aquatic farming, including the following:

The following regulations in chapter 41 are proposed to be changed to

- (1) 5 AAC 41.200. clarify the applicability of the regulations;
- (2) 5 AAC 41.220. clarify and make specific the requirements for applying for an aquatic farm operating permit;
- (3) 5 AAC 41.230. clarify and make specific when the department can request additional information from an applicant, and the consequences of an applicant's failure to provide the additional information;
- (4) 5 AAC 41.240. clarify and make specific the department's process for the review of applications, the criteria that will be applied when reviewing applications, decision deadlines, and requests for reconsideration;
- (5) 5 AAC 41.250. clarify and make specific the conditions that may be imposed in an aquatic farm operating permit;
- (6) 5 AAC 41.260. clarify the rules that govern inspection of an aquatic farm;
- (7) 5 AAC 41.270. clarify the annual reporting duties of an aquatic farm permit holder;
- (8) 5 AAC 41.280. clarify and make specific the rules that govern permit renewal and permit transfer;
- (9) 5 AAC 41.290, 5 AAC 41.300, and 5 AAC 41.400. clarify and make specific the process for applying for a stock acquisition permit, the criteria for issuing a stock acquisition permit, the purposes for which a stock acquisition permit will be issued, and the permit conditions that may be placed on a stock acquisition permit; and define needed terms.

Chapter 41 is proposed to be changed by adding the following new sections that would

**ORIGINAL NOTICE**

(10) 5 AAC 41.245. govern when and under what circumstances an aquatic farmer can have access to wild resources on the farm site;

(11) 5 AAC 41.295. govern the transfer of aquatic plants and shellfish from or between an aquatic farm or shellfish hatchery.

(12) 5 AAC 41.210 and 5 AAC 41.300. are proposed to be repealed. The intended effect of the repeal of 5 AAC 41.210 is to do away with an unnecessary regulation. The repeal of 5 AAC 41.300 is being proposed because the substance of the regulation has been incorporated into another section which is intended to make the process of the transfer of stock clearer

You may comment on the proposed regulation changes, including the potential costs to private persons of complying with the proposed changes, by submitting written comments to Kenneth Imamura, Mariculture Coordinator for the Alaska Department of Fish and Game at ADF&G, Division of Commercial Fisheries, Capital Office Park, 1255 W. 8th St., P.O. Box 25526, Juneau, Alaska 99802-5526; or by email to [ken\\_imamura@fishgame.state.ak.us](mailto:ken_imamura@fishgame.state.ak.us); or by fax to (907) 465-4168. The comments must be received no later than 5:00 p.m. on January 18, 2001.

Oral or written comments also may be submitted at hearings to be held on January 4, 2001 in Ketchikan, Alaska at the Alaska Department of Fish and Game conference room, at 2050 Sea Level Drive, from 6:30 p.m. to 10:00 p.m. and on January 8, 2001 in Anchorage, Alaska at the Alaska Department of Fish and Game Aerie conference room at 333 Raspberry Road from 6:30 p.m. to 10:00 p.m.

If you are a person with a disability who needs a special accommodation in order to participate in this process, please contact Kenneth Imamura at the above mailing or e-mail address, or fax number, or by calling (907) 465-6150 no later than December 28, 2000 ensure that any necessary accommodations can be provided.

For a copy of the proposed regulation changes, contact Kenneth Imamura at the above mail or e-mail address, or by fax number, or by calling (907) 465-6150, or go to the department's website at [www.state.ak.us/local/akpages/FISH.GAME/adfghome.htm](http://www.state.ak.us/local/akpages/FISH.GAME/adfghome.htm).

After the public comment period ends, the Alaska Department of Fish and Game will either adopt these or other provisions dealing with the same subject, without further notice, or decide to take no action on them. The language of the final regulations may be different from that of the proposed regulations. **YOU SHOULD COMMENT DURING THE TIME ALLOWED IF YOUR INTERESTS COULD BE AFFECTED.**

Statutory Authority: AS 16.05.050; AS 16.05.092; AS 16.40.100; AS 16.05.340; AS 16.05.160.

Statutes Being Implemented, Interpreted, or Made Specific: AS 16.40.100 - 16.40.199.

Fiscal Information: It is estimated that the proposed regulation changes will require increased appropriations as follows: FY 01, \$25K; FY 02, \$10K; FY 03, \$50K; FY 04, \$-0-.

DATE: \_\_\_\_\_ Ken Imamura  
Mariculture Coordinator

For more information contact Kerri Tonkin, phone (907)465-6124, fax (907) 465-2604, e-mail [kerri\\_tonkin@fishgame.state.ak.us](mailto:kerri_tonkin@fishgame.state.ak.us).

ADDITIONAL REGULATIONS NOTICE INFORMATION (AS 44.62.190(d):

1. Adopting agency: Alaska Department of Fish and Game.

2. General subject of regulation: Aquatic Farming.

3. Citation of regulation: 5 AAC 41.200 - 5 AAC 41.400.

4. Reason for the proposed action:

compliance with federal law

compliance with new or changed state statute

compliance with court order

development of program standards

other: Re-write of regulations.

5. Program category and BRU affected: Department Programs

6. Cost of implementation to the state agency and available funding (in thousands of dollars)

Initial Year Subsequent

FY -01 Years 02

Cost \$ 50 \$ 10

General fund \$ 50 \$ 10

Federal funds \$ \$

Other funds

Permit Fees \$ 25 \$ -0-

7. The name of the contact person for the regulations:

Name Ken Imamura

Title Mariculture Coordinator

Alaska Department of Fish and Game

Address 1255 West 8th Street

Juneau, Alaska 99802

Telephone 907-465-6150

8. The origin of the proposed action:

staff of state agency

federal government

general public

petition for regulation change

other Commissioner of Alaska Department of Fish and Game

9. Date: December 15, 2000 Prepared by: \_\_\_\_\_

Name (typed) Ken Imamura

Title (typed) Mariculture Coordinator

Telephone: 907-465-6150

## FISCAL NOTE

1. Regulation-adopting agency: Alaska Department of Fish and Game.
2. General subject of regulation: Aquatic Farming
3. Citation of regulation: 5 AAC 41.200 - 5 AAC 41.400.
4. Program category and BRU requiring appropriations: Mariculture/Aquatic Farming.
5. Estimated appropriations required (in thousands of dollars): Fifty.

