

AND RELEASE OF LIVE FISH; AQUATIC FARMING

Article

- *1. Scope of Regulations (5 AAC 41.001)
- *4. Aquatic Farming (5 AAC 41.200 — 5 AAC 41.400)

Article 1. Scope of Regulations

Section

- 1. Application of this chapter

5 AAC 41.001. APPLICATION OF THIS CHAPTER. The provisions of this chapter govern the transportation, possession, or release of live fish transplanted for or cultivated for human consumption or sport fishing purposes, or as part of an aquaculture program for scientific, educational, or propagative purposes, and the transportation and possession of shellfish or aquatic plants for commercial purposes in conjunction with an aquatic farming operation. Unless specifically provided, the provisions of this chapter do not apply to the cultivation of ornamental fish. Additionally, the provisions of this chapter do not apply to the transportation, possession, or release of fish taken for commercial fishing, sport, or subsistence purposes. In effect before 1988; am 4/10/88, Register 106; am 8/12/89, Register 111

Authority: AS 16.05.060 AS 16.40.100
 AS 16.05.251 AS 16.40.160

Chapter 41. Transportation, Possession, and Release of Live Fish

Article

1. Scope of Regulations (5 AAC 41.001)
2. Permit System Established (5 AAC 41.005 — 5 AAC 41.060)
3. General Provisions (5 AAC 41.070 — 5 AAC 41.100)

Article 1. Scope of Regulations

Section

1. Application of this chapter

5 AAC 41.001. APPLICATION OF THIS CHAPTER. The provisions of this chapter govern the transportation, possession, or release of live fish transplanted for or cultivated for human consumption or sport fishing purposes, or as part of an aquaculture program for scientific, educational or propagative purposes. Unless specifically provided, the provisions of this chapter do not apply to the cultivation of ornamental fish. Additionally, the provisions of this chapter do not apply to the transportation, possession, or release of fish taken for commercial, sport, or subsistence purposes.

Authority: AS 16.05.251 (a) (4), (8) and (10)

Article 2. Permit System Established

Section

5. Permit required
10. Uniform application procedures
20. Inspection for disease of brood stock
30. Permit issuance or denial
40. Amendments to the permit
50. Permit conditions
60. Retention of permit for inspection

5 AAC 41.005. PERMIT REQUIRED. (a) No person may transport, possess, export from the state, or release into the waters of the state, any live fish unless the person holds a fish transport permit issued by the commissioner or his authorized designee, and the person is in compliance with all conditions of the permit and the provisions of this chapter. A fish transport permit will be issued for a fixed term subject to the provisions of (c) of this section.

(b) A fish transport permit authorizes only that operation specified in the permit. Any change of species, brood stock, or location requires a new permit. Any other change requires an amendment to the permit.

(c) The commissioner shall suspend the permit, or particular provisions of the permit including amendments, if he finds

(1) on the basis of new information or changed circumstances, that the permitted activity will adversely affect the continued health and perpetuation of native, wild, or hatchery stocks of fish; or

(2) the permittee has failed to comply with permit terms or the provisions of this chapter.

(d) Notwithstanding the expiration, termination or suspension of a fish transport permit, each permittee is responsible for the obligations arising under the terms and conditions of the permit, and under the provisions of this chapter.

Authority: AS 16.05.251 (a)(4),(8),(10) and (12)

5 AAC 41.010. UNIFORM APPLICATION PROCEDURES. (a) Each applicant for a fish transport permit shall submit the following information to the department:

(1) identification of each species and location of the stock to be transported, possessed or released;

(2) the destination of the transported fish and the release site;

(3) the number of fish and their life history stage or age;

(4) a descriptive history of previous transport, if any;

(5) a statement on the health or condition of the fish, including a disease history of the stock, a disease history of the hatchery or rearing facilities through which they may have passed, and any previous disease treatments or vaccinations, or, if the disease history is incomplete or unavailable a brood stock inspection and certification pursuant to 5 AAC 41.020;

(6) isolation measures planned to control disease during transport, including a description of containers, water source, depuration measures, and plans for disinfection;

(7) a description of proposed egg-take methods;

(8) the source of water for rearing and proposed effluent discharge location;

(9) identification and status of native stocks in the area of taking, retention and release site, including a statement of expected interactions with other stocks in these areas;

(10) the method of transport or release and the expected date of transport or release;

(11) the purpose and expected benefits of the transport or release; and

(12) evaluation plans.

(b) A completed application must be submitted to the department regional office in the region in which the proposed transport or release will occur.

(c) If the commissioner or his authorized designee determines that an application is incomplete and that further information is necessary, the department will return the application to the applicant with a description of the deficient information.

(d) The commissioner or his authorized representative will approve, condition, or deny a permit within 45 days after a completed application containing all of the applicable information listed in (a) of this section has been received in the appropriate regional office. (In effect before 1982; am 7/25/82, Reg. 83)

Authority: AS 16.05.251(a)

5 AAC 41.029. INSPECTION FOR DISEASE OF BROOD STOCK. If the disease history of the brood stock is unavailable or incomplete as required by 5 AAC 41.010(a)(5), an inspection of the brood stock to detect fish disease must be scheduled by the applicant and conducted by the fish pathology section of the department, or by a person designated by the fish pathology section. The applicant must submit samples of the brood stock as directed by the fish pathology section for the purpose of inspection. The applicant will receive a certification from the fish pathology section upon successful completion of the inspection.

