

ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672
10162 ADMINISTRATIVE REGULATION REVIEW

5 AAC 41.240 is repealed and readopted to read:

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

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

(1) the proposed site:

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

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

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

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

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

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

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

(2) the proposed site is

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

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

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

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

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

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

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

(3) the proposed site or facility

(A) will disrupt or adversely affect

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

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

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

(iv) salmon milling, spawning, or rearing;

(v) maintenance of kelp or eelgrass beds;

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

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

(viii) harbor seal rookeries

(B) is within

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

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

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

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

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

AAC 95.

(4) the applicant cannot

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

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

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

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

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

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

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

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

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

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

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

Authority: AS 16.05.050 AS 16.40.105 AS 16.40.160

5 AAC 41.250 is repealed and readopted to read:

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

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

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

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

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

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

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

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

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

Authority: AS 16.05.050 AS 16.40.100 AS 16.40.160
AS 16.05.092

5 AAC 41.260 is repealed and reenacted to read:

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

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

Authority: AS 16.05.050 AS 16.40.100 AS 16.40.160

AS 16.05.092

AS 16.40.150

5 AAC 41.270 is repealed and readopted to read:

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

Authority: AS 16.05.050 AS 16.40.100 AS 16.40.160
AS 16.05.092

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

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

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

Authority: AS 16.05.050 AS 16.40.100 AS 16.40.160
AS 16.05.292

5 AAC 41.280 is repealed and readopted to read:

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

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

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

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

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

Authority: AS 16.05.050 AS 16.40.100 AS 16.40.110
AS 16.05.092 AS 16.40.105 AS 16.40.160
[AS 16.05.340 (b)]

5 AAC 41.290 is repealed and readopted to read:

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

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

- (5) when the wild stock will be collected;
- (6) the purpose for which the wild stock will be used;
- (7) the names of the vessel and its operator(s) if other than the persons

conducting the collections,

- (8) the kind of gear and the methods to be used for acquiring the wild stock;
- (9) the location from which the wild stock will be taken; and
- (10) the location and facilities at which collections will be consolidated, held, and

staged prior to the transfer of the wild stock.

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

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

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

- (1) give reasonable notice to the department before engaging in collection activities.
- (2) report the results of wild stock collection activity to the department;
- (3) submit samples of wild stock collected to the state fish pathology laboratory to establish a disease history of the wild stock collected, prior to the transfer of the wild stock to an aquatic farm or shellfish hatchery;
- (4) give reasonable notice to the department before transferring wild stock to an aquatic farm or shellfish hatchery; and
- (5) comply with 5 AAC 41.245 prior to the harvest of enhanced wild stock.

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

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

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

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

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

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

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

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

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

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

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

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

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

- (1) a regulatory management plan has been adopted for the species;
- (2) guideline harvest levels or harvest quotas have been established and met in recent years;
- (3) the fishery for the species is subject to limited entry by the Commercial Fisheries Entry Commission; and

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

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

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

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

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

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

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

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

5 AAC 41.300 is repealed:

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

Authority: AS 16.40.140

5 AAC 41.400 is repealed and readopted to read:

5 AAC 41.400. DEFINITIONS.

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

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

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

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

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

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

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

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

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

(10) "established use" means;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Legal Basis for On-bottom Aquaculture in Alaska

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By way of introduction, I must say that I am personally an advocate of aquaculture. In my commercial fishing career about 10 years ago, when I was the director of the Prince William Sound Aquaculture Corporation, I wrote a graduate thesis titled, "The Public Policy Issues Relating to Net Pen Salmon Farming," thinking that it might be useful in Alaska if and when we start farming salmon. Obviously, we haven't yet, so that thesis by now is obsolete. In any event, it was a fun exercise. Since then I have joined the state of Alaska, and I have been working principally for the Department of Fish and Game on some aquaculture and other general fisheries issues.

My particular interest, on which I have done some writing, is the common-use and the other equal-access clauses of the Alaska Constitution which are implicated by on-bottom aquaculture. The scenario for on-bottom aquaculture follows the following pattern: the state issues permits and leases to a potential farmer applicant, the applicant obtains a stock acquisition permit from the Department of Fish and Game to acquire the on-site natural wild resource (in this case the clams), does some enhancement on the clam population; and then markets the final product. That is today's scenario.

There are a number of ways to approach this topic. I could give you a summary of the statutes and regulations about application procedures, qualifications, and issuance of permits, but those topics are readily available from the statutes and regulations. If you do not know the process and what is expected of you as a potential farmer, you will easily learn them by the end of the conference. Instead, I will spend twenty minutes talking about some of the more esoteric aspects of this industry, the legal aspects I anticipate will be challenged, and the approach my department will take to defend a lawsuit. The possible confrontations stem from constitutional issues including the public trust doctrine and other related areas.

Most of the questions I receive about this industry and the development of a clam farming component are, "What about common use? What about exclusive right of fisheries? What about the public trust doctrine?"

For the next fifteen minutes or so I will present a brief overview of the constitutional public trust doctrine issues. Approaching this topic I will refer to specific litigation dealing with aquatic farming in Kachemak Bay and then finish with some goals I would like to see this conference address. Some issue resolution at this conference may help us at the Department of Law to defend this program from legal challenge.⁴ There are two constitutional issues contained in two clauses under Article 8 of the Alaska Constitution. They are part of what is termed the equal-access clauses of our Constitution that are unique to Alaska. What these provisions do in a broad sense is guarantee that there is public access to natural resources; and, in particular, to fish and game. The first clause is called the common-use clause. It says "wherever occurring in their

⁴ See Appendix 3 for an outline of the legal arguments and Alaska Constitution clauses.

natural state (natural state is important) fish, wildlife, and waters are reserved to the people for common use."

The Supreme Court has been dealing with this clause actively during the last ten years and essentially believes that the drafters of that clause meant it to guarantee broad public access to natural resources, and to prohibit any monopoly of those resources, particularly with respect to fish, game, and water. In 1988, the Alaska Supreme Court struck down what was called the exclusive guide area system for professional hunting guides. You may ask, "Well, what does that have to do with clam farming?" It has a lot to do with aquatic farming, and I anticipate if clam farming is challenged under the equal-access clauses, the first thing that the challenger is going to try to do is to draw an analogy between the exclusive guide area systems that the professional guides had and the clam farming industry. The Supreme Court said the exclusive guide area systems essentially created a privatization of a public resource. How they did that was interesting. The Supreme Court said there are five problems with that guide system: exclusivity, seniority, duration, transferability, and compensation. If these problems are considered collectively, the guide area system failed to comply with the common-use clause. There are some similarities between the guide area systems and on-bottom aquaculture, but there are also some significant differences.

Exclusivity

In the exclusive guide area systems, the state of Alaska essentially carved up all of the lucrative guiding areas in Alaska and allocated them out to guides. A person may have had a guide license, but unless the person had an exclusive guide area system, basically, he or she could not practice in your profession. Each guide had one or more exclusive guide area systems, and they were exclusive because no one else could come in and guide in that area. There is a similarity because when aquatic farm permits and leases are issued, they are exclusive, and no one else can gain access to the site and harvest the resource. At least for exclusivity, the two programs are similar.

Seniority

One of the problems that the Supreme Court had with exclusive guide area systems was that, when a permit was transferred, the person that acquired it from the previous holder had an advantage if they had use, occupancy, and interest or investment already in the site. If you are an applicant and you had any activity in the area, you had priority over another person who might be interested in getting that guide area. Aquatic farming also has a seniority system. If you have a permit, and you intend to renew that permit, you have an advantage over someone else that might want to have that permit—you have a seniority right. If you want to convert that permit into a lease, there is a preference for people who already have the permit. With this seniority right, you have an advantage for progressing from permit to permit and eventually getting a lease. In that aspect, there is a troubling similarity between the two programs.

Duration

An exclusive guide area could be owned for the life of the guide. Not so with aquatic farm permits and leases. Permits are three years in duration; you can renew them up to three times. Eventually, you can apply for a ten-year lease; but, at each point the farmer's performance under

that permit or lease is examined. This provision allows the state to not renew a permit or lease . That frees the farm site for another applicant.

Transferability

The Supreme Court had a real problem with transferability of permits under the exclusive guide system. A person could not directly transfer his system to someone else. When the professional guide decided he wanted to retire from the guide system, his exclusive guide permit went back to the Guide Board. However, under the regulations, the guide could sell the improvements to an applicant who wanted that exclusive guide area system. Earlier, I mentioned the seniority or preference for people who had already invested in that exclusive guide area system. In the instance when a guide was leaving the system, he could, under regulations, recommend transfer to a person that had invested in the system. That recommendation held a lot of weight with the Guide Board. Here is a scenario of how the system worked. If I am going to leave the guide area system, and someone wants to take it over for me because it is a good guide area system, I could sell all of the improvements to that person for an inflated value. In actuality, the person is buying not just the improvements but also my recommendation. I make a pile of money off of selling the "improvements." I take my recommendation to the Guide Board. They see he is already invested and transfer the permit. The Supreme Court looked at it and said, "This is a sham." The retiring guide is selling a public resource, a public common property resource, to another person and the Guide Board is just acting as a conduit. In aquaculture we do not have that in this system. Fortunately, the permits cannot be transferred. Leases can be transferred or assigned but only with the approval of Department of Natural Resources (DNR). That is a significant distinction between the guide area systems and the aquatic farm system.

Finally, the Supreme Court was very troubled with the whole process of passing on guide area systems, since there was no compensation to the state for the value of the resource. We are developing a program for the state to receive compensation for the value of the resource that is passed along with the aquatic farm permits and leases.

The other clause under the Alaska Constitution that would be raised in challenging this system is called the "no-exclusive-right-of-fisheries clause." That says no exclusive right or special privilege of a fishery shall be created or authorized in the natural waters of the state with an exception for limited entry and commercial fisheries. How the Supreme Court has interpreted this clause is interesting. It requires us to think in terms of users and uses of the resource.

Users

The Supreme Court interprets this clause to mean that when the state determines eligibility for who can harvest a resource that decision is examined under this clause. A good example is the former subsistence system. The former law said only people who lived in rural areas could be subsistence users. That was the criteria for who qualifies to use the resource. The court examined closely the method for distinguishing who could become members of that group to see if the criteria fit the purpose of the program or the intent of the legislature. When the analysis was applied in the McDowell case, the Supreme Court threw out the rural preference for subsistence.

Uses

Under the constitution, the state can allocate harvest opportunities among various users. In other words, the Board of Fisheries can decide that this fish stock can only go to commercial fishermen, or this game stock can only go to subsistence users, or what have you. Allocating between groups is acceptable under the constitution, and it is only inside the group that illegibility and equal-access clauses are implicated. We are talking users—admission to user groups—versus uses. Allocation among uses is what the state may do. But we have constitutional problems when we say that this person is eligible for membership in a particular user group, but another person may not qualify.

The public trust doctrine

Public trust doctrine was an issue in the Kachemak Bay case. Kachemak Bay Watch versus NOAA is the only existing lawsuit, that I am aware of, currently dealing with aquatic farming in the state. That case arose a few years ago and involves Kachemak Bay Watch challenging some of the procedures followed by DNR when they first identified aquatic farm districts in Kachemak Bay; and secondly, when they issued three permits for farms in the bay. The challenges are all procedural things like, should DNR have taken action by regulation when they identified the districts, as opposed to just announcing it? Did the regulations which DNR adopted comply with the underlying which says, for example, that DNR has to adopt regulations which limit farm sites in a particular area? In its regulation, the DNR said that you cannot have more than one-third of the surface of the bay covered with aquatic farm sites. Did that really comply with the statute? Those are the kinds of procedural questions that were being raised before the Superior Court. The Superior Court found in favor of DNR on all those issues. The bad news, however, is that the case is being appealed to the Alaska Supreme Court on most of those procedural issues. The state's argument is being prepared right now. In its decision the Superior Court made an interesting finding relating to the public trust doctrine which is helpful to the clam farming industry. In fact, that determination is not being challenged. In the Superior Court, Judge Hopson said that when reading over the aquatic farming statutory scheme, it seemed to him that the legislature, in adopting the leasing process, decided that it was bypassing the public trust doctrine for this program. In other words, the Superior Court says that the state abandoned its public trust duty when it adopted this program. That is not an issue in the appeal.