Current FY\_01\_\_ Next FY\_02\_\_ Next FY \_03\_\_ Next FY \_04\_\_

100 PERSONAL SERVICES

200 TRAVEL 37 2 30

300 CONTRACTUAL 5 5

400 COMMODITIES 4 8 4

500 EQUIPMENT 11 11

600 LAND AND STRUCTURES

700 GRANTS, CLAIMS, ETC.

TOTAL 50 10 50 -0-

6. Funding (in thousands of dollars): Fifty.

GENERAL FUND 25 10 50 -0-

FEDERAL FUNDS

OTHER (specific source) Permitting Fees 25 25

TOTAL 50 10 50 25

7. Positions:

PERMANENT FULL-TIME

PART-TIME/SEASONAL

TOTAL NO. OF STAFF MONTHS

8. Description: Estimated operating costs for Mariculture Program that will be incurred applying new regulations.

9. Date: \_\_\_\_\_ Prepared by: \_\_\_\_\_

Ken Imamura

Telephone: (907) 465-6150

**Revision History:**

12/19/2000 08:53:17 AM by Mary Stone/OOC/ADFG/State/Alaska/US

12/19/2000 08:54:40 AM by Mary Stone/OOC/ADFG/State/Alaska/US

# Online Public Notice

## State of Alaska Online

<a href="#">Home Page</a>	<a href="#">Go Back</a>			
<b>Submitted by</b>	<b>Date Modified</b>	<b>AK Admin Journal</b>	<b>Attachments</b>	<b>Public (Web edit)</b>
Mary Stone/OOC/ADFG on 01/04/2001 at 10:35 AM		[not printed]	No files attached	

## Aquatic Farming And Shellfish Hatcheries

**Category: Notices of Proposed Regulations**  
**Publish Date: 01/04/2001**

**Department: Fish & Game**  
**Location: Statewide**  
**Region: Statewide**

### Body of Notice:

Supplemental notice of Proposed Changes in the Regulations of the Alaska Department of Fish and Game

The Commissioner of the Alaska Department of Fish and Game proposes to adopt regulation changes in Title 5 of the Alaska Administrative Code, dealing with aquatic farming and shellfish hatcheries, including the following:

The following regulations in chapter 41 are proposed to be changed:

- (1) 5 AAC 41.200 - clarifies the applicability of the regulations;
- (2) 5 AAC 41.220 - clarifies and makes specific the requirements for applying for an aquatic farm or shellfish hatchery operating permit;
- (3) 5 AAC 41.230 - clarifies and makes specific when the department can request additional information from an applicant, and the consequences of an applicant's failure to provide the additional information;
- (4) 5 AAC 41.240 - clarifies and makes specific the department's process for the review of applications, the criteria that will be applied when reviewing applications, decision deadlines, and requests for reconsideration;
- (5) 5 AAC 41.250 - clarifies and makes specific the conditions that may be imposed in an aquatic farm or shellfish hatchery operating permit;
- (6) 5 AAC 41.260 - clarifies the rules that govern inspection of an aquatic farm or shellfish hatchery;
- (7) 5 AAC 41.270 - clarifies the annual reporting duties of an aquatic farm or shellfish hatchery permit holder;
- (8) 5 AAC 41.280 - clarifies and makes specific the rules that govern permit renewal and permit transfer;
- (9) 5 AAC 41.290 - clarifies and makes specific the process for applying for a stock acquisition permit, the criteria for issuing a stock acquisition permit, the purposes for which a stock acquisition permit will be issued, and the permit conditions that may be placed on a stock acquisition permit;

**NOTICE EXTENSION**

(10) 5 AAC 41.400 - defines needed terms.

Chapter 41 is proposed to be changed by adding the following new sections:

(11) 5 AAC 41.245 - governs when and under what circumstances an aquatic farmer can have access to wild resources on the farm site;

(12) 5 AAC 41.275 - governs an annual shellfish hatchery management plan;

(13) 5 AAC 41.295 - governs the transfer of aquatic plants and shellfish from or between an aquatic farm or shellfish hatchery.

(14) 5 AAC 41.210 and 5 AAC 41.300 are proposed to be repealed. The intended effect of the repeal of 5 AAC 41.210 is to do away with an unnecessary regulation. The repeal of 5 AAC 41.300 is being proposed because the substance of the regulation has been incorporated into another section which is intended to make the process of the transfer of stock clearer

This is a SUPPLEMENTAL NOTICE adding to the NOTICE OF PROPOSED CHANGES that was issued on December 15, 2000 concerning these proposed regulation changes. This SUPPLEMENTAL NOTICE is being issued to extend the comment period to February 12, 2001 and to announce another public hearing in Juneau, Alaska on January 30, 2001 in the Commissioner's conference room at the Alaska Department of Fish and Game Headquarters building at 1255 West 8th Street, from 2:00 p.m. to 6:00 p.m.

You may comment on the proposed regulation changes, including the potential costs to private persons of complying with the proposed changes, by submitting written comments to Kenneth Imamura, Mariculture Coordinator for the Alaska Department of Fish and Game at ADF&G, Division of Commercial Fisheries, Capital Office Park, 1255 W. 8th St., P.O. Box 25526, Juneau, Alaska 99802-5526; or by email to [ken\\_imamura@fishgame.state.ak.us](mailto:ken_imamura@fishgame.state.ak.us); or by fax to (907) 465-4168. The comments must be received no later than 5:00 p.m. on February 12, 2001.

Oral or written comments also may be submitted at hearings to be held in the following locations:

On January 4, 2001 in Ketchikan, Alaska at the Alaska Department of Fish and Game conference room, at 2030 Sea Level Drive, from 6:30 p.m. to 10:00 p.m.