Authority: AS 16.05.251(a)(4),(8) and (10)
AS 16.05.868

5 AAC 41.030. PERMIT ISSUANCE OR DENIAL. (a) The commissioner or his authorized designee will issue a fish transport permit if it is the department's determination that the proposed transport, possession or release of fish will not adversely affect the continued health and perpetuation of native, wild, or hatchery stocks of fish; or

(b) The commissioner or his authorized designee will issue a fish transport permit with terms and conditions attached if it is the department's determination that the terms and conditions are necessary to protect the continued health and perpetuation of native, wild, or hatchery stocks of fish.

(c) The commissioner or his authorized designee will deny an application for a permit, or a request for amendment of a permit, if the applicant's proposed plans, methods, or specifications are not adequate, on the basis of fish disease, genetics, competition, predation, or other biological considerations, to assure the continued health and perpetuation of native, wild, or hatchery stocks of fish. Written notice of denial shall be given to the applicant, including the reasons for denial.

Authority: AS 16.05.251(a)(4),(8)and(10)

5 AAC 41.040. AMENDMENTS TO THE PERMIT. (a) A permittee may request amendment of a fish transport permit by submitting, in writing to the department regional office where the permit was issued, an amended plan and a statement explaining why the amendment is necessary.

(b) The commissioner or his authorized designee will issue an amendment to the permit upon a determination made pursuant to 5 AAC 41.030(a) or (b). The commissioner or his authorized designee will approve, condition or deny a request for amendment within 30 days after receipt of the request in the appropriate regional office.

(c) The commissioner or his authorized designee may alter or amend permit conditions if additional information or unforeseen changes allow relaxation, or changed circumstances affect the adequacy of permit terms and conditions.

Authority: AS 16.05.251(4),(8)and(10)

(d) Amendments approved by the commissioner or his authorized designee become effective when received by the permittee, or at a later date specified in the amendment. Unless otherwise specified, amendments remain valid for the duration of the permit.

Authority: AS 16.05.251(4),(8)and(10)

5 AAC 41.050. PERMIT CONDITIONS. The commissioner or his authorized designee may prescribe conditions on a permit to control the occurrence of fish disease, genetic change, or control other disturbances of biological origin affecting native, wild, or hatchery stocks of fish. These conditions may include designation of brood stock and release locations, methods of transport or release, quarantine and depuration requirements and procedures, disease inspections, disposal of wastes and effluents, timing of transportation and release, reporting requirements, and other measures necessary to achieve the purposes of 5 AAC 41.

Authority: AS 16.05.251(a)(4),(8)and(10)

5 AAC 41.060. RETENTION OF PERMIT FOR INSPECTION. (a) After issuance a copy of the permit including any amendments must be retained by the permittee, and be made available upon request for inspection by a representative of the department, or a law enforcement officer of the Department of Public Safety.

(b) For the purpose of inspecting and monitoring compliance with the terms of the permit or the requirements of this chapter for the continued health and perpetuation of native, wild, or hatchery stocks of fish, each permittee shall give authorized representatives of the department, and law enforcement officers of the Department of Public Safety, free and unobstructed access at all times to permit sites. Each permittee shall give such assistance and furnish information the representative or law enforcement officer may reasonably require for monitoring and inspection.

Authority: AS 16.05.251(a)(4),(8)and(10)

Article 3. General Provisions

Section

70. Prohibitions on imports and release of live fish

80. Reporting and control of fish diseases at egg-take sites, hatcheries, and rear-facilities

90. Delegation of authority

100. Definitions

5 AAC 41.070. PROHIBITIONS ON IMPORTS AND RELEASE OF LIVE FISH. (a) Except as provided in (b) and (c) of this section, no person may import any live fish into the state for purposes of stocking or rearing in the waters of the state.

(b) Live oysters originating from locations other than Korea, the Gulf of Mexico, and the Atlantic Coast of North America, may be imported for aquaculture purposes and may be released into the waters of the state only pursuant to a permit required by this chapter. Live oysters native to and originating from Korea, the Gulf of Mexico, or the Atlantic Coast of North may be imported for aquaculture purposes pursuant to a permit required by this chapter and released into the waters of the state only if

(1) the brood stock is derived from oysters commercially cultured on the Pacific Coast of North America through three or more generations; and

(2) the disease history or an inspection indicates no incidence of disease that is not indigenous to Alaska.

(c) Ornamental fish not raised for human consumption or sport fishing purposes may be imported into the state, but may not be reared in or released

into the waters of the state. Fish wastes and waste water from ornamental fish may not be released directly into the waters of the state.

Authority: AS 16.05.251 (a)(4),(8)and(10)

5 AAC 41.800. REPORTING AND CONTROL OF FISH DISEASES AT EGG-TAKE SITES, HATCHERIES, AND REARING FACILITIES. (a) The requirements of this section apply to all public and private egg-take programs, fish hatcheries, and fish rearing facilities in the state.