I would like to conclude my presentation by being optimistic about this program, not only for what it does but also for its legal basis. I would like to identify what I think are some goals that can help us strengthen the program from legal attack. I have listed the goals at the bottom of my outline. If you will deal with those topics in the next couple of days and help answer some of those questions, we will be on much firmer ground if this program, once it is on its feet, gets challenged under some of the principles I have mentioned so far.

My optimism for the program (at least for its legal basis) stems from several factors. First of all, I think that we can distinguish the aquatic farm situation from the exclusive guide area system in three important ways: duration; transferability; and, particularly, the compensation to the state. The permits and leases issued by DNR are basically exempt from all these constitutional issues. That conclusion is based on an analysis by the Department of Law a few years ago. At that time

the issue was whether shore fishery leases issued by the state for setnet sites violated the exclusive right-of-fisheries clause. Our analysis concluded that lease sites have nothing to do with fisheries. The state is giving away land, a property right, for an opportunity to use real estate. We are not giving anyone an opportunity to catch fish and are not permitting an exclusive right to fish. The fish may or may not be there. All the state does is say that the leasee has an exclusive right to set up his or her operation on this beach.

I guess that is the good news. The bad news is. DNR is not only issuing these permits and leases. but Fish & Game is issuing the stock acquisition permits which actually allow the farmer to acquire that common property resource, do some enhancement, and then sell it. That raises the issue of exclusive rights. However, I see some features of stock acquisition permits that would be very helpful in a lawsuit. First, before one of those permits can be issued, the state is required to make a determination that protects access to the resource. They must consider other existing and potentially competing uses for that resource. In fact, a stock acquisition permit cannot be issued if it unreasonably disrupts an established use. There will not be a situation where a stock acquisition permit is issued for a beach that is heavily or predominately utilized by other persons. That feature protects public access to the resource. The basic purpose of the constitutional clauses is to maximize the use of the resource, and our farming program is actually going to be creating more use of the resource. The state would be filling in, or supplementing, any existing uses that might be there. Thus, broadening public access to the resource will help this program withstand legal challenge.

Two features, exclusivity and seniority, are problematic for aquatic farming. They cannot be prohibited because they are needed for a viable industry. Obviously, no one is going to invest in this industry if they do not have exclusive right to a particular site, that is if anybody else can take of the resource, particularly their enhanced product. Seniority is the advantage for succession. It gives a priority to past users in the permitting and leasing processes. Unless someone can expect that they are going to have a site for a reasonable length of time, he or she will not invest time or money into developing a farm. These two features, even though they are problematic, are critical to this industry and without them, this industry could not function.

The exclusive guide area system virtually covered the entire state; there was no lucrative guide area that was not already locked up by somebody. At least at this stage of the aquatic farming industry, I believe there will be many sites available to farmers. Essentially, we are not prohibiting new entrants into the industry.

Finally, aquatic farming can be distinguished from the use versus users issues using the McDowell situation. Here, the state has not placed any undue restriction on eligibility to become an aquatic farmer. The state is not saying that only rural people are eligible. It is not establishing some kind of requirement that is not specifically directed toward making this industry viable. The only requirement is an operational plan and several other operational necessities. In other words there are no personal qualifications or qualities for the aquatic farming program similar to those that have caused the state legal trouble in other user group situations.

I would like to see three things accomplished at this conference. If you address these issues, that will help us defending the program from legal challenge. The first is, how should the state resolve access and acquisition conflicts where there are existing or anticipated uses of the standing public resource at a proposed farm site? In other words, when ADF&G receives an application for a stock acquisition permit and inquires whether there are any existing uses of the resource at that site, how will it respond if the answer is "yes"? Are there ways to accommodate existing uses? Or will it mean that the site will never used for aquatic farming?

The second issue is, when does the standing public resource become "enhanced" so that it is no longer in its natural state? The common-use clause only talks about fish and game in the natural state. A true aquaculture product is not governed by common use because no one would invest in aquaculture if the public were entitled to harvest the product. Here a public natural resource, through enhancement, becomes an aquatic farmed resource. At what point does this happen? How can we distinguish a clam farming situation from commercially harvesting clams? I have heard many people say that clam farming is just a sham for commercial harvesting of clams, so it is necessary to define the distinction. What is legitimate enhancement? How much effort and investment is needed? What is a workable definition of farming that state regulators can use to distinguish it from commercial harvesting? We must address this issue, otherwise it will provoke a lot of controversy.

Finally, the third issue is, what is fair compensation to the public for the standing, common property resource? In other words when the potential farmer acquires that standing clam crop and starts to enhance it, what is the value of the original resource? How should the state capture that value and make it available to all its residents.

STATE OF ALASKA
DEPARTMENT OF FISH AND GAME

41

TO: Distribution

DATE: July 11, 1995

FROM: Robert Bosworth *RB*
Deputy Commissioner

SUBJECT: Clam Farming

On June 30, 1995 division representatives met with Commissioner Rue and me to discuss clam farming being proposed by a number of aquatic farm applicants. The purpose of the meeting was not to make any final decisions on the department's position on these activities, but was to discuss what appear to be the primary issues at hand and to formulate a plan to develop a departmental position on this potential use of our intertidal resources.

At Commissioner Rue's direction a departmental mariculture working group was formed to begin this process. The working group members are:

Rob Bentz	Sport Fish
Jim Cochran	CFMD
Paul Larson	CFMD
Al Kimker	CFMD
Don McKay	Habitat and Restoration

We will also ask the Attorney General's Office to participate as there were a number of legal issues presented. Wildlife Conservation asked that they review draft recommendations only.

I will take the lead for the Commissioner's Office and will participate as time permits. Jim Cochran will schedule meetings and insure that progress reports are submitted to me as the process evolves.

The ultimate goal of the workgroup is to develop a draft department policy on clam farming. The policy is to include recommendations for implementation of the policy, including interactions with the industry and other departments. The first task will be to articulate and analyze the several policy questions involved in this issue. Examples of questions that might be explored include:

- Under what circumstances would we oppose clam farms?
- When is a clam farm actually a wild harvest?
- Have we explored the technology involved (in littleneck harvesting) so that we know what is feasible?
- What are the potential conflicts with existing resources and uses, and how might they be mitigated?
- Does clam farming constitute an exclusive use of a resource?
- What regulatory alternatives are available?
- Do we have the capacity to manage shellfish farming?

MEMORANDUM

STATE OF ALASKA
DEPARTMENT OF FISH AND GAME

46

TO: Distribution

DATE: July 26, 1995

FILE NO:

TELEPHONE NO: 465-4160

FROM: James O. Cochran
Mariculture Coordinator
Commercial Fisheries Management
and Development Division -- Juneau

SUBJECT: ADF&G Mariculture Workgroup
July 20, 1995
Clam Farming Meeting
Summary

In attendance:	Geron Bruce (Chair for Rob Bosworth)	GB
	Bob Clasby	BC
	Steve White (Department of Law)	SW
	Paul Larson	PL
	Rob Bentz	RB
	James Brady	JB
	Don McKay	DM
	Tom Rutz	TR
	Jim Cochran	JC

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Geron asked each person to articulate issues they wished to address concerning farming of clams directly (no enclosures) in the intertidal zone. Twenty issues of concern were identified. They are listed below without annotation. Following the listing are summary notes of the discussion that followed. If you find errors, or have a different interpretation of what occurred in a discussion please let me know. I believe it is important to keep in mind that these are issues of concern to one or more workgroup members and not necessarily statements of fact even though the wording may indicate otherwise.

To help workgroup members identify the originator of an issue and pursue clarification if they wish, I have assigned initials to each (see attendance list).

ISSUES

- 1) Is it legal to grant an aquatic farm permit for the purpose of farming clams on intertidal areas in Alaska? (JC)
- 2) Granting an exclusive use of beach area. (RB, DM)
- 3) Using native clam seed for exclusive use. (DM)
- 4) Distinguishing clam farming from commercial fishing for clams. (JB)

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

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

April 19, 2000

Mr. Scott Thomas
Alaska Trademark Shellfish
945 Lincoln Street
Ketchikan, AK 99901

Dear Mr. Thomas:

Under Alaska Statutes 16.40.100-16.40.110, you have applied to the Alaska Department of Fish and Game (ADF&G) for an aquatic farm operation permit. In your application, you propose to farm geoducks (*Panope abrupta*) in Southeast Alaska.

This is notice that I intend to conditionally approve your aquatic farm operation permit application. After setting out the facts and pertinent laws that support my decision, I will describe the specific conditions that must be met before your permit can be issued. In addition, you are responsible for all other approvals, leases, and certificates required for aquatic farming activities on your proposed farm site(s).

It is important to clarify that an aquatic farm permit does not, in itself, give a farmer the exclusive right to harvest, for a commercial purpose, the wild fishery resources that are located at the farm site. A contrary conclusion is inconsistent with the laws that govern aquatic farming, and it may contradict the Alaska Constitution's prohibition against exclusive rights in fisheries.

However, an aquatic farmer may take wild fishery resources if they are to be used only for aquatic farming purposes. Those purposes are limited to 1) further growth or 2) propagation. The right to take wild resources for those purposes is acquired through a stock acquisition permit, issued by ADF&G under Alaska Statute 16.40.120.

A preliminary site assessment conducted by ADF&G divers in September 1999 revealed that there may be significant populations of wild geoducks on the sites you have proposed for your farms. To date you have not applied for stock acquisition permits.

Because the density of geoducks on your site may exceed that necessary to provide seed stock for propagation, it is likely that a portion of the wild geoducks at your proposed sites would remain a common property resource, which should be made available for other uses. That is because the Alaska Constitution, in article VIII, section 1, states that it is state policy to make natural resources "available for maximum use consistent with the public interest."

The 1999 site assessment revealed that wild geoduck populations at your proposed farm sites might be sufficient to support a harvest by commercial or personal use divers. It is conceivable, pending a complete stock assessment survey, that the department will authorize a commercial harvest of those stocks, in the future.

Authorizing that harvest would be consistent with the past management and development of the commercial geoduck fishery in Southeast Alaska. That fishery has existed since the early 1970s. In

recent years. geoduck divers have been subjected to limited entry, and they have voted to assess themselves to help pay for ADF&G research and management activities that will enable them to continue their existing harvests and expand into new areas as stock assessment work is done. By any measure, the commercial dive fishery is a traditional and existing use of the geoduck resource of Southeast Alaska. Excluding divers from viable geoduck populations would alter the deliberate and cautious development of that fishery.

Under Alaska Statute 16.40.105, an aquatic farm may not require significant alterations in traditional fisheries or other existing uses of fish resources. Also, a proposed farm plan must demonstrate technical and operational feasibility. Under that statute, I am prevented from approving your application unless you demonstrate that your proposed farming activity can technically and feasibly allow access to your sites for the commercial and personal use harvesting of wild geoducks that are not acquired through a stock acquisition permit.

Preserving access and harvest opportunity by other users, required by Alaska Statute 16.40.105, is consistent with a pertinent standard of the Alaska Coastal Management Program. In particular, your farm must be managed to maintain or enhance the state's sport, commercial, and subsistence fishery (6 Alaska Administrative Code 80.130). Under that standard, your farm is governed by a stipulation that provides for nondisruptive public access to fishery resources at the farm site.

Accordingly, the following conditions will be attached to your aquatic farm operation permit. You must satisfy these conditions before an aquatic farm operation permit will be issued for your aquatic farm.

1. For each proposed farm site, describe in writing to ADF&G a method for distinguishing (or segregating) wild, common property geoducks from cultivated, farmed geoducks. The method must allow practical access and commercial or personal use harvest of wild geoducks on each site that are not acquired through a stock acquisition permit. At the same time, the method must prevent excessive disturbance of cultivated, farmed geoducks by commercial access and harvesting.

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

This is my final administrative decision. If you disagree with it, you may file an appeal with the superior court under Alaska Statute 22.10.020. The appeal must be filed within thirty days of your receipt of this decision.

Sincerely,



Frank Rue
Commissioner

Enclosure

STATE OF ALASKA

DEPARTMENT OF FISH AND GAME

DIVISION OF COMMERCIAL FISHERIES

TONY KNOWLES, GOVERNOR

45

P.O. BOX 25526
JUNEAU, ALASKA 99802-5526
PHONE: (907) 465-4210

May 19, 2000

Mr. Scott D. Thomas
Alaska Trademark Shellfish
945 Lincoln Street
Ketchikan, AK 99901

Dear Mr. Thomas:

This letter is to inform you of Commissioner Rue's decision relative to general principles associated with issuance of geoduck clam operation permits. On April 19, 2000 I sent you a letter conditionally approving your permit application for an aquatic farm operation permit to farm geoduck clams. The condition in my letter required you to identify, and later comply with, a method for distinguishing (or segregating) wild, common property geoducks from cultivated, farmed geoducks. The method would have to allow other users to have practical access to the wild, common property geoducks on your proposed site that were not acquired under a stock acquisition permit. Neither you nor any other farmer was able to identify such a method.