On January 8, 2001 in Anchorage, Alaska at the Alaska Department of Fish and Game Aerie conference room at 333 Raspberry Road from 6:30 p.m. to 10:00 p.m. either in person or through a teleconference by calling one of the following Legislative Information Offices: Homer (907) 235-7878; Seward (907) 224-5066; and Cordova (907) 424-5461.

On January 30, 2001 in Juneau, Alaska at the Alaska Department of Fish and Game Headquarters building in the Commissioner's conference room from 2:00 p.m. to 6:00 p.m. in person or through a teleconference by calling one of the following Legislative Information Offices: Homer (907) 235-7878; Seward (907) 224-5066; Cordova (907) 424-5461; Kodiak (907) 486-8116, Ketchikan (907) 225-9675; Wrangell (907) 874-3013; Petersburg (907) 772-3741; or Sitka (907) 747-6276.

If you are a person with a disability who needs a special accommodation in order to participate in this process, please contact Kenneth Imamura at the above mailing or e-mail address, or fax number, or by calling (907) 465-6150 no later than January 15, 2001 to ensure that any necessary accommodations can be

provided.

For a copy of the proposed regulation changes, contact Kenneth Imamura at the above mail or e-mail address, or by fax number, or by calling (907) 465-6150, or go to the department's website at [www.state.ak.us/local/akpages/FISH.GAME/adfghome.htm](http://www.state.ak.us/local/akpages/FISH.GAME/adfghome.htm).

After the public comment period ends, the Alaska Department of Fish and Game will either adopt these or other provisions dealing with the same subject, without further notice, or decide to take no action on them. The language of the final regulations may be different from that of the proposed regulations. **YOU SHOULD COMMENT DURING THE TIME ALLOWED IF YOUR INTERESTS COULD BE AFFECTED.**

Statutory Authority: AS 16.05.050; AS 16.05.092; AS 16.40.100; AS 16.05.340; AS 16.05.160.

Statutes Being Implemented, Interpreted, or Made Specific: AS 16.40.100 - 16.40.199.

Fiscal Information: It is estimated that the proposed regulation changes will require increased appropriations as follows: FY 01, \$25K; FY 02, \$10K; FY 03, \$50K; FY 04, \$-0-.

If you have any questions please call Kerri Tonkin, Regulation Specialist at 465-6124 or e-mail [kerri\\_tonkin@fishgame.state.ak.us](mailto:kerri_tonkin@fishgame.state.ak.us).

#### Additional Regulations Notice Information (AS 44.62.190(d))

1. Adopting agency: Alaska Department of Fish and Game.
2. General subject of regulation: Aquatic Farming.
3. Citation of regulation: 5 AAC 41.200 - 5 AAC 41.400.
4. Reason for the proposed action:
  - compliance with federal law
  - compliance with new or changed state statute
  - compliance with court order
  - development of program standards
  - other: Re-write of regulations.
5. Program category and BRU affected: Department Programs
6. Cost of implementation to the state agency and available funding (in thousands of dollars)
  - Initial Year Subsequent
  - FY -01 Years 02
  - Cost \$ 50 \$ 10
  - General fund \$ 50 \$ 10
  - Federal funds \$ \$
  - Other funds
  - Permit Fees \$ 25 \$ -0-
7. The name of the contact person for the regulations:  
  
Name Ken Imamura  
Title Mariculture Coordinator, Alaska Department of Fish and Game

Address 1255 West 8th Street  
Juneau, Alaska 99802  
Telephone 907-465-6150

8. The origin of the proposed action:

- staff of state agency
- federal government
- general public
- petition for regulation change
- other Commissioner of Alaska Department of Fish and Game

9. Date: January 3, 2001

Prepared by: \_\_\_\_\_

Name (typed) Kerri Tonkin  
Title (typed) Regulation Specialist  
Telephone: 907-465-6124

**Revision History:**

01/04/2001 10:35:26 AM by Mary Stone/OOC/ADFG/State/Alaska/US

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

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**ADF&G — Commercial Fisheries**

STATEWIDE :

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# Statewide Aquatic Farming Production and Value at Point of Sale

*Accounting Years 1996–1997, preliminary data for 1998*

ALASKA STATEWIDE								Total
Year	Farms	Oysters (ea)	Sales	Clams (lb)	Sales	Mussels (lb)	Sales	Sales
1996	34	869,816	\$357,540	35,197	\$87,993	6,935	\$13,870	\$459,402
1997	38	860,773	\$357,100	35,014	\$87,535	2,098	\$4,196	\$448,831
1998**	39	892,366	\$367,261	26,006	\$83,321	4,989	\$13,193	\$463,776

SOUTHEAST ALASKA						Total
Year	Farms	Oysters (ea)	Sales	Clams (lb)	Sales	Sales
1996	10	616,781	\$250,000	35,197	\$87,993	\$337,993
1997	10	608,773	\$250,000	35,014	\$87,535	\$337,535
1998**	11	543,930	\$212,842	26,006	\$83,321	\$296,163

SOUTHCENTRAL ALASKA						Total
Year	Farms	Oysters (ea)	Sales	Mussels (lb)	Sales	Sales
1996	24	253,035	\$107,540	6,935	\$13,870	\$121,410
1997	28	252,000	\$107,100	2,098	\$4,196	\$111,296
1998**	28	340,436	\$154,420	4,989	\$13,193	\$167,613

STATEWIDE VALUE				Overall
Year	Oysters	Clams	Mussels	Total
1996	\$357,540	\$87,993	\$13,870	\$459,402
1997	\$357,100	\$87,535	\$4,196	\$448,831
1998**	\$367,261	\$83,321	\$13,193	\$463,776

DATA NOT FOR LEGAL INTERPRETATIONS

This page is also available as a PDF file\* — [here](#).



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Contact: Ken Imamura ([ken\\_imamura@fishgame.state.ak.us](mailto:ken_imamura@fishgame.state.ak.us))

Webmaster: ([cfweb@fishgame.state.ak.us](mailto:cfweb@fishgame.state.ak.us))

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Last updated: Friday, December 15, 2000 11:23:48

**ADF&G — Commercial Fisheries**

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## Mariculture FAQ

### Why is Alaska a good place to grow oysters?

Oysters can grow very well in cold water if there is abundant, high-quality plankton. Many estuaries in Alaska produce so much high-quality plankton during certain times of the year that Alaskan shellfish can match growth achieved by shellfish raised in warmer waters of the Pacific Northwest. Cold, clean water also reduces bacterial contamination, extending shelflife and assuring safety when eating cultured oysters, especially when eaten raw.

### Why are Alaskan oysters so remarkable?

Pacific oysters, grown in warm waters, reach sexual maturation during their second summer of life, causing them to become soft and a milky color. These characteristics make the oysters unmarketable. In Alaska, because cold water retards maturation, high-quality oysters are available year round. Because they cannot reproduce, wild or naturally occurring, oysters are very uncommon in Alaska. All farmed Alaskan oysters are imported as spat (juvenile oysters) from Pacific Coast hatcheries.

### What about Paralytic Shellfish Poisoning?

Paralytic Shellfish Poisoning (PSP) results from a specific type of plankton that filter feeders, like clams, oysters and mussels, sometimes ingest. These plankton can produce a toxin that is poisonous to humans. Each shellfish farm's product is closely monitored for PSP. All shellfish from a farm is lot tested using the Department of Environmental Conservation's Uniform Shellfish Sampling Plan for Paralytic Shellfish Poisoning. If PSP is found, the grower cannot ship/sell his product. There has never been a case of Paralytic Shellfish Poisoning in Alaskan-farmed shellfish.

### How do you raise shellfish?

Generally, a shellfish farmer buys or collects juvenile shellfish, called "spat." He then puts them in special nets or lines (oysters and mussels) that are anchored in the ocean, or plants them on a beach (clams). The animals feed by filtering the abundant, high-quality plankton that naturally occur in the water. The farmer must keep the animals clean from algae and protect them from predators. He then harvests the animals when they grow to a marketable size.

### How long does it take the shellfish to grow to market size?

- Oysters: 18-36 months
- Mussels: 18 months

### What is a good farm site like?

A potential farm site should have good tidal flushing so that food (plankton) is readily carried to the site and waste is carried out to sea. The site must be protected from storms. The site must be reasonably close to the markets that will buy the shellfish. Staff should be able to live near the site.

### Can I get rich from this?

The industry is fairly new to Alaska and start-up costs are high. So far, most farms are providing some income, but not enough to support a family. Of the 56 farms in Alaska, only 2 provide enough income to solely support the owners. Farms are usually in remote areas and have high transportation costs. Shellfish farming is also hard work; to be successful farms should be operated on a daily basis and worked year

round.

### **How long does the permitting process usually take?**

You can apply for an Aquatic Farm Permit only during a 120-day opening established by the Department of Natural Resources. In the past this opening has occurred during January through April. The application is a consolidated packet combining all required state and federal permits. There is a \$100 application fee. It normally takes 10 months to go through the regulatory process. Permit applications are obtained from either:

Mariculture Officer  
Alaska Dept of Natural Resources  
Division of Mining, Land and Water  
550 W. 7th Avenue, Suite 900C  
Anchorage, AK 99501-3577  
(907)269-8543 (907)269-8913 FAX

Mariculture Coordinator  
Alaska Dept of Fish and Game  
Div. of Commercial Fisheries Management and Development  
P.O. Box 25526  
Juneau, AK 99802-5526  
(907)465-6150 (907)465-4168 FAX

### **What is required by the Department of Environmental Conservation?**

A growing area classification must be completed before shellfish may be harvested for sale. This may start anytime after the permits/leases have been obtained from the Department of Fish and Game and Natural Resources. Classification is a two-part process, the water quality survey and shoreline survey. The water quality survey consists of the collection of water samples that are taken from designated stations. The number of water samples can vary from 15 to 30 depending on the area classification. Fifteen samples are required for a remote area with no human habitation, whereas thirty remote area with no human habitation, whereas 30 samples are required for an approved area where human habitation is present.

The shoreline sanitary survey is a physical onsite evaluation of all actual and potential sources of pollution that may affect the growing area. Water samples may be taken during the shoreline survey. Water samples can be taken by a trained individual or by ADEC personnel. ADEC personnel must perform all shoreline work. Both the water quality and shoreline survey results must be satisfactory in order for the area to be classified.

### **Are there any oyster hatcheries in Alaska?**

Yes, one hatchery and two nurseries. Hatcheries spawn adult oysters and produce microscopic oyster spat. Nurseries grow these spat to a large enough size for shellfish farmers to place in nets or hang on lines.

### **What kind of shellfish/aquatic plants are being raised in Alaska?**

In order of importance to the shellfish farming industry: Pacific oysters (*Crassostrea gigas*), blue mussels (*Mytilus edulis*), littleneck clams (*Protothaca staminea*), scallops (*Chlamys rubida*, *Chlamys hastata*, *Crassidoma giganteum*, *Patinopecten caurinus*), bull kelp (*Nereocystis leutkeana*), and *Porphyra* species.

### **Can I raise fish?**

No. Alaska statute 16.40.210 prohibits finfish farming. However, Alaska does allow nonprofit ocean ranching. Finfish farming is defined as growing or cultivating finfish in captivity. Ocean ranching, on the other hand, involves releasing young fish into public waters and being available for harvest by fishermen upon their return to Alaskan waters as adults.



# RECORDS CERTIFICATION



I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original documents after microfilm reproductions have been made.