On May 9, the Alaska Department of Fish and Game (department) held a teleconference to discuss standards that could be adopted as regulations for implementing the aquatic farm permitting statutes. The department gave participants an opportunity to present proposals to meet the condition expressed in the April 19 letter.

At the teleconference, two questions received the most attention. The first question was, "What would be a significant alteration of "traditional fisheries" or "existing uses" under AS 16.40.105(2)?" Some participants responded that only an active, ongoing fishery at a proposed site would cause farming to create that type of alteration. The second question was, "Under what circumstances may a stock acquisition permit be issued for the standing wild stock on a farm site?" Ideas on this question ranged from allowing onsite, wild shellfish acquired under a stock acquisition permit to be used only for broodstock to allowing it to be harvested and sold to finance farming operations.

Based on information received at the teleconference, the department developed the following general principles. The principles will be presented in draft regulations that will be released for public review and comment. Of particular interest to you, the principles will guide the department's actions on your pending permit applications.

1. The department believes that the best way to interpret AS 16.40.105(2), in terms of the commercial geoduck fishery, is to determine, at the time a farm permit is applied for or renewed, (1) whether the proposed farm site has an occurring commercial geoduck fishery at that specific location; or (2) whether the proposed farm site is within an area that has been identified in an operating plan developed under AS 43.76.2000(b), as an area for which a bioassessment survey and subsequent commercial harvest will be conducted. If either condition exists, an aquatic farm would necessarily create a significant alteration of a traditional fishery or existing use and, therefore, would create a conflict under AS 16.40.105(2). If neither condition is present, locating a farm at that site would not cause a conflict under that statute.

It does not appear that the above conditions exist for any of the geoduck permit applications that are pending before the department. Therefore, the sites are not "off limits" in favor of the commercial diving industry.

However, it is important to note that the above determination will be made each time that a farm operation permit is being renewed. If a farmer wants to continuously farm at a particular site, the determination would be made every five years. If, during the time since the last renewal the site has been identified in an annual plan as an area for a bioassessment and commercial harvest, a conflict would exist. In that case, the permit renewal would be denied or it would be granted only if commercial divers are first allowed an opportunity to harvest wild geoducks at the site.

2. Before geoduck farming can commence, there must be a scientifically based dive survey of the proposed farm site. The purpose is to determine the amount of standing stock presently on the site.

For the present permit applicants, ADF&G will, at its expense, conduct the surveys. All future applicants, as part of their application process, will be required to perform and pay for the "pre-planting" survey.

3. Before a farmer may harvest geoducks on the farm site, the farmer will need to conduct a "pre-harvest" dive survey – another scientifically based, verifiable survey to determine geoduck abundance. This survey will be conducted at the farmer's expense.

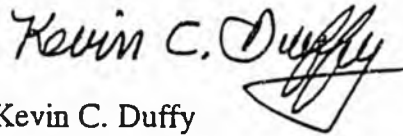
4. Based on the increased level of abundance at the farm site that can be attributed to the farmer's cultivation techniques, the farmer will be allowed to harvest the biomass that is the difference between pre-farming abundance and the present abundance.

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

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If you wish to be issued a geoduck farm operation permit under the principles above, please contact Mariculture Coordinator Ken Imamura in writing within 30 days of the date of this letter. In that event, the department will issue you a permit with conditions that reflect those principles. Please note that the sooner the department hears from you the sooner we will act on the permit applications and geoduck farm operation permits. If you do not respond within 30 days, or if you indicate that you do not wish such a permit, the department will deny your application.

Sincerely,



Kevin C. Duffy
Deputy Director



Craig's Dive Center

48

Post Office Box 796 * Craig, Alaska * 99921

Phone/fax 907-826-3481

E-mail craigdiv@ptialaska.net

December 17, 1999

To:

Re: Mariculture Farm Comments

Good morning,

I would like to submit my opinions on the aquafarm permit applications currently being reviewed. My connections to the issues, besides being a resident of the state, are being a small business owner, a long-time dive fishery participant, and having a personal interest in operating my own mariculture operation eventually.

Trying to keep it brief, most of the points I'd like to bring up specifically concern the new geoduck applications, but also are relevant to existing clam operations, and they are:

- *Competition with the existing geoduck dive fishery.* There is great potential for growth in this very underdeveloped fishery. "Farmed product" would possibly have a significant negative effect on the market share/price. Fishery income here in Craig tends to stay here, where geoduck farm money would not have the connection to the local community.
- *Lack of available spat.* To the best of my knowledge, there is no geoduck spat available for farmers to plant, and will not become available for at least two years. How can one "farm" when there is no seed?

000474



Craig's Dive Center™

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Post Office Box 796 * Craig, Alaska * 99921

Phone/fax 907-826-3481

E-mail craigdiv@ptialaska.net

- *Difficulty enforcing regulations.* At these remote sites, opportunity to monitor the farm operations are next to impossible. Anecdotally, it is common knowledge that farm operators hire local people to harvest littleneck clams under their permit in Sea Otter Sound, but don't confine the harvest to the permitted area. It wouldn't take much of an investigative effort to prove up these allegations.
- *Inability of state agencies to agree upon, and clearly define the regulations.* At the last Board of Fish meeting three years ago, there was clear, direct, and emotional testimony regarding concerns with clam farm operations – many of these same issues are coming up again without any action in the intervening time. Apparently, the distinction between “farming” and a “commercial harvest” is a gray area, when it should be black and white. Acquisition of broodstock necessitates a few to a few dozen organisms, not continual harvest of wild stock to sell on the open market.
- *Intent of the applicants to farm.* Looking at the realities of a mariculture business, trying a species new to culturing in Alaska, not having available broodstock, and knowing many of the applicants personally, it is my belief that there is no intent to actually farm. Not a bad business concept to be able to take advantage of regulatory loopholes to acquire a valuable state resource for minimal expense, harvest and sell it for substantial sums, then walk away from their “farm” after the resource has been depleted.

In summary, the relevant agencies need to do the right thing by making the hard decision to clearly define and enforce true aquaculture – which is spawning and nurturing growth of a species to a marketable size.

Aquaculture is not the harvest of wild stock – essentially the giveaway of a state resource.

G0047J



Craig's Dive Center

50

Post Office Box 796 * Craig, Alaska * 99921

Phone/fax 907-826-3481

E-mail craigdiv@ptialaska.net

Thanks for your consideration,

Craig Sempert
Owner

Craig's Dive Center
PO Box 796
Craig, AK 99921

907-826-3481 ph/fax
craigdiv@ptialaska.net

000476

Moira Ingle

51

From: Moira Ingle [moira_ingle@adfg.state.ak.us]
Sent: Wednesday, February 16, 2000 8:27 AM
To: 'Ken Taylor'
Subject: RE: ATS geoduck letter

Thanks for the vote of confidence--sometimes this gets to be a frustrating job (but never boring, that's for sure!) I have to say I prefer wolves (and any other critter) to culverts, but I am getting pretty fond of those little coho juveniles--they're tough little guys, worth arguing over!

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

From: Ken Taylor [mailto:ken_taylor@fishgame.state.ak.us]
Sent: Wednesday, February 16, 2000 8:13 AM
To: moira_ingle@adfg.state.ak.us
Subject: Re: ATS geoduck letter

Thanks Moira. By the way, I read your outstanding evaluation a few weeks ago and meant to let you know how much I appreciate all of your hard work. I'm really pleased you are on our staff... I was hoping to hire you when I was in Wildlife...now I'm glad I never had the opportunity!

Guess we're going to get beat up a little by Sen. Torgerson over clams and geoducks next week... we'll survive.

Ken

Moira Ingle wrote:

I just read the letter to Governor Knowles from Alaska Trademark Shellfish (Scott Thomas), in which he asks the Governor to grant permits in time for the 2000 planting season. If you remember from that teleconference with him that we participated in, Ken, according to the hatchery there is no Alaskan seed available for planting, and none expected for at least 2 years.

9/28/00

Subject: RE: Southeast Aquatic Farm PDS
 Date: Mon, 29 Nov 1999 17:12:37 -0900
 From: "Moira Ingle" <moira_ingle@adfg.state.ak.us>
 To: "Guyla McGrady" <Guyla_McGrady@dnr.state.ak.us>
 CC: "Lana S Flanders" <lana_flanders@fishgame.state.ak.us>
 "William A Hanson" <bill_hanson@fishgame.state.ak.us>

Thanks for the info. As I mentioned on the phone, I wanted to highlight a couple of pieces of info on cultural sites that apparently did not make it into DNR before the preliminary best interest findings were issued. I recognize that part of the purpose of the public review period is to gather info like this, and that you most likely don't have everything. I just wanted to highlight these now, because of their regional importance (according to the local FS archeologist), and because it seems as though they may be more of a siting criteria for DNR than for ADF&G, per se. I'll also try to make sure they appear in ADF&G's final written comments, however.

In both cases, the proposed BIF states that
 "There are no known historic or cultural resources in the area."

1. ADL 106579; Thomas; West Long Island

Cultural: Immediately adjacent to the proposed aquafarm sites, Koinglas is an important Haida cultural site: one of a limited number of "14 H1 Historic and Cemetary Sites" conveyed to Sealaska (whc I believe is therefore the upland owner, not Klukwan, Inc., as identified by the applicant, or the Forest Service, as identified by DNR.) Serious concerns exist about disturbance of upland, intertidal, and subtidal areas, according to the archeologist. Possibly all three "plots" would be affected.

Subsistence: the entire area of Kaigni Strait has been identified (1999 Division of Subsistence surveys) as a traditional subsistence area for shellfish, fishing, and hunting. This would include 106578, -579, and -580. Also, abalone populations (discussed in the SWPWAP) are reduced in the area (as they are throughout the POW area as a result of commercial overfishing), but are still taken for subsistence by residents of Hydaburg and other towns.

2. ADL 106568; Kittams; Port Santa Cruz

Cultural: Farm is immediately adjacent to upland historic site (Spanish exploration/settlement period). Similar concerns for excavation or disturbance of uplands and intertidal area.

Other: Three, not two anadromous streams in Port Santa Cruz: two within 300 yards of site, one (the only one identified by the applicant) approximately 1.5 miles away.

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

From: Guyla McGrady [mailto:Guyla_McGrady@dnr.state.ak.us]
 Sent: Monday, November 29, 1999 1:01 PM
 To: moira_ingle@fishgame.state.ak.us
 Subject: Southeast Aquatic Farm PDS

Moira, attached are the decisions for the Prince of Wales Island and SW POW Island areas. Let me know if you have any other questions. Also, I attached a copy of the teleconference info, maybe you could post this in your office or hand out. thanks, Guyla

000462

November 1, 2000

Ms. Janice Levy
Assistant Attorney General
P.O. Box 110300
Juneau, AK 99811

Dear Ms. Levy:

I have applied for a geoduck aquatic farm site lease, at Aguada Cove in Port Santa Cruz, from the State of Alaska Department of Natural Resources. I believe three employees of the Alaska Department of Fish and Game, Ken Taylor, Lana Flanders and Moria Ingle, have violated the Ethics Act, which I ask you to investigate.

Mrs. Ingle is married to Mr. Craig Sempert and they live in Craig, Alaska. Mr. Sempert owns and operates a dive shop in Craig. He is also a geoduck harvest diver and member of the Southeast Alaska Regional Dive Fishery Association, or SARDFA. SARDFA is the largest opponent to geoduck aquaculture. Mr. Sempert has vigorously opposed, and continues to oppose, DNR and ADF&G issuing me permits to establish an aquatic farm operation. This is because Mrs. Ingle's husband thinks that my aquatic farm would harm his dive shop's business interests. He also feels that he and the other members of SARDFA have exclusive rights to all undeveloped geoduck beds in Southeast Alaska.