*William J. Carter*

Signature of Camera Operator

10/14/2003

Date

2-27-01

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RFP

# ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair  
Sen. Robin Taylor, Vice-Chair  
Sen. Lyda Green  
Sen. Georgianna Lincoln  
Rep. Jeannette James  
Rep. Joe Hayes



State Capitol, Room 116  
Juneau, AK 99801-1182  
(907) 465-5446 fax: 465-6592  
Interim  
716 W. 4<sup>th</sup> Ave. Suite 430  
Anchorage, AK 99501  
(907) 269-0250 fax: 269-0249

## Administrative Regulation Review Committee

### AGENDA

Tuesday 02/27/01, House State Affairs, Room 102, 2:45-4:30pm

- I. Proposed "Best Value" Procurement
- II. Kachemak Bay Closure to Bottom Mariculture

\*This Hearing will be teleconferenced

## UAF's Best Value Construction Procurement Proposal at Issue

UAF's Physical Plant Renewal project (\$3,750,000) was advertised in late January 2001 to be a "Best Value" procurement.

"Best Value" means that offers would be received and evaluated, taking into consideration the bid price and the experience, past performance and technical expertise of the general contractors, and their team of mechanical and electrical sub-contractors in projects of similar size and complexity. The respondents submit their bid amount in a separately sealed envelope. Upon evaluation of references and review of past performance of the various respondents, a committee reviews the sealed bid amount and recommends to the procurement officer the respondent with the team that represents the best value to the University. The procurement officer implements the recommendation or remands for additional consideration.

For renovation projects, where work requires extraordinary levels of communication and coordination between the owner and the contractor, UAF and others believe that the traditional "Low Bid" process does not necessarily ensure the best value in terms of quality of construction, maximizing the budget, and assuring timely completion of the project.

In this regard, the "Best Value" contracting method is a process that has been utilized very successfully for new construction and remodel work by the federal government for the past six years. UAF has extensively studied the federal government's track record and processes, and first attempted to utilize the "Best Value" construction RFP process in January for UAF's Physical Plant Renewal. Additionally, many in the contracting community have embraced this type of procurement and worked successfully with the federal government using this procurement method. As with any process, there are dissenting opinions.

UAF believes that it is critical for selected projects in the future to move forward with the Best Value procurement method. Selected projects would most likely be renewal projects where the exact extent of repair work, e.g. behind walls, is not known, since it is prohibitively expensive to perform 100% sampling of materials and conditions before bidding a project.

UAF encourages contractors and others to express their concerns. UAF will discuss those concerns and anticipates gaining consensus within the contracting community and further developing and explaining a fair and consistent evaluation process that addresses the concerns that are raised.

We hope that you can support us in this process. Thank you.

# Online Public Notice

## State of Alaska Online

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Submitted by	Date Modified	AK Admin Journal	Attachments	Public (Web Edit)
Carol L. Pickett/FBX/UA on 01/24/2001 at 03:35 PM	02/07/2001 03:33:37 PM	[not printed]	No files attached	

## UA - Physical Plant Code Corrections and Renewal - IFB #2001049

**Category: Competitive & Other Solicitations**  
**Sub-Category: Invitation to Bid**  
**Publish Date: 01/24/2001**

**Department: University of  
Alaska**  
**Location: Fairbanks**  
**Region: Northern**

### Body of Notice:

Physical Plant Code Corrections and Renewal  
Invitation For Bids Number 2001049, Project Number 2001008 PPDF

This is a "Best Value" type of competitive procurement. Under this methodology, the University of Alaska will evaluate and select the responsive and responsible Bidder, who, in the opinion of the University of Alaska, provides the best overall value.

Sealed bids for the Physical Plant Code Corrections and Renewal project will be received by the University of Alaska, Facilities Services, Office of Division of Design and Construction until Wednesday, 2:00 p.m., February 28, 2001, at the Office of Division of Design and Construction, 590 University Avenue, 2nd Floor, Fairbanks, Alaska. The Contractor is to submit a response to this ITB that demonstrates experience, past performance, and technical excellence separate from the sealed bid.

The work consists of: Remodeling for five maintenance shops within the East portion of the Physical Plant building. Demolition of interior walls, hazardous materials abatement, construct interior walls, upgrade structural components, upgrade sprinkler and fire alarm systems, and install new mechanical and electrical systems.

The award for construction of this Project will be made to a responsible Bidder whose proposal is responsive and offers the best value to the University. Best value will be determined on an integrated technical assessment of each proposal in terms of price, experience, past performance, and technical excellence.

Invitation For Bids may be obtained from the Office of Division of Design and Construction at the address listed above, phone (907) 474-5299.

A Pre-bid conference will be held Thursday, February 15, 2001, at 9:30 a.m. at the Physical Plant, University of Alaska, 803 Alumni Drive, 1st Floor Dispatch, Fairbanks, Alaska.

The University of Alaska reserves the right to reject any or all bids, offers, or parts thereof it deems

**Invitation to bid**  
**On line version**

necessary, to waive any informality in the bid or offer received, and to award in the best interest of the University.

The University of Alaska Fairbanks is an affirmative action/equal opportunity employer and educational institution.

**Revision History:**

01/24/2001 03:35:45 PM by Carol L. Pickett/FBX/UA/State/Alaska/US

01/25/2001 10:04:00 AM by Carol L. Pickett/FBX/UA/State/Alaska/US

02/07/2001 03:33:37 PM by Carol L. Pickett/FBX/UA/State/Alaska/US

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A Bidder may replace a listed subcontractor other than the prime mechanical and electrical subcontractor if the subcontractor:

1. fails to comply with AS 08.18, Construction Contractors;
2. files for bankruptcy or becomes insolvent;
3. fails to execute a contract with the Contractor involving performance of the Work for which the subcontractor was listed and the Contractor acted in good faith;
4. fails to obtain bonding;
5. fails to obtain insurance acceptable to the Owner;
6. fails to perform the Contract with the Contractor involving work for which the subcontractor was listed;
7. must be substituted in order for the prime contractor to satisfy required Owner federal affirmative action requirements;
8. refuses to agree or abide with the Contractor labor agreement or;
9. is determined by the Owner not to be a responsible subcontractor.

A Bidder who attempts to circumvent the requirements of this section, for example, by listing as a subcontractor another contractor who, in turn, sublets the majority of the Work required under the Contract violates this section. If a contract is awarded to a Bidder who violates this section, the Owner may:

1. cancel the Contract; or
2. after notice and a hearing, assess a penalty on the Bidder in an amount that does not exceed ten (10) percent of the value of the subcontractor at issue.

Replacement of electrical or mechanical subcontractor will be considered ground to reject the bid and the bid security may be retained by the Owner.

### 13. COMPARISON AND EVALUATION OF BIDS

A: This Invitation to Bid is prepared for a single general contract unless otherwise stated herein or on the Bid Form.

This is a "Best Value" type of competitive procurement. Under this methodology, the University of Alaska will evaluate and select the responsive and responsible Bidder, who, in the opinion of the University of Alaska, provides the best overall value. Inherent in this process is the use of subjective judgment on the part of the evaluators in assessing technical merit and in weighing the assessment against price, thereby selecting a Bidder who evaluators determine provides the overall "best value" for the University of Alaska. Therefore, Bidders acknowledge this will be a subjective evaluation and agree, by submittal of their bid, that the University of Alaska may accept other than the lowest priced responsive bidder if the University of Alaska's assessment in terms of General Contractor experience, General Contractor past performance, and Subcontractor experience, in the sole opinion of the University of Alaska, are worth the higher price.

The award will be made to the responsible Bidder whose bid is responsive and offers the best value to the Owner. Best value will be determined based on an integrated assessment of each bid in terms of price, General Contractor experience, General Contractor past performance, and Subcontractor experience. Therefore, subjective judgment by the Owner is implicit in the evaluation process. In addition, award may be made to other than low priced bid and may be made without conducting discussions.

If a Bidder does not have relevant past performance history (e.g., no experience in utility construction), the Bidder may not be evaluated favorably or unfavorably on past performance.

Bidders are required to provide specific data on all contracts performed within the last five years that are similar in scope, size, and complexity. In addition, for each contractor the Owner may prepare a list and contact other references known to the Owner, consumer protection organizations, and other sources that may have useful and/or relevant information.

Upon compilation of the list of contacts for each contractor, evaluators will collect information as necessary on General Contractor experience, General Contractor past performance, and Subcontractor experience, noting responses to a list of standardized questions asked of references.

Once information have been gathered, bidders will be evaluated by committee members using the assessments identified herein for General Contractor experience, General Contractor past performance, and Subcontractor experience.

When the committee members have completed evaluations for all the bidders, the evaluations will be forwarded to a separate committee. This committee will review the completed evaluations, open the sealed envelope containing the Bid Price, and then forward a recommendation to the Contracting Officer as to which bidder provides the "Best Value" to the University of Alaska. The Contracting Officer will make the final determination of "Best Value."

#### **GENERAL CONTRACTOR EXPERIENCE:**

**Low Risk** - Little doubt exists, based on the Bidder's experience in governmental contracts, that the Bidder can complete this kind of work. Standard: Good experience in projects of similar size, scope and complexity in governmental contracts.

**Moderate Risk** - Some doubt exists, based on the Bidder's experience, that the Bidder can complete this kind of work. Standard: Good experience in non- governmental projects of similar size and scope or extensive experience as the primary subcontractor for governmental projects similar in size and scope.

**High Risk** - Significant doubt exists, based on the Bidder's experience, that the Bidder can complete this kind of work. Standard: No experience in projects of this kind and no experience in governmental and only limited experience in non-University projects of similar size and scope or some experience as a subcontractor for governmental in projects of similar size and scope.

#### **GENERAL CONTRACTOR PAST PERFORMANCE**

**Excellent** - Entirely favorable past performance. Standard: A significant majority of the sources of information are consistently firm in stating that the Bidder's performance was superior and that they would unhesitatingly do business with the Bidder again. Complaints are negligible or unfounded. The Bidder has no record of criminal conduct, civil fraud, or negligence, or the record is old and the Bidder

CONTRACTORS LICENSE #AA116

February 13, 2001



Mr. Mark Hamilton, President  
University of Alaska  
P.O. Box 755000  
Fairbanks, AK 99775

Re: UAF Best Value Procurement Method

Dear President Hamilton:

GHEMM Company applauds the University of Alaska for their insight that the low dollar bid does not always represent the owner's best interest.

The UAF Physical Plant Code Corrections and Renewal bid document requires the general contractor to list up to ten previous contracts for pertinent experience and ten previous contracts for performance evaluation. The two main subcontractors, mechanical and electrical, must also list ten previous contracts for similar reference checks. This is the same reason an employer asks potential new hires for a resume and why pay typically depends on an employee's experience (DOE). The relative ratings of the contractors will be compared against the bid dollar amount. The UAF will then select the "best value" contractor for this project.

During a contract, the successful bidder in a low dollar only approach has little incentive to do its best as all they have to do to win a contract in the future is to get low. In best value contracts, poor performance becomes baggage that is opened the next time they bid.

In "best value" procurement, the owner is charged with making sure the selection process is accomplished in a forthright manner acceptable to the contracting community and to assure the bid is fair and open to all. To generalize and say best value procurement is wrong does not make sense. Sometimes the naysayer carries baggage from past projects. Others are suspicious that the owner will not treat the bids with an honest approach. Suspicion can be eliminated by post bid debriefings and by acceptance of input prior to bidding.

Quality, timeliness, fair change orders, completeness, warranty and coordination are all cost factors in every construction bid and/or contract. For example, a bidding advantage can be gained by ignoring an owner's completion date.



Mark Hamilton - University of Alaska  
February 13, 2001  
Page 2

Should that late contractor's next low bid be considered on an apples-to-apples basis with a contractor that would have performed on time? Perhaps finishing late will cost the owner more than the dollar difference in the bids.

Other public entities are currently successfully using the best value method of procurement. The Corps of Engineers has been using it for the last couple of years and there is little dissention that their bidding is handled in a fair and open manner. If the best value system is not allowed to be tried, then the message put out is that only low dollar matters. To heck with the value that quality, timeliness, etc. bring to the contract.