Representing their business, Mr. Sempert, clearly outlines his opposition to the issuance of Permits by ADF&G in a 3-page letter sent to ADF&G on December 17, 1999. (Copy enclosed.) In that letter Mr. Sempert wrote:

Looking at the realities of the mariculture business, trying a species new to culturing in Alaska, not having available broodstock, and knowing many of the applicants personally, it is my belief that there is no intent to actually farm. Not a bad business concept to be able to take advantage of regulatory loopholes to acquire a valuable state resource for minimal expense. harvest and sell it for substantial sums, then

walk away from their "farm" after the resource has been depleted.

Ms. Ingle works as a habitat technician for ADF&G in Craig, Alaska. As the sole ADF&G employee in Craig, she lacked the immediate supervision and oversight that should have been required. Her direct supervisor, Mrs. Lana Flanders, knew of the conflict between my project and Mrs. Ingle's business, yet still relied on her extensively. I met with Ms. Flander's supervisor, Mr. Taylor, who is the Director of Habitat and Restoration for ADF&G, in October of 1999. At that meeting, Mr. Taylor assured me that Ms. Ingle would no longer be involved in the evaluation of aquatic farm applications, because of the obvious conflicts of interest she had, given her husband's businesses interests and personal opposition to aquatic farming.

However, after that meeting with Mr. Taylor, Ms. Ingle was continuously requested and encouraged by her supervisor Mrs. Lana Flanders to work on my project. Mrs. Flanders in a March 15, 2000, email to Mrs. Ingle stated,

Please take what we've got so far for draft ACMP comments in Port Santa Cruz, Figgins Point and Betton Island and **prepare final draft comments** for my finalization on March 21. Incorporate any input from CFMD, **add your latest info regarding use of the anchorage at Port Santa Cruz**, and add the appropriate additional stips using language in DGC's final consistency on the other farms. **Thanks for all your help in these reviews.**

Mrs. Ingle further wrote in a January 5, 2000 email,

Attached are Region 1 draft final reviews for the farms on POW. Lana has not yet reviewed them directly, although I have been working with her conceptually. They do represent the general direction we're heading, although we have more fleshing out to do. We're both available and planning to work with you right up to the end, if need be.

This documents that Mrs. Ingle was integral, if not responsible, for the evaluation of my project. Her supervisors gave Mrs. Ingle, as a habitat technician, too much responsibility. She was also allowed to research other topics not pertinent to her job and enter them into the record. In fact, the ADFG's only role in the permitting process was to address conflicts

between my project and the Alaska Coastal Management Plan (ACMP). In a November 3, 1999 email she wrote to Mrs. Flanders,

Reading through the DNR Aquatic Farmsite Permits and Leases statutes, I see a couple references to cumulative effects...

It is not the responsibility of a habitat technician to be doing research which should be handled by the Department of Law or Department of Natural Resources.

Throughout the review process, Mrs. Ingle was informed about my project via E-mail. On April 17, 2000, fully a year after the review began, Mrs. Ingle was again asked to evaluate my project by her supervisors. She expressed her disdain for my farm again and expressed SARDFAs continued interest in the project.

Mrs. Ingle organized and attended a public hearing sponsored by DNR, on my aquatic farm application as a representative of ADF&G on December 2, 1999. During this official DNR comment period there were only two general concerns for anchoring at my site, both by SARDFAs members.

Mrs. Ingle took it upon herself to use state time and monies to elaborate on this baseless anchoring controversy. Her apparent goal was to impede my lease application with an unsubstantiated violation of the ACMP. Fortunately, her search for controversy ended without support. Mrs. Ingle in a March 14, 2000, internal email to Mrs. Flanders wrote about my project,

I spoke to an urchin diver and a sport fish charter boat operator about potential conflicts. Neither the diver nor the operator felt there would be conflicts with their activities at the farm site. The charter operator indicated that he and most boats he knows fish heavily in Indiada Cove, but not in Aguada. Both individuals indicated that the best area for anchorage is at the head of Port Santa Cruz.

These comments directly supported my application. However, Mrs. Ingle and Mrs. Flanders left this pertinent information out of the public document they published a week later on March 21, 2000, the ADF&G Final ACMP Comments. In fact, they published the following contradictory information.

ADF&G staff talked to several trollers, a sport charter operator and urchin fishermen regarding uses of Port Santa Cruz, including the farmsite. Craig fishermen report that "quite a few" trollers and seiners use Port Santa Cruz, primarily as an anchorage.

ADF&G habitat staff and local fishermen confirm the importance of the majority of Port Santa Cruz, including the proposed farm site as a year-round anchorage for trollers and other users.

This contrary, undocumented, unsupportable information was extremely detrimental to the outcome of my project. The DNR and ADF&G cited these comments as the **major** component for evaluation of my project as well as the subsequent denial of my lease by DNR.

Ms. Ingle's actions on my aquatic farm site are violations of the Ethics Act. I believe she has adversely influenced the outcome of my permits by using her official position. Mr. Taylor and Mrs. Flanders have violated the Ethics Act in failing to keep Ms. Ingle out of the review process, and by allowing her to continue in the review process of my lease.

Ms. Ingle's financial interest in the Craig, Alaska business owned by her and her husband and their income derived from commercial geoduck harvesting appears to be influencing the performance of her public responsibilities in violation of AS 39.52.010(a)(1), and is a conflict of interest in violation of the Act.

She has misused her position to focus improper treatment of my application for an aquatic farm site and to bring down unfavorable treatment of my permit application in ADF&G's permit review process for aquatic farm permits. This is in violation of AS 39.52.120(a). By her association with Mr. Sempert, and adopting Mr. Sempert's antagonism towards me, she has used state time, property, and equipment to benefit her and her husband's personal and financial interests in violation of AS 39.52.120(b)(3). She also appears to have taken official actions to affect a matter in which she and her husband have a personal or financial stake, in violation of AS 39.52.120(b)(4).

Please immediately investigate this situation and these apparent violations of the Ethics Act by Mrs. Ingle, Mrs. Flanders and Mr. Taylor.

Sincerely,

Andrew Kittams

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I have reviewed the allegations in this letter. and the complaint and it is submitted with my permission.

DATED this _____ day of November, 2000 at Petersburg, Alaska.

Andrew Kittams

STATE OF ALASKA)
)ss:
FIRST JUDICIAL DISTRICT)

WITNESS my hand and official seal the day and year in this certificate above written.

Notary Public for Alaska
My Commission

Expires: _____

(F) the costs associated with each activity or phase of development and whether financing has been secured;

(14) a description of all known human uses of fish and wildlife resources on or around the proposed site, including commercial fishing, personal and subsistence use;

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

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

(17) if an applicant intends to apply for a stock acquisition permit to acquire wild stock, an application for a stock acquisition permit should be attached;

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

(19) if an applicant does not intend to cultivate and harvest wild stock present at the proposed site, an explanation of how wild stock of the same species intended for culture which occupy the site, can be or will be differentiated from planted stock and protected from harvest or harm by the proposed activities;

(20) information not already described regarding plans for the physical or biological alteration of a site; and

5 AAC 41.240 is repealed and readopted to read:

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

(b) The commissioner may deny an application if it is determined that

(1) the proposed site

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

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

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

(D) supports a high abundance of predators or competitors of the species intended for culture that cannot be reasonably controlled;

(2) the proposed site is

(A) used for the conduct or support of traditional fishing operations, including the setting, operation, and retrieval of fishing gear, harvesting, handling, or processing of fish, anchoring, staging, or storage of vessels or other fishing gear, or for transfer or storage of a harvested product or gear and the proposed activities will significantly alter this use;

(B) identified in an annual operating plan developed by the department, by itself or in cooperation with other users of the resource, such as the regional dive fishery development associations described in AS 43.76.200(b), unless the site has been surveyed and the site is excluded as an area that could support a commercial fishery;

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

(D) used for recreational, traditional, cultural, or ceremonial purposes associated with fish and wildlife resources on the site and the proposed activities will significantly alter this use.

(3) the proposed site or facility

(A) will significantly affect

- (i) milling, spawning, or rearing of important forage fish;
- (ii) use of the area by shorebird or waterfowl species for feeding, molting, breeding, refuge, or staging;
- (iii) marine mammal rookeries or feeding, pupping, nursing, or refuge areas;
- (iv) salmon milling, spawning, or rearing;
- (v) kelp or eelgrass beds;
- (vi) critical or unique nursery areas for fish, shellfish, or aquatic plants; or
- (vii) critical wildlife travel corridors, feeding areas, or other identified critical habitat;

(B) has been identified by a federal agency as containing critical habitat for species listed as of concern, threatened, or endangered and the proposed activities will significantly affect that species;

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application shall be in writing and will explain the basis for the denial. Unless reconsideration is requested, a decision on an application will be considered final agency action that can be appealed under AS 22.10.020.

(d) An application for an aquatic farm or shellfish hatchery operation permit that has been denied by the commissioner will, in the commissioner's discretion, be reconsidered if the applicant provides new information, not available at the time the application was submitted, that might alter the original decision. A request for reconsideration must be received by the Commissioner within 60 days of the applicant's receipt of the Commissioner's denial of the permit application and must include the new information and reasons why it was not submitted with the original application. (Eff. 4/10/88, Register 106; am 8/12/89, Register 111; am ____/____/2001, Register ____)

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

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

5 AAC 41.245. HARVEST OF WILD RESOURCES. Wild stock that occurs naturally at a proposed farm or shellfish hatchery site do not become the property of an aquatic farm or shellfish hatchery operation permit holder unless the permit holder obtains a stock acquisition permit issued under 5 AAC 41.290. (Eff. ____/____/2001, Register ____)

Authority: AS 16.05.050 AS 16.40.105 AS 16.40.160

5 AAC 41.250 is repealed and readopted to read:

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

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(1) use culture methods designed to enhance the productivity of the species intended for culture;

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

(3) not store, or otherwise possess animals of the same species being cultured, that have been commercially or recreationally harvested, unless the commercially or recreationally harvested animals are clearly separated from cultured species, labeled, and if applicable, accompanied with a receipt of purchase;

(4) identify the site with signage readable from the outside boundaries of a site, including the name of the permit holder, the department's aquatic farm or hatchery operation permit number, and contact information for the permit holder;

(5) prevent aquatic farm and shellfish hatchery operations from significantly altering traditional fisheries or other existing uses of fish and wildlife resources;

(6) conduct aquatic farm and shellfish hatchery operations to avoid significantly affecting fish, wildlife, and their habitats;

(7) report site preparation activities, use of wild stocks, disposition of incidental species, and harvest methods and gear;

(8) prevent injury or death to specified predators or incidental species;

(9) avoid adverse effects of predator exclusion methods on the environment and incidental species;

(10) submit an annual report;

(11) apply for stock transfer permits;

(12) report outbreaks of disease;

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and amendments that have been approved for the culture of new species or the use of more or new kinds of gears since the submission of the last annual report.

(c) Requests for renewal of an aquatic farm or shellfish hatchery operation permit will be reviewed under the same criteria as a permit issued under AS 16.40.105 and 5 AAC 41.240. If the commissioner determines that an aquatic farm or shellfish hatchery operation permit holder has not substantially complied with conditions in the previous operation permit, the Commissioner may deny the application for permit renewal, unless the Commissioner finds the noncompliance with previous permit conditions was due to circumstances beyond the permit holder's control and the permit holder has presented a plan of correction.

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

(e) A permit holder may continue operations until the Commissioner approves or denies an application for renewal or transfer. (Eff. 8/12/89, Register 111; am ____/____/2001, Register _____)

Authority:	AS 16.05.050	AS 16.40.100	AS 16.40.110
	AS 16.05.092	AS 16.40.105	AS 16.40.160

[AS 16.05.340 (b)]

5 AAC 41.290 is repealed and readopted to read:

5 AAC 41.290. AQUATIC STOCK ACQUISITION PERMIT. (a) Any person, including an aquatic farm operation permit holder and a shellfish hatchery operation permit

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

(12) other information that may be required by the department to verify that the applicant meets the requirements of AS 16.40 and 5 AAC 41.200 - 5 AAC 41.400.

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

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

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

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

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

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

(5) demonstrate that the culture methods used enhanced the productivity of the wild stock;

(6) limit the harvest of wild stock obtained for culture to a biomass equivalent to the increase in harvestable biomass attributed to the culture methods used; and

(7) pay for third party surveys to determine the pre-farming biomass and the pre-harvest biomass of the cultivated stock.