We support UAF's attempt to provide the public with best value projects.

Sincerely,

GHEMM Company, Inc.

A handwritten signature in cursive script that reads "Albert E. Bell".

Albert E. Bell, PE  
President

Cc: Senator Pete Kelly  
Senator Gene Therriault  
Senator Gary Wilken  
Representative John Coghill  
Representative John Davies  
Representative Hugh Fate  
Representative Joe Hayes  
Representative Jeanette James  
Representative Jim Whitaker

## **ALCAN BUILDERS, INC.**

### **GENERAL CONTRACTORS**

P.O. Box 70752 • Fairbanks, Alaska 99707

Phone: (907) 456-1383 • Fax: (907) 452-4378

February 5, 2001

Open letter to all Interior Senators & Representatives of Alaska Legislature

Dear Legislators,

On 01-31-01, a meeting of several general contractors and subcontractors was held at the local Fairbanks Associated General Contractors, AGC, office for the purpose of introducing us to the University of Alaska Fairbanks new system of construction procurement called "Best Value".

The "Best Value" procurement method is new to the industry and has been experimented with by the Federal Government for the last two or three years.

This "Best Value" system of contractor selection is flawed in many ways and is highly disliked by a majority of general contractors and subcontractors in the Fairbanks area for some of the following reasons.

1. It allows the government to open bids behind closed doors. Hence, the popular public bid opening process is subverted. The public bid process assures accountability to interested parties and prevents government from knowingly or unknowingly corrupting the system. Each bidder and interested party knows where he or she stands on bid day with this tried and proven system.
2. With the new "Best Value" system, contractors are graded on subjective past performance criteria including job size. With the present public opening system, a contractor with a bond for the project in question can bid and procure work above his proven range of capability. This system allows growth. The "Best Value" system grades the contractor on completion of like projects awarding low risk points to contractors who have successfully completed like size projects and high risk points to contractors working out of past price ranges. Hence, a contractor who has completed one to three million dollar projects stands a small chance of winning a contract on a six to nine million dollar job and is locked into the one to three million dollar category with this "Best Value" process. Hence, the contractor is left stratified into one category; small, medium, or large with chance of growth in the private sector only.

3. The "Best Value" process discriminates against new contractors in that a contractor is graded on past performance. Hence, an individual with 30 years of contracting experience to his or her credit operating under a new name has almost no chance of obtaining work in the public sector until his new company can build a track record. A true free enterprise system should welcome individuals into the system to encourage participation for innovation. The "Best Value" system discourages free enterprise and favors only construction companies with proven track records.
4. The "Best Value" process ties up a contractor's bonding, as the evaluation period is slow and cumbersome. A contractor needs to get fast reliable feedback as to where he or she stands on a project, as our construction season is very short. If a contractor bids a multimillion dollar project on May 15<sup>th</sup> and it takes 60 days to evaluate his or her bid, that contractor may be held back from bidding new work by his bonding company until mid July or later. With the tried and proven public opening process, everyone is informed on the same day as to whether or not they were the successful bidder.
5. The "Best Value" system will result in the eventual blackballing of subcontractors by general contractors as the past performance of subcontractors is a factor in bid award. If a mechanical or electrical subcontractor receives a low score termed as "high risk", other general contractors will eventually blackball the subcontractor on future "Best Value" work. This discourages growth and simply looks in a particular group.
6. The "Best Value" system is very cumbersome as a great deal of demand is placed upon the contractor in providing data on past performance. UAF is requiring that we supply past clients with forms to fill out and mail prior to bid time. The past clients are burdened with providing written opinions on general and subcontractor's past performance. The information they are required to provide can drastically hurt or help a contractor and that information is too subjective. If a past client does a poor job of responding, the contractor is hence, damaged.
7. There are a limited number of subcontractors available in this small Fairbanks area. "Best Value" will result in team marriages between general, mechanical and electrical subcontractors resulting in a very limited number of successful general contractors over the next few years. In other words, we will see contractors either fold or go off into the private sector as a result of the poorly thought out system. If one or two contractors become owner favorites or even appear as favorites for a particular agency, other contractors will pull away from bidding and the cost of construction for the agency will rise dramatically. We are seeing this develop at the local military

bases. Contractors are simply giving up on attempting to bid projects and very closed systems are forming.

8. Good ole boy systems will form as a result of "Best Value" contracting. If a contractor provides good performance to an owner on a project, he or she is certain to be favored on future projects as there is no dollar variance criteria allocated to the scoring system. In other words, if bidder A has a much lower price than bidder B, but bidder B is the favored contractor, where is the accountability to the taxpayer if B is selected?
9. The "Best Value" system that UAF has adopted is fundamentally flawed because a general contractor is required to name and use its two major subcontractors, mechanical and electrical. The system does not work if there are alternates because although a subcontractor may be low bidder on the base bid, he or she may not necessarily be low if alternates are selected. The cost impact on a general could be substantial if the owner forces you to go with the selected and approved subcontractor. Remember, you are awarded the project if you and your subcontractors receive a favorable rating. Changing the subcontractors after the fact is not allowed.
10. General contractor's and subcontractor's businesses have been built in the public sector on the public bid system. In other words, through mathematical probability, (supply and demand) we all receive our fair share of public works projects. As our quantity of work decreases, our prices come down and as the quantity increases our prices come up, decreasing our probability of obtaining work. This new "Best Value" system puts that mathematical probability aside as price is only a small factor for award of a contract. "Best Value" will put many of us out of business because the supply and demand system is brushed aside. We are already seeing impact in this community as a result of the military's "Best Value" system. Simply put, a subcontractors probability of obtaining a contract is reduced dramatically with this flawed system.
11. The new "Best Value" system could lead to power brokering and kickbacks as the system is subjective and individuals' decisions will result in contract awards. Selection committees will be made up of individuals who harbor preconceived notions about contractors and subcontractors. Those biases will affect their decision-making and the ultimate contractor selection. The power the new "Best Value" system will place in the hands of individuals could lead to kickbacks because of the amount of money at stake.