6-5

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

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

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

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

- (1) a regulatory management plan has been adopted for the species;
- (2) guideline harvest levels or harvest quotas have been established and met in recent years;
- (3) the fishery for the species is subject to limited entry by the Commercial Fisheries Entry Commission; and

STATE OF ALASKA
DEPARTMENT OF FISH AND GAME

Frank Rue Commissioner



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Public Communications

P.O. Box 25526

Juneau, Alaska 99802-5526

Phone (907) 465-6166, Fax (907) 465-2332

Press Release... For Immediate Distribution, February 14, 2001

**Public Comment Period to be Re-opened for
ADF&G Shellfish Farming Regulations**

Monday, February 12th, Alaska Department of Fish & Game Director (ADF&G) of Commercial Fisheries, Doug Mecum, formally requested that the Department of Natural Resources (DNR) extend, for 60 days, the Multi-Agency Aquatic Farm Application April 30th filing deadline. Tuesday, ADF&G received a memo from DNR granting the extension that will keep the filing period open until June 30th. Extending the filing period to June 30th will allow ADF&G additional time to review public comment and make needed revisions to the ADF&G draft Aquatic Farming and Shellfish Hatchery Regulations. The extension will also allow ADF&G to re-notice the regulations after revisions are made, in order to give shellfish farmers and hatchery operators another opportunity to comment on the draft regulations. ADF&G intends to have the regulations in place prior to the June 30th filing deadline for aquatic farm applications.

Last week's ADF&G Mariculture Advisory Panel discussions clearly gave reason for revising the regulations, and extending the application deadline," said Mecum. "This allows the department to re-open the comment period on a new draft that will include many suggested changes made by the stakeholders."

The public comment period on the current Draft Regulations closed on Monday February 12th.

The proposed 2001 schedule for the Revised Draft Regulations is as follows:

- By February 23rd: review public comment and revise the draft regulations.
- February 26th: Notice and distribution of new draft regulations.
- February 26th – March 27th: Public comment period.
- Between March 14th – 19th: Hold a Statewide public hearing via teleconference.
- Between March 27th – May 8th: ADF&G review of public comment and revisions to regulations, and Department of Law review completed.
- May 8th: draft regulations filed with Lt. Governor.
- June 8th: Effective date for adopted regulations.

END

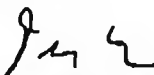
67

Dear Administrative Regulation Review Committee:

As applicants for aquatic farm in Southeast Alaska we would like to voice our concerns over draft regulation being proposed against aquatic farming. We recently submitted our applications to the Department of Natural Resources to make the application deadline of April 31, 2001. We have since been notified that the application period has been extended to accommodate changes to aquatic farm regulations. After reviewing these regulations our concern is that if these draft regulations are passed and become effective it will be almost impossible to implement our development plan and meet the requirements of the regulations.

The primary species for cultivation at our farms will be geoduck clams. Under the draft regulations we would only be allowed to use the existing stocks for very limited purposes. The regulations would require us to farm around the existing stocks and comply with two management plans, one for natural occurring clams and another for planted seed stock. This is an impossible situation. Our suggestion would be for the Alaska Department of Fish & Game to put their final draft of the regulation out for public review again, and take whatever time is necessary to work with the industry to come up with workable regulations.

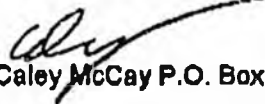
Sincerely,



Derek Thynes P.O. Box 1624, Petersburg, AK 99833 Ph. (907) 772-3709

Andrew W. Kittans by Stacy Kittans A.I.F.

Andy Kittans P.O. Box 1544, Petersburg, AK 99833 Ph. (907) 772-2327



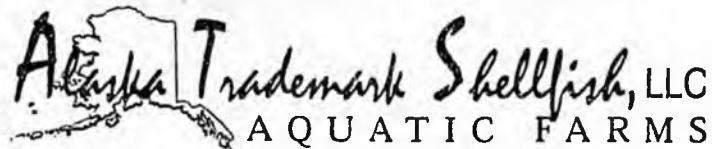
Caley McCay P.O. Box 2142, Petersburg, AK 99833 Ph. (907) 772-4823

Alaska Trademark Shelfish, LLC

From: Kim Kruse <kimk@dnr.state.ak.us>
To: <ats@kpunet.net>
Cc: <guyla_McGrady@dnr.state.ak.us>
Sent: Thursday, April 26, 2001 12:02 PM
Attach: kimk.vcf
Subject: 2001 aquatic farm applicants

Scott, here's the list you requested with the names and addresses of this year's aquatic farm applicants. Kim

Caley McCay, P.O. Box 2142, Petersburg, AK 99833 907/772-4823
Derek Thynes, P.O. Box 1624, Petersburg, AK 99833 907/772-3709
Andrew Kittams, P.O. Box 1544, Petersburg, AK 99833 907/772-2327



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April 28, 2000

Frank Rue
Commissioner

Alaska Department of Fish and Game
P.O. Box 25526
Juneau, Alaska 99802-5526

Dear Commissioner Rue:

I have received your final administrative decisions with regard to our Aquatic Farm Operational Permits. In response to the letter I have included our applications for Aquatic Stock Acquisition Permits and supporting materials. I will comment briefly on the letter and then provide you with two practical and reasonable options to the conditions set forth in the letter and then a third option that combines a compromise of the first two options.

On page 2 of the letter, paragraph 2, the second sentence states "Also, a proposed farm plan must demonstrate technical and operational feasibility". In response to this statement I would suggest that the department go back again and review our Aquatic Farm Authorizations Shellfish & Aquatic Plants Application, or talk to the other issuing agencies, DGC, DNR and ADF&G personal, all who have had our applications for over a year and have since made final findings. A review of this information will demonstrate technical and operational feasibility.

Your letter requests a "Practical" method to a set of conditions that are not reasonable. That is to say, that aquatic farming of shellfish can coexist in the State with other uses. In fact they can coexist in a region or even a ADF&G defined sub-district. Multiple uses could probably even exist on a zero lot line, but they can not practically or reasonably coexist on the same real estate. In response I will present you with a couple of more reasonable options.

OPTION 1

- a.) Provide access to standing stock based on 50% of the total area for each site working from North to South for the first 3 years, then each subsequent year provide access to standing stock based on planting performance by area.
- b.) We will provide a Restoration Bond based on the cost of replanting by the piece. For example we are estimating that it will cost \$0.52 to replant each animal, for

each single clam we would provide \$0.52 to the State to be held in escrow until we begin replanting.

- c.) We would cover the cost for two ADF&G employees to inspect and monitor our progress and to ensure we are complying with conditions of our permits, however the cost can not exceed \$10,000 annually.
- d.) As long as there are natural stocks on our site we would provide the opportunity for any eligible person to collect geoducks from our sites for subsistence, sport or personal use as long as that use was not destructive to cultivated or enhanced shellfish.
- e.) We would clearly mark the boundaries and corners of each farm site plot and the half way line by area for each plot both on surface and on bottom.
- f.) We would keep a harvest record of all natural stock by the pound and piece to be turned into ADF&G within 48 hours of harvest. In addition we would pay ADF&G \$0.05 per pound to cover administrative costs.

OPTION 2

- a.) Provide access to 100% of the standing stock based on 100% of the total area.
- b.) As long as there are natural stocks on our site we would provide the opportunity for any eligible person to collect geoducks from our sites for subsistence, sport or personal use as long as that use was not destructive to cultivated or enhanced shellfish
- c.) Based on ADF&G's September 1999 assessments of abundance of our 3 sites for geoducks clams, the department determined there to be a 615,285 lb bio-mass. We would provide specific access for two years to 100% of what the quota would be if a commercial capture fishery were conducted on our sites for the ten year term of our lease.

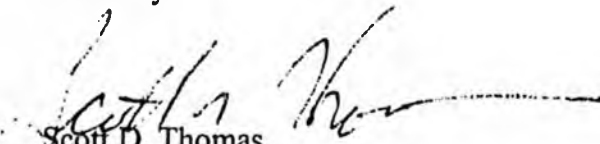
OPTION 3

- a.) Issue ATS Stock Acquisition Permits for all standing geoduck stock based on 100% of the leased area.
- b.) As long as there are natural stocks on our site we would provide the opportunity for any eligible person to collect geoducks from our sites for subsistence, sport or personal use as long as that use was not destructive to cultivated or enhanced shellfish.
- c.) We will provide a Restoration Bond of \$0.20 for every wild geoduck harvested off our leased sites, which will be held in escrow until we begin replanting.
- d.) We will pay up to \$5,000 annually for ADF&G to inspect our sites to ensure we are complying with the conditions of our permits.
- e.) We would clearly mark the boundaries and corners of each farm site, both on surface and on bottom.
- f.) We would keep a harvest record of all natural stock by the pound and piece to be turned into ADF&G within 48 hours of harvest.

d.) Based on ADF&G's September 1999 assessments of abundance of our 3 sites for geoducks clams, the department determined there to be a 615,285 lb bio-mass. We would provide specific access for two years to 100% of what the quota would be if a commercial capture fishery were conducted on our sites for 5 years. ADF&G uses a 2% harvest rate for the current experimental geoduck fishery. If a commercial geoduck fishery were conducted on our sites the annual quota would be 12,305 lbs. Over five years if a commercial fishery had taken place the total harvest would have been 61,525 lbs. We would be willing to give up *Plots 1&2 from Site 1* , for two years so the Developing, Experimental Geoduck Fishery could harvest this bio-mass. According to ADF&G's recent bio-assessments of this site, these two plots contain 204,188 lbs. In addition we would complete the water quality work for the area by July, 2000. After two years these areas would return to use in the form of aquatic farm leases.

Please give me your thoughts on these options ASAP

Sincerely


Scott D. Thomas

Mr. Steve White
January 25, 2000
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fish...or their products, and 'captivity' means having the fish...under positive control, as in a pen, pond, or an area of land or water..." AS 16.05.940(15). (Note that geoduck is an invertebrate and is included in the definition of fish, AS 16.05.940(12).)

In summary, nothing prohibits aquatic farm applicants from harvesting and selling standing stock on aquatic farm sites.

V.

Suggested Solutions

We urge ADF&G to withdraw the ADF&G Geoduck Guidelines from consideration. We urge ADF&G to attempt to come to a mutually agreeable solution to a seemingly difficult problem for ADF&G to address. We believe that a mutually agreeable solution should address the primary concerns that ADF&G disclosed to us earlier this year.

We believe that each application for a geoduck aquatic farm site and stock acquisition permit should address ADF&G's three legitimate concerns set forth above. We also believe that the following factors should be incorporated into reasonable policies on geoduck aquatic farm and acquisition permits:

1. All applications should be addressed on a case-by-case basis, on a site-specific basis.
2. ADF&G should be able to recover management costs to oversee and administer aquatic farm development. ATS would pay ADF&G five percent of its annual gross sales to pay for administrative and management costs.
3. An aquatic farm applicant should be required to provide contractual and financial security to insure that it will not take a resource and run, and if it does, the State will be able to mitigate impacts to the resource.

Mr. Steve White
January 25, 2000
Page 32

4. Each site will be open to inspection at any time by ADF&G personnel.

5. Independent auditors or observers could be provided by the applicants to reduce administrative burdens on ADF&G and to provide the State with a periodic unannounced site visits to insure that applicants adhere to conditions of permits.

6. To ensure ADF&G that standing stock is maintained on a sustainable yield basis, applicants would restock the substrate with geoducks. This stock replacement would be in addition to planned farm planting, as well as continued natural seeding. These seeding measures should insure that each site is continuously kept well above the maximum natural biomass. This will also address the State's concern of "take and run."

7. In accordance with AS 16.40.120(b)(1) and ADF&G's Commissioner's policies, property rights to "standing stocks" pass to the permittee with the lease. The stock acquisition permit will allow standing stock to become the property of the farm permit holder. The farm permit holder will not be restricted to harvest standing stock during commercial dive openings. However, the farmer will notify ADF&G at least 14 days in advance of harvest operations on a site.

8. ATS will allow ADF&G personnel on site at any time. ATS will file annual reports that will include such information requested by ADF&G including the number and poundage of geoducks harvested, the number of diver-hours on site, the number of harvest and planting days, and gross revenues and expenses.

IV.

Conclusions

I look forward to meeting with you and discussing this letter and the concerns, issues and possible solutions in more detail. Again, I believe that it is more beneficial for all parties involved in this matter to expend time, energy, and

The Alaska State Constitution

Article VIII

Natural Resources

SECTION 15. NO EXCLUSIVE RIGHT OF FISHERY. No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

Early April--- Third revision of regulations completed and sent to Department of Law.

Early May--- Review completed by DOL and regulations filed with the Lt. Governor

Early June--- Regulations become effective.

Late June--- 2001 application period for aquatic farm sites closes.

Summary of Revisions to Aquatic Farm Permitting Regulations

- Three drafts of regulations completed.
- Two separate public comment periods provided.
- Five opportunities for oral public comments on the regulations provided.
- Two meetings of a mariculture panel, composed of industry experts and affected stakeholders, convened to review and discuss changes to regulations.
- Over 160 changes made to the second and third version of the regulations in response to public comments and the work of the mariculture advisory panel.

Some of the major changes to the regulations that were adopted in response to public comments are:

- Transfer and renewal of existing permits made routine as long as continuing operations consistent with conditions and terms of the original permit.
- Removed requirements from regulations that are the responsibility of DNR or DEC.
- Deleted requirement to provide proof of financing.
- Extended period of aquatic farm permit from five to ten years.
- Removed requirement that department requests for additional information from farm applicant be supplied within 30 days.
- Provided increased flexibility to applicants in meeting application requirements.
- Modified a number of the definitions of terms used in the regulations such as: aquatic farming, adversely affect other uses, or fish and wildlife populations, and their habitats, and enhance the productivity at the farm site.
- Changed 'will' to 'may' regarding a number of requirements that might result in rejection of an application for an aquatic farm site.

Regulatory Review Committee
April 24, 2001
Doug Mecum, Director
Division of Commercial Fisheries

Chronology of Events Concerning Revision of Aquatic Farm Regulations

1996-1998

Moratorium on aquatic farm permits resulting from legal challenge to DNR procedures.

1999

Aquatic Farm application period reopens.

Forty-one applications submitted, including applications to farm "on-bottom" littleneck clams and geoducks, species native to Alaska.

Meetings held with aquatic farm applicants, at their request, to assist in application process (One day for littleneck clams applications and one day for geoducks).

During reviews department recognizes need to redraft permitting regulations to address issues regarding naturally occurring stocks and "on-bottom" farming.

2000

During 1999 and 2000 11 aquatic farming permits were issued. Nine geoduck permits were also approved for issuance, but rejected by the applicants because of their opposition to certain permit conditions.

March--- Geoduck farm applicants file judicial appeal of conditions in permits.

December--- Revised permitting regulations released for public comment. First public comment period extended from mid-January to early February.

2001

January--- Public hearings held in Ketchikan, Juneau and Anchorage on proposed regulations with links to teleconference sites in several other communities. Department establishes Mariculture Advisory Panel.

February--- First meeting of mariculture panel to work on proposed regulations. Second draft, revised based on public comments and mariculture panel work on the first draft, released for public review and comment on February 26 with a second 30 day public comment period provided. DNR, at the request of ADF&G, extends deadline for application for aquatic farm sites.

March--- Second meeting of mariculture panel to discuss second draft of permitting regulations. Second public comment period closed the March 27.

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. 4th Ave. Suite 430
Anchorage, AK 99501
(907) 269-0250 fax: 269-0249

Administrative Regulation Review Committee

May 01, 2001

The Honorable Fran Ulmer
Lieutenant Governor
State of Alaska
P.O. Box 110015
Juneau, Alaska 99811-0015
Mailstop: 0015

Dear Lieutenant Governor:

In the next few weeks it is expected that you will be receiving for signature and filing, Regulations repealing and readopting 5 AAC 41, establishing rules for the permitting and operation of Aquatic Farms and Hatchery Operations under AS 16.40.100-.199, "The Aquatic Farm Act." Since first drafted in early 2000 the regulations have undergone revisions in an attempt to better align them with statute.

The Committee has carefully followed the progress of these regulations and has maintained an open discussion with stakeholders on how they will affect the industry. It is our concern that even with the latest revision these proposed regulations contain substantial flaws in that they do not allow for meaningful opportunities to develop shellfish farms. It is our opinion that some of these regulations may be in direct contradiction to the intent of the Aquatic Farm Act, and because these regulations are being promulgated to implement this act; it is the Legislature's responsibility to weigh in.

At least one group also believes the Department intends to hamper shellfish farm growth and is currently involved in litigation over aquatic farming permits. A final ruling on this case has yet to be issued and should the court decide in favor of the Appellants could require the Department to completely rewrite the regulations.


For the past 15 years, the Department of Fish & Game has managed mariculture under policies that apparently have resulted in 56 successful aquatic farms around the state. While it may not be a perfect way to run a department or an industry it was working. Problems began when the Department began promulgating regulations that directly contradicted their past policies and arguably the statute itself.

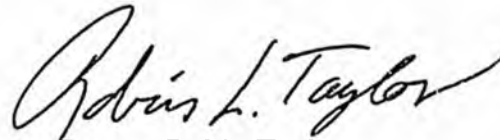
Today, we are approaching what the Department perceives as the end of a process. The Committee is concerned that it is only the beginning of additional unnecessary litigation costs that will be born both by the state and individuals attempting to Foster shellfish farming.

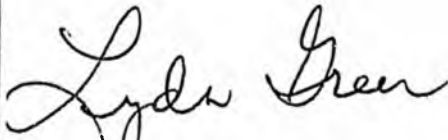
**LETTER TO LT. GOVERNOR FROM
COMMITTEE**

Therefore, the Administrative Regulation Review Committee requests that you use the Governor's option delegated to you under AS 44.62.040 (c) and return these regulations to the adopting agency until such time as all litigation and appeals have been resolved. The Department can continue to issue permits as they have for the past 15 years. A copy of this letter is being sent to the Commissioner of Fish & Game and the Attorney General. Thank you for your assistance in this matter.

Sincerely:

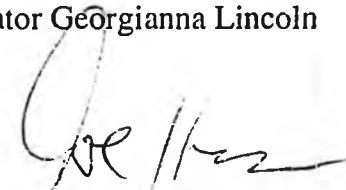

Representative Lesil McGuire
Chair


Senator Robin Taylor
Vice-Chair


Senator Lyda Green

Senator Georgianna Lincoln


Representative Jeannette James


Representative Joe Hayes



FRAN ULMER
LIEUTENANT GOVERNOR
STATE OF ALASKA

May 1, 2001

The Honorable Lesil McGuire, Chair
Administrative Regulation Review Committee
Alaska State Legislature
State Capitol, Room 115
Juneau, AK 99801-1187

Dear Representative McGuire:

I have received your letter requesting that I return to the Department of Fish and Game regulations repealing and readopting 5 AAC 41, establishing rules for the permitting and operation of aquatic farms and hatchery operations under AS 16.40.100-199. You are requesting that I "use the Governor's option delegated to [me] under AS 44.62.040(c) and return these regulations to the adopting agency until such time as all litigation and appeals have been resolved."

These regulations are currently undergoing technical review by the Department of Law and have not yet come to my office for filing. When they do come, I will follow the statutory requirements for reviewing them under the statute cited in your letter. The standards for returning regulations to the adopting agency are quite clear, and are set out in the attached memorandum from the Department of Law.

Sincerely,

A handwritten signature in black ink, appearing to read "Fran Ulmer".

Fran Ulmer
Lieutenant Governor

Enclosure

MEMORANDUM

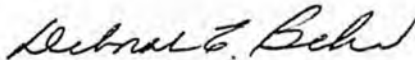
State of Alaska
Department of Law

To: The Honorable Fran Ulmer
Lieutenant Governor

Date: May 1, 2001

File No.:

Tel. No.: 465-3600

From: 
Deborah E. Behr
Assistant Attorney General
and Regulations Attorney
Legislation and Regulations Section

Re: Lieutenant Governor's role
in reviewing and returning
regulations under
AS 44.62.040(c)

You have requested legal advice as to the scope of your ability to review and return regulations before filing under AS 44.62.040(c).

AS 44.62.040(c) states as follows:

(c) Before submitting the regulations and orders of repeal to the lieutenant governor under (a) of this section, every state agency that by statute possesses regulation making authority, except boards and commissions and the office of the ombudsman, shall submit to the governor for review a copy of every regulation or order of repeal adopted by the agency, except regulations and orders of repeal identified in (a)(1) - (2) of this section. The governor may review the regulations and orders of repeal received under this subsection. The governor may return the regulations and orders of repeal to the adopting agency before they are submitted to the lieutenant governor for filing under (a) of this section. (1) if they are inconsistent with the faithful execution of the laws or (2) to enable the adopting agency to respond to specific issues raised by the Administrative Regulation Review Committee. The governor may not delegate the governor's review authority under this subsection to a person other than the lieutenant governor.

(Emphasis added.)

As you know, the governor has formally delegated to you this "review and return" function for state regulations.

The statute provides standards for the return of regulations. The first standard is, in essence, a legal standard -- whether the regulation is "inconsistent with the faithful execution of the laws." In evaluating a regulation for consistency under this standard, you may rely upon the Department of Law's legal opinion approving or disapproving the regulation for filing. See AS 44.62.060(b).

The second standard allows you to return regulations "to enable the adopting agency to respond to specific issues raised by the Administrative Regulation Review Committee."

It is reasonable to interpret this provision as referring to new issues not previously raised and responded to by the adopting agency. But regardless of whether the agency previously considered and responded to a particular issue raised by the committee, AS 44.62.040(c) places no obligation on you to return the regulation -- both the review and the return of regulations under that statute are discretionary, not mandatory actions.

If you return regulations adopted by an agency and approved for filing by the Department of Law, the reason stated for the return must meet the statutory standards. AS 44.62.040(c) does not authorize the lieutenant governor to return regulations for any other reason.

Finally, you have asked what your duties are for filing of the regulations if you decide to return regulations to "enable the agency to respond to specific issues raised by the Administrative Regulation Review Committee." Once the adopting agency has responded to the issues and returned the regulations for filing, your filing duties are ministerial and the regulations should be promptly filed. (1992 Inf. Op. Att'y Gen.; (Jan. 24; 663-92-0325)

If you need more information, please let me know.

DEB:jf

Dear Committee Members,

The following statement is a memo I wrote my to my lawyer by way of explanation.

Dear Bruce,

The most obvious story is that top-level Com-fish managers Director Doug Mecum and Region one director Scott Marshall took control of the process at a very early stage. They did not allow staff to do their job and then review the results. A consequence of this reality is that applicants never got an opportunity to obtain the proper evaluations of their proposals. Upper level management made their decision not to issue permits before evaluations were conducted. The logic was, why do all the work of evaluating development plans when it has been predetermined that permits would not be issued? Director level and Commissioner level elevations in the ACMP process were pointless because the Director made the decisions in the first place. They controlled the direction from the beginning. The e-mail record documents a continuous stream of attempts on the part of Ken Imamura to do the right thing and objecting to what was being forced upon him, to the point where he will most likely retire this spring instead of going through another application process. There are many Ken e-mails that support the positions in our complaint. The e-mails between Steve McGee and former Mari-culture coordinator Jim Cochran are the most revealing of many. I would like to put this one in some context for you. There was a major policy meeting on October 14, 1999. Even Jackie Timothy could not get an invitation. At that meeting Doug Mecum convinced Commissioner Rue that the previously issued permits for on-bottom aquaculture allowing harvest of standing stock of littlenecks were experimental and provisional. Doug needed the Commissioner's support to proceed with his plan and basically lied to him about the facts. Steve McGee knew it was a lie and contacted Cochran to verify the facts. These are the e-mails that we have. I believe that these e-mails are only the tip of the iceberg and staff like Steve McGee, Ken Imamura and Robert Pirokowski have a story to tell about how they where over-ruled and over-run by the bias of the commercial fisheries managers in the department.

Committee members,

I heard Director Mecum make this same statement to you at the hearing, that the permits were experimental. Casting this fact in this light allows the Director to minimize the significance of the precedence that was established by this action as well as the underlying legal rationale. He also made the statement that he had legal advice from the AG that it was unconstitutional to privatize the standing stock. Enclosed are a series of documents that indicate otherwise.

Thank you,
Steve LaCroix

CONSTITUTIONALITY

Assistant Attorney General, Steve White prepared a document on this issue in 1996 for presentation at a conference on "Broadening Alaska Shellfish Farming Opportunities". He said, "Under the constitution the state can allocate harvest opportunities among various users...Allocating between groups is acceptable under the constitutions, and it is only inside the group that eligibility and equal-access are implicated...Allocation among uses is what the state may do. But we have constitutional problems when we say that this person is eligible for membership in a particular group, but another person may not qualify." (Complete text enclosed, page 38-40)

He goes on to say that,

"Two features, **exclusivity** and seniority, are problematic for farming. They cannot be prohibited because they are needed for a viable industry. Obviously, no one is going to invest in this industry if they do not have **exclusive right** to a particular site, that is if someone else can take of the resource, particularly their enhanced product."