In conclusion, I'd like to emphasize that any time government takes bids behind closed doors, we the people have a serious problem. The last major example of restrictive bidding and attempted abuse of tax dollars took place in the mid eighties and a former governor came very close to being impeached over it. That case dealt with what is now the FNSB School District building on 5<sup>th</sup> Avenue but at the time the state set up a bid packet that restricted an intended lease of office space to a very small location on 5<sup>th</sup> Avenue in Fairbanks. The case was taken to court and it was found that investors had influenced the process from start to finish. As a result of this case, stricter procurement laws were enacted, particularly at UAF. Time has apparently dulled their memories.

Sincerely,



Jeff Alling

Sec. 36.30.990. Definitions.

In this chapter, unless the context in which a term is used clearly requires a different meaning or a different definition is prescribed for a particular provision,

(1) "agency"

(A) means a department, institution, board, commission, division, authority, public corporation, the Alaska Pioneers' Home, or other administrative unit of the executive branch of state government;

(B) does not include

(i) the University of Alaska;

(21) "state money" means any money appropriated to an agency or spent by an agency irrespective of its source, including federal assistance except as otherwise specified in AS 36.30.890, but does not include money held in trust by an agency for a person;

Chapter 36.30. STATE PROCUREMENT CODE

Sec. 36.30.005. Centralization of procurement authority.

(c) Notwithstanding other provisions of law, all rights, powers, duties, and authority relating to the procurement of supplies, services, professional services, and construction and the disposal of supplies for the University of Alaska are transferred to the Board of Regents. To the maximum extent possible, authority granted under this subsection shall be exercised in accordance with this chapter. The Board of Regents shall adopt regulations under this subsection that are substantially equivalent to the regulations adopted by the commissioner of administration to implement this chapter. For the purposes of this subsection, unless the context otherwise requires, in this chapter

(1) "agency" means a subunit of the University of Alaska;

(2) "attorney general" means the president of the University of Alaska;

(3) "chief procurement officer" means a person designated by the president of the University of Alaska whose qualifications are substantially equivalent to those provided in AS 36.30.010

(a)

(4) "commissioner," "commissioner of administration," or "commissioner of transportation and public facilities" means the Board of Regents or the president of the University of Alaska if so designated by the Board of Regents by regulations adopted under this subsection; and

(5) "department" means the University of Alaska.

## Article 02. COMPETITIVE SEALED BIDDING

### Sec. 36.30.100. General policy.

(a) Except as otherwise provided in this chapter, or unless specifically exempted by law, an agency contract shall be awarded by competitive sealed bidding.

### Sec. 36.30.110. Invitation to bid.

(a) When competitive sealed bidding is used, the procurement officer shall issue an invitation to bid. It must include a time, place, and date by which the bid must be received, purchase description, and a description of all contractual terms and conditions applicable to the procurement.

(b) The bidder must have a valid Alaska business license at the time designated in the invitation to bid for bid opening. A bidder for a construction contract shall also submit evidence of the bidder's registration under AS 08.18.

(c) If the commissioner of transportation and public facilities makes a written finding that the release of the estimated cost of a construction contract would adversely affect the state's ability to obtain the best competitive bid, the estimated cost is confidential information and may not be released to the public before bid opening.

### Sec. 36.30.140. Bid opening.

(a) The procurement officer shall open bids at the time and place designated in the invitation to bid. All bid openings are open to the public. The amount of each bid and other relevant information that is specified by regulation of the commissioner, together with the name of each bidder, shall be recorded.

(b) The information recorded under (a) of this section is open to public inspection as soon as practicable before the notice of intent to award a contract is given under AS 36.30.365 . The bids are not open for public inspection until after the notice of intent to award a contract is given. To the extent the bidder designates and the procurement officer concurs, trade secrets and other proprietary data contained in a bid document are confidential.

### Sec. 36.30.170. Contract award after bids.

(a) Except as provided in (b) - (h) of this section, the procurement officer shall award a contract based on the solicited bids with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid conforms in all material respects to the requirements and criteria set out in the invitation to bid.

(b) The procurement officer shall award a contract based on solicited bids to the lowest responsive and responsible bidder after an Alaska bidder preference of five percent, an Alaska products preference as described in AS 36.30.322 - 36.30.338, and a recycled products preference under AS 36.30.337 have been applied.

Sec. 36.30.308. Innovative procurements.

(a) A contract may be awarded for supplies, services, professional services, or construction using an innovative procurement process, with or without competitive sealed bidding or competitive sealed proposals, in accordance with regulations adopted by the commissioner. A contract may be awarded under this section only when the chief procurement officer, or, for construction contracts or procurements of the state equipment fleet, the commissioner of transportation and public facilities, determines in writing that it is advantageous to the state to use an innovative competitive procurement process in the procurement of new or unique requirements of the state, new technologies, or to achieve best value.

(b) The procurement officer shall submit a procurement plan to the Department of Law for review and approval as to form before issuing the notice required by (c) of this section.

(c) A procurement under this section is subject to the requirements of AS 36.30.130 .

(d) Nothing in this section precludes the adoption of regulations providing for the use of bonuses instead of preferences in a procurement of construction.

Sec. 36.30.850. Application of this chapter.

(a) This chapter applies only to contracts solicited or entered into after January 1, 1988, unless the parties agree to its application to a contract solicited or entered into before that date.

(b) This chapter applies to every expenditure of state money by the state, acting through an agency, under a contract, except that this chapter does not apply to

3) contracts of the University of Alaska where the work is to be performed substantially by students enrolled in the university;

(15) a contract that is a delegation, in whole or in part, of investment powers held by

(A) the commissioner of revenue under AS 14.42.200 , 14.42.210, AS 18.56.095, AS 37.10.070 , 37.10.071, or AS 37.14;

(B) the Board of Regents of the University of Alaska under AS 14.40.250 - 14.40.491;