Steve White, the assistant attorney general for ADF&G is saying that without an exclusive right to the site the industry is not viable. Recognition of this fact is why the constitution exempted the efficient promotion of aquaculture from the exclusive right of fisheries prohibition in Article VIII, section 15.

In 1988 the legislature expressed its desire to have a viable aquatic farming industry for shellfish by passing the aquatic farm act. The act restricts farming to sites that "may not require significant alterations in traditional fisheries or other existing uses of fish and wildlife resources." Determination by the legislature that aquatic farming is a preferred **beneficial use** of public resources does not violate the constitution as long as equal access values are not violated. There are no laws restricting who is eligible to apply for an aquatic farm. Anyone who desires to farm may make an application. What the state may not do is create a special privilege within the user group. For example it cannot allow one farmer the use of standing stock and not another.

When confronted with problems resulting from his interpretation of the statutes through proposed regulations by committee members last week the director said, "We will have to seek legislative remedy." In other words, the legislature will have to bring the statutes into compliance with his regulations. This statement demonstrates the director's lack of understanding that it is the regulations that have to be consistent with the statutes.

Article IX, Section 7. Dedicated Funds. The proceeds of any state tax or license shall not be dedicated to any special purpose...

This is the section of the constitution that SARDFA had to structure its self-assessment around in order to have a viable commercial fishery. ADF&G refused to allow the development of the fishery unless they were funded. One of the reasons for the

prohibition on dedicated funds is to minimize the influence of income to agencies on good policy decision-making. Maybe that is what is happening in this case. The bias of the director in favor of commercial fisheries is compounded by income the department receives from funds dedicated to commercial geoduck fisheries management that are based on the value of the fishery. Is it possible the director's motivation is more than a defender of the constitution?

Sincerely yours,

Stephen La Croix

Administrative Regulations Review Committee

At the hearing on April 24th the director of com-fish, Doug Mecum, attempted to create three impressions, which I believe are false.

- 1) The stakeholder panel members and industry are generally happy with the proposed regulations. False
- 2) The "department" is supportive of aquaculture and is doing everything within its power to promote it. False
- 3) The Attorney General has given the department legal advise that transfer of standing stock on the leased farm site to the permit holder is unconstitutional. The director therefore has no choice in the matter. False

RESPONSES

- 1) As you may recall from testimony last week there were several topics at the regulation panel meetings that we were not allowed to discuss. Fact is we were not allowed to discuss anything. No debate was allowed. We were only allowed to respond to the proposals with suggested changes to the language or brief comments. Subjects that may relate to the court case were off limits. We were not given an opportunity to make constructive additions to the proposals that would promote the industry. We still have not seen a final version of the regulations project. If the director were sincere in his intent to promote aquaculture he would have no problem showing us the submitted version of the regulations and taking every level of input we are willing to provide.
- 2) I have presented several documents for your review that demonstrate that it has been the intention of the director to deny these permits from the start. It is my testimony today that these proposed regulations are simply a method to kill on bottom aquaculture by subverting the plain intent of the statutes. That is why the director is not willing to show us his work or postpone the process to take real input from stakeholders on the substantive unresolved issues. (Page 1,7,8)
- 3) The Attorney General has consistently supported the legality of aquatic farming in Alaska for leasing and transfer of interests in the resources on the leased site. Enclosed documents are samples of these positions. The director made the decision that use of the standing stock is unconstitutional not the attorney general. He does not want to transfer the stock and this is the excuse. The statute has no problem with the use of standing stock as long as the proposal does not alter existing uses. (Pages 24,25,31,37,38-40)

REQUEST

I agree with Steve McGee that they are doing all they can to kill my farm application. (Page, 10) One of the things they are doing to kill my application is promulgating regulations. I suggest to this committee they ask the department to suspend

the filing of these regulations, that they be processed under negotiated rule making so the critical issues of standing stock can receive proper public input, and that the process be delayed until after the Superior Court ruling. This request can be made of the Governor under the authority of,

AS 44.62.040 (c) Before submitting the regulations The governor may return the regulations and orders of repeal to the adopting agency before they are submitted to the lieutenant governor for filing under (a) of this section, (1) if they are inconsistent with the faithful execution of the laws or (2) to enable the adopting agency to respond to specific issues raised by the Administrative Regulations Review Committee. The governor may not delegate the governor's review authority under this subsection to a person other than the lieutenant governor.

Sincerely yours,

Stephen La Croix

FAX TRANSMITTAL

FRAN ULMER
Lieutenant Governor



P.O. Box 110015
Juneau, AK 99811-0015

(907) 465-3520
Fax: (907) 465-5400

DATE: 5-21-01

TO: Rep. Lesil McGuire

FAX NO.: (907) 269-⁰²²⁹~~0223~~

PAGES: 8 w/ cover

FROM: Lt. Governor's office

MESSAGE: Aquatic Farm Regulations



FRAN ULMER
LIEUTENANT GOVERNOR
STATE OF ALASKA

May 21, 2001

The Honorable Lesil McGuire
Alaska State Legislature
Administrative Regulation Review Committee
716 W. 4th Avenue, Suite 350
Anchorage, AK 99510-2133


Dear Representative McGuire:

On May 18, 2001, I filed regulations amending 5 AAC 41.200- 5 AAC 41.400, Aquatic Farming. The regulations take effect on June 17, 2001.

Under AS 44.62.040(c), the Lieutenant Governor has two reasons for returning regulations to a department before filing: "(1) if they are inconsistent with the faithful execution of the laws or (2) to enable the adopting agency to respond to specific issues raised by the Administrative Regulation Review Committee."

The Department of Law reviewed the regulations and found no basis for returning them under the first standard.

I have enclosed copies of correspondence with the Department of Fish and Game which reflect its response to specific concerns expressed by the Legislature's Administrative Regulation Review Committee, and position as to why the regulations needed to be filed at this time.

Sincerely,

Fran Ulmer
Lieutenant Governor

Enclosure

cc: Commissioner Frank Rue, Department of Fish and Game
Bruce Botelho, Attorney General, Department of Law

STATE OF ALASKA

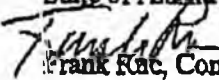
TONY KNOWLES, GOVERNOR

DEPARTMENT OF FISH AND GAME OFFICE OF THE COMMISSIONER

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

MEMORANDUM

TO: Fran Ulmer, Lt. Governor
State of Alaska

FROM: 
Frank Koc, Commissioner
Department of Fish and Game

DATE: May 17, 2001

SUBJECT: Mariculture Regulations

You have asked the department to respond to specific issues raised by the Administrative Regulation Review Committee (ARRC) regarding the mariculture regulations the department has adopted. On May 8, 2001, I sent you a memorandum detailing the process the department went through in adopting these regulations, including the extended public comment period and the changes the department made to the regulations in response to public comment. In addition, the department appeared in front of the ARRC twice to respond to questions and concerns about the process for the development of these regulations.

The ARRC has raised no new issues in its letter sent to you on May 1, 2001, asking that you refrain from signing the regulations.

The ARRC's first concern is that the regulations do not allow for the meaningful opportunity to develop shellfish farms. Without any specific examples it is difficult to respond to this concern; however, the mariculture industry has commented extensively on these regulations and has let the department know their concern that these regulations will inhibit the growth of the mariculture industry. The department disagrees with this viewpoint and believes that these regulations will promote the efficient development of mariculture consistent with the state's constitution and statutes. This is not a new issue to the department.

Second, the ARRC states its opinion that some of the regulations may be in direct contradiction to the intent of the Aquatic Farm Act. The Assistant Attorney General we have been working with on these regulations has reviewed them, and it is her legal opinion that the regulations are consistent with the Aquatic Farm Act, AS 16.40 *et seq.*, and the Alaska Constitution. The fact that some people believe that the regulations are inconsistent with the Aquatic Farm Act is not a new issue to the department.

Lt. Governor Fran Ulmer

2

May 17, 2001

Third, the ARRC believes the regulations should not go into effect because ongoing litigation could result in a need to rewrite the regulations. One of the issues in the current litigation between aquatic farmers and the department is that the department applied policies that were not in regulation. In order to prevent a situation where this allegation could be leveled at the department again, and because the department will be acting on new applications submitted during a new application period that closes at the end of June, the filing of these regulations cannot wait for a ruling from the court which may or may not impact the substance of these regulations. It is important for the department to proceed with the regulations to guide it through future application reviews and to avoid further litigation. This issue was discussed at length during the public comment period and with the ARRC, and is not a new issue that the department has not considered.

Having responded to the specific issues raised by the ARRC, it is my hope that you will sign these regulations expeditiously. We wish to accept, review, and approve new applications for aquatic farms this year. The application period ends July 2, 2001, so we need the regulations in place as soon as possible.

Thank you.

cc: Representative Lesil McGuire, Administrative Regulations Review Committee Chair
Bruce Botelho, Attorney General, Department of Law
Doug Mecum, Commercial Fisheries Director, ADF&G
Ken Taylor, Habitat and Restoration Director, ADF&G

STATE OF ALASKA

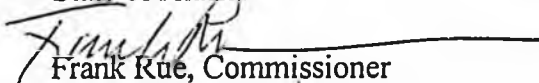
TONY KNOWLES, GOVERNOR

DEPARTMENT OF FISH AND GAME
OFFICE OF THE COMMISSIONER

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

MEMORANDUM

TO: Fran Ulmer, Lt. Governor
State of Alaska

FROM: 
Frank Rue, Commissioner
Department of Fish and Game

DATE: May 17, 2001

SUBJECT: Mariculture Regulations

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Second, the ARRC states its opinion that some of the regulations may be in direct contradiction to the intent of the Aquatic Farm Act. The Assistant Attorney General we have been working with on these regulations has reviewed them, and it is her legal opinion that the regulations are consistent with the Aquatic Farm Act, AS 16.40 *et seq.*, and the Alaska Constitution. The fact that some people believe that the regulations are inconsistent with the Aquatic Farm Act is not a new issue to the department.

Third, the ARRC believes the regulations should not go into effect because ongoing litigation could result in a need to rewrite the regulations. One of the issues in the current litigation between aquatic farmers and the department is that the department applied policies that were not in regulation. In order to prevent a situation where this allegation could be leveled at the department again, and because the department will be acting on new applications submitted during a new application period that closes at the end of June, the filing of these regulations cannot wait for a ruling from the court which may or may not impact the substance of these regulations. It is important for the department to proceed with the regulations to guide it through future application reviews and to avoid further litigation. This issue was discussed at length during the public comment period and with the ARRC, and is not a new issue that the department has not considered.

Having responded to the specific issues raised by the ARRC, it is my hope that you will sign these regulations expeditiously. We wish to accept, review, and approve new applications for aquatic farms this year. The application period ends July 2, 2001, so we need the regulations in place as soon as possible.

Thank you.

cc: Representative Lesil McGuire, Administrative Regulations Review Committee Chair
Bruce Botelho, Attorney General, Department of Law
Doug Mecum, Commercial Fisheries Director, ADF&G
Ken Taylor, Habitat and Restoration Director, ADF&G



FRAN ULMER
LIEUTENANT GOVERNOR
STATE OF ALASKA

May 15, 2001

Commissioner Frank Rue
Department of Fish and Game
PO Box 25526
Juneau, AK 99802-5526

Dear Commissioner Rue:

I have received regulations for filing from your department amending 5AAC 41.200-41.400, Aquatic Farming.

As you are aware, these regulations were the subject of several meetings of the Legislature's Administrative Regulation Review Committee (ARRC). The committee, in a letter dated May 1, 2001 (enclosed), expressed concern that the regulations discourage development of aquatic farms and suggested the department should return to relying on previous regulations for permitting aquatic farms. The committee requested that I not file the regulations until all pending litigation and appeals are completed.

Under AS 44.62.040(c), the Lieutenant Governor has two reasons for returning regulations to a department prior to filing: "(1) if they are inconsistent with the faithful execution of the laws or (2) to enable the adopting agency to respond to specific issues raised by the Administrative Regulation Review Committee."

The Department of Law has reviewed the regulations and found them to meet the first standard. Regarding the second standard, are there any specific issues raised by the ARRC letter to which you have not responded? I would appreciate some information as to why these regulations need to be filed at this time.

Thank you for your prompt response.

Sincerely,

A handwritten signature in black ink, appearing to read "Fran Ulmer".

Fran Ulmer
Lieutenant Governor

Enclosure

cc: Representative Lesil McGuire, Chair, Administrative Regulations Review Committee
Bruce Botelho, Attorney General, Department of Law

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF FISH AND GAME

OFFICE OF THE COMMISSIONER

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

MEMORANDUM

OFFICE OF THE
MAY-11 2001
LIEUTENANT GOVERNOR

TO: Fran Ulmer, Lt. Governor
State of Alaska

FROM: *Frank* Frank Rue, Commissioner
Department of Fish & Game

DATE: May 8, 2001

SUBJECT: Mariculture Regulations

You will soon be receiving a regulation packet from the Department of Law amending 5 AAC 41.200 - 41.400. These regulations govern the application for, and review and issuance of, aquatic farm permits. This memorandum provides a summary of: the need for the amended regulations; the effects of the regulations; the process for adopting the amended regulations, including how the regulations changed as a result of public comments; and a description of the issues that remain controversial.

Background:

The Alaska State Legislature authorized the farming of shellfish and aquatic plants in 1988. Under state law, the Department of Fish and Game (ADF&G) is responsible for the permitting of aquatic farms and the Department of Natural Resources DNR is responsible for the leasing of state tidelands upon which aquatic farms are to be situated. Litigation against the Department of Natural Resources over leasing procedures resulted in a moratorium on the application for farm permits from 1996 through 1998.

When the application period was reopened in 1999, 41 applications for aquatic farm permits were received. Many of the applications proposed "on-bottom" farming of species native to Alaska, specifically littleneck clams and geoducks, a species of large clam occurring in a sub-tidal environment. While there had been interest in farming these species prior to the moratorium, the 1999 application period presented a level of interest that was well beyond anything the state had dealt with previously.

Lt. Governor Fran Ulmer

2

May 8, 2001

During the review of the 1999 applications, it became clear ADF&G needed to amend the existing regulations to provide more specificity about the information required of the applicants and the procedures and criteria used in evaluating applications. This was especially the case with applications for "on-bottom" farming of native species.

Effects of Amended Regulations:

The amended regulations describe in greater detail than the existing regulations the information required on applications for aquatic farm permits. Section 41.240 provides more specificity concerning the criteria and standards the ADF&G will use in reviewing and issuing aquatic farm permits. Of particular interest in this section are provisions that implement the criteria established in statute for review and determination of the suitability of applications for aquatic farm permits. These criteria are found in Alaska Statute 16.40.105. Section 5 AAC 41.250 further specifies discretionary permit conditions that ADF&G may apply to permits. Other sections describe permit transfer and renewal procedures and definitions of terms used in the aquatic farming regulations. The amended regulations also deal with issues raised by the new interest in "on-bottom" farming of native species. These sections include: 5 AAC 41.245, Acquisition of Wild Resources, and 41.290, Aquatic Stock Acquisition Permit.

Process for Developing the Regulations:

While the need to amend these regulations became apparent during 1999, the workload associated with reviewing the applications submitted during the application period slowed the ADF&G's efforts. Draft regulations were published for public review and comment in early December of 2000. At the request of the Alaska Shellfish Growers Association, the department extended the deadline for written comments until the middle of February, a comment period of approximately two months. During January, public hearings were held in Ketchikan, Juneau, and Anchorage on the proposed regulations; additional communities were connected via audio-conference. Some of these communities were: Homer, Kodiak, Seward, Cordova, Sitka, Petersburg, Wrangell, and Craig.

The department also convened a mariculture advisory panel to discuss and advise the department on the draft regulations. Representation on this panel included the Alaska Shellfish Growers Association, the Seward Shellfish Hatchery, the University of Alaska Sea Grant Program, an individual geoduck farm applicant, the United Fishermen of Alaska, the Alaska Marine Conservation Council, and the Southeast Alaska Regional Dive Fisheries Association. This group met twice. These meetings were connected via audio-conference to the same communities that were connected to the public hearings, and additional public comments were taken at both meetings.

A second draft of the regulations was prepared in an attempt to address as many of the concerns as possible that were expressed during the public comment period and during the mariculture advisory panel. This draft of the regulations was released for an additional 30-day period of public review and comment on February 26. After the closure of the second public comment period and the second meeting of the mariculture advisory panel, a third draft was prepared and submitted to the Department of Law for legal review and subsequent filing with the Lt. Governor. Over 160 changes

Lt. Governor Fran Ulmer

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May 8, 2001

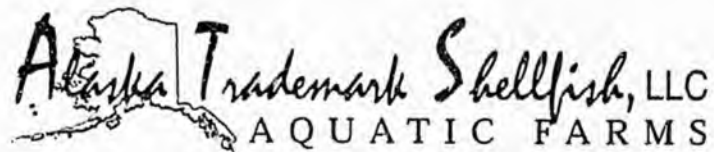
from the original proposed regulations are contained in the final regulations the department is submitting to you for filing. Many of the changes were minor. Some of the most significant changes were:

- The process for transfer and renewal of existing permits was simplified. Under the amended regulations transfer and renewal is routine as long as continuing operations remain consistent with conditions and terms of the original permit.
- Removed requirements from regulations that are the responsibility of DNR or DEC.
- Deleted requirement to provide proof of financing.
- Extended period of aquatic farm permit from five to ten years.
- Removed requirement that department requests for additional information from farm applicant be supplied within 30 days.
- Provided increased flexibility to applicants in meeting application requirements.
- Modified a number of the definitions of terms used in the regulations such as: aquatic farming; adversely affect other uses, or fish and wildlife populations, and their habitats; and enhance the productivity at the farm site.
- Changed "will" to "may" regarding a number of requirements that could result in rejection of an application for an aquatic farm site.

Remaining Controversy:

Some individuals remain opposed to the regulations because the regulations do not allow an aquatic farmer to assume outright ownership of naturally occurring shellfish present on their farm site. Such action would be contrary to state law and Article VIII of the Alaska Constitution.

A number of individuals also oppose the regulations because they are currently in litigation with the State of Alaska concerning their aquatic farm applications. They argue that no regulations should be adopted prior to the completion of this litigation.



April 19, 2001

The Honorable John Torgerson
Alaska State Senate
State Capitol Building
Juneau, Alaska 99801-1182

Dear Senator Torgerson:

We thank you for introducing SB 141 and for your effort to assist Alaska's struggling mariculture industry.

We would also like to apologize for not giving the bill more attention sooner. We have been so busy managing our lawsuit against the State over its impediments to aquatic farming and battling the new proposed draft regulations, that we have not had the necessary time to work with you on SB 141..

I believe the bill is a good start and sends ADF&G a clear message that the legislature supports shellfish aquatic farming. As you know many member of the aquatic farming industry recently commented on specifics of the bill at your recent Senate Resources Committee meeting. Rather than going into the bill again I believe it would be more productive to address the fundamental problems the industry is having in the state.

The problem is not the Aquatic Farm Act, as the DNR Director of Mining Land and water, Richard Thompson said " The Aquatic Farm Act has worked well for years".

The problem as we see it is that our current administration has refused to follow state law. In addition, despite our good faith attempts to comply with the ACT, ADF&G has continually changed its informal policies and interpretations of the ACT, which in effect have pulled the rug out from our ability to develop this industry. We have been completely blindsided by ADF&G's efforts to thwart the aquatic farm industry in this State. In addition, it appears the Director of Commercial Fisheries has been dictating most of the effort to stop this industry, and has not been held accountable to anyone.

More troubling is that it now appears that the Alaska Department of Law is willing to circumvent their statutory requirements and internal policies in order to satisfy their client agency, and they appear to be trying to strike down a state law, instead of meeting their duty to uphold the law and defend the legislature's policies. *(Please see letter from our attorney Bruce Weyhrauch to Steve LaCroix regarding this issue.)*

The Honorable John Torgerson
April 19, 2001
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The enclosed letter raises some serious questions about the Department of Law and whether they are following their own procedures in their defense to our suit to get aquatic farm permits. In light of the information in this letter, we ask that your office seek a formal opinion from Attorney General Bruce Botelho about the questions raised in the letter.

Our company and aquatic farmers state wide have been treated very unfairly for the past 2 years by ADF&G, which seems willing to do everything possible to quash on bottom shellfish farming in the state. What the state agency charged with carrying out the legislature's intent in developing aquatic farming has been doing to us is a complete abuse of discretion. There is absolutely no science behind ADF&G's positions against aquatic farming

Despite ADF&G's position that aquatic farmers are now satisfied with the draft regulations, if the Lieutenant Governor signs these regulations; and they go into effect there will be no "new" on bottom shellfish culture in Alaska. Essentially the proposed regulations will put a ban on clam farming in the state, similar to the ban in Kachemak Bay.

I am not sure if passing new legislation is the answer at this point, especially since the administration refuses to follow the current laws. Some believe that taxing the aquatic farm industry would solve the problem. Please note that if the State allows aquatic farming to develop, we would still be required to pay a fisheries business tax, annual lease fees and restoration bonding. We do not, and have never opposed these revenue-enhancing measures that would benefit the State. In fact, our company has already paid tens of thousands of dollars to the state in fees and we are still not in business. Our second annual lease fees are due in less than 30 days and we still do not have ADF&G operational permits.

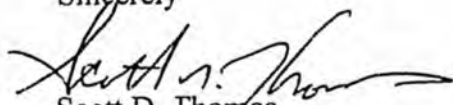
We believe that efforts by the legislature to assist the industry should focus on creating a viable industry and enhancing the resource, rather than taxation. Getting the industry up and running and forcing the administration to follow state law should be the priority.

In closing, I know that we and other aquatic farmers would be more than pleased to come before you and your committee to answer questions our concerns you have about our farms. We appreciate your effort to help develop this industry in the state, diversify our resource-based economy with a clean, environmentally sound industry, that is growing everywhere except Alaska. We also appreciate this opportunity to get clarification whether ADF&G officials are being inappropriately supported in their effort to stop aquatic farming by the Department of Law.

The Honorable John Torgerson
April 19, 2001
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Thank you again, and please call me at (907) 225-1171 if you have any question or would like additional information.

Sincerely



Scott D. Thomas

Cc:

Sen. Robin Taylor
Sen. Georgianna Lincoln
Sen. Kim Elton
Sen. Dave Donley

Rep. Lesil McGuire
Rep. Lisa Murkowski
Rep. Drew Scalzi
Rep. Jeannette James
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April 5, 2001

Mr. Steven LaCroix
P.O. Box 5322
Ketchikan, AK. 99901

Re: ATS & Zaugg et al. v. State et al.
File: 269.329

You and five other individuals are involved in an appeal in Alaska Superior Court. Among the issues on appeal are whether the Alaska Department of Fish and Game has violated Alaska law by failing to timely issue you aquatic farm permits, and failed to followed statutory criteria in issuing you permits. In addition, ADF&G and the Department of Law had advised the public that shellfish stock present on leased aquatic farm sites becomes the property of an aquatic farmer. ADF&G has now reversed that position and the Department of Law is defending ADF&G's refusal to follow Alaska statutes and ADF&G's "new" position that the stock on aquatic farm sites do not pass to the aquatic farmer.

At a recent oral argument before the superior court on your appeal, the assistant attorney general representing ADF&G even went so far as to question the constitutionality of a statute adopted by the Alaska Legislature. You asked whether the Department of Law has violated any law or duty in taking the positions that it has.

I should first note that this is the first case that I have seen where a private party is trying to get the Department of Law and a state agency to follow the law, and the state is ignoring the law and arguing that a statute

Mr. Steven LaCroix
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is constitutionally infirm. The state has turned the roles of what is usually a private party challenging a statute, completely around. In doing so in this case, the state appears to be acting contrary to its earlier advice to agencies. The more difficult question this situation presents is, if the Department of Law has violated its public trust or statutory duties in this case by taking these positions, what remedy do you have.

Background

You and other aquatic farmer appellants have sought, among other things, to require ADF&G to issue aquatic farm permits using the criteria in AS 16.40.105, which sets forth 4 specific criteria that must be met:

The commissioner shall issue permits under AS 16.40.100 on the basis of the following criteria:

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