(b) Within 24 hours of transporting live fish eggs between watersheds, all eggs must be treated, for at least 10 minutes, with an iodine solution of at least 100 parts per million of active iodine ingredient, with pH at least 6.0 or greater, or in a manner approved by the fish pathology section of the department. This requirement does not apply to shellfish eggs.

(c) Each fish hatchery or fish rearing facility must be inspected by the department's fish pathology section at least once each year at least two weeks prior to the transport or release of fish. The commissioner or his authorized designee may require and conduct additional inspections if the disease history of the stock or facility is incomplete, or if the disease history or current condition of the stock evidences incidence of disease.

(d) The occurrence of any of the following pathogens or disease of fish must immediately be reported to the department's fish pathology section:

(1) **Class I—Diseases of Critical Concern.**

Infectious Pancreatic Necrosis Virus (IPNV)—trout pancreatic virus;
Viral Hemorrhagic Septicemia Virus (VHSV)—Egved virus;
Pike Fry Rhabdovirus;
Spring Viremia of Carp (SVC)—a carp virus of potential danger to native cyprinids;
Ceratomyxa shasta—myxosporidian disease of salmonids;
Myxosoma cerebralis—whirling disease; and
Mytilicola intestinalis—an endoparasitic copepod of shellfish.

(2) **Class II—High-risk Diseases.**

Infectious Hematopoietic Necrosis Virus (IHNV)—sockeye or chinook salmon kidney virus;
Harpovirus salmonis—low-temperature virus;
Viral Erythrocytic Necrosis (VEN)—intranuclear virus of marine fish;
Vibrio parahaemolyticus—vibriosis in fish and shellfish;
Aeromonas salmonicida—furunculosis;
Yersinia ruckeri—bacterial redmouth disease;

Renibacterium salmoninarum—bacterial kidney disease (BKD);
Flexibacter columnaris—columnaris disease;
Henneguya—spp.—myxosporidian disease of fish and shellfish;
Labyrinthomyxa marina—fungal or haplosporidian disease of shellfish;
Minchinia nelsoni—a haplosporidian disease of shellfish; and
Ocenebra japonica—an oyster drill;

(3) Class III—Diseases of Concern.

Vibrio alginolyticus—vibriosis in fish and shellfish;
Vibrio anguillarum—vibriosis in fish and shellfish;
Aeromonas hydrophila—aeromonad septicemia;
Ichthyobodo—spp.—costiasis in fish and shellfish;
Hexamita—protozoan disease of salmonids and shellfish;
Trichodina—spp.—external fish parasite;
Diplostomum—spp.—eye fluke disease of fishes; and
Mytilicola orientalis—an endoparasitic copepod of shellfish.

(e) Diseases reported under (d) of this section, if found by inspection under (c) of this section, must be treated by taking steps acknowledged by the fish pathology section to be effective in eliminating the disease. Containers or facilities must be disinfected by the permittee in a manner directed or approved by the commissioner or his authorized designee. Presence of any of these diseases, or any other disease not previously observed in Alaska, may be cause for the commissioner or his authorized designee to prohibit stocking of the fish in new areas, and to quarantine the permittee's facility until disinfected.

(f) Stocks of fish in hatcheries or rearing facilities in which a Class I disease has been detected must be immediately destroyed by the permittee if the commissioner or his authorized designee determines that the disease is new to the area, the disease is a different strain of a disease than occurs locally, or if the disease poses a threat to the health and perpetuation of native, wild, or hatchery stocks of fish in the hatchery effluent watershed or the intended release location. In limited circumstances, the commissioner or his authorized designee may allow retention or transportation of these diseased fish under controlled conditions that pose no threat to native, wild, or hatchery stocks of fish (e.g., movement to a disease laboratory).

(g) Stocks of fish in hatcheries or rearing facilities in which a Class II disease has been detected must be immediately destroyed by the permittee if the commissioner or his authorized designee determines that the disease poses a threat to the health and perpetuation of native, wild, or hatchery stocks of fish in the hatchery effluent watershed or the intended release location.

Authority: AS 16.05.251(a)(4),(8)and(10)

5 AAC 41.090. DELEGATION OF AUTHORITY. For the purposes of administering this chapter, the commissioner may delegate his authority to designated employees of the department.

Authority: AS 16.05.020(2) and (3)
AS 16.05.270

5 AAC 41.100. DEFINITIONS. In addition to the definitions set out in AS 01.10.060 and AS 16.05.940, in this chapter

(1) "completed application" means a form, series of forms, letters or other documents which provide all of the information necessary for the commissioner or his authorized designee to issue, condition or deny a permit;

(2) "department regional office" means the Alaska Department of Fish and Game, Fisheries Rehabilitation, Enhancement and Development Division offices located as follows:

Region I—Southeastern Region
Island Center Building
P.O. Box 20
Douglas, Alaska 99824-0020

Region II—Central, Westward and
Arctic-Yukon-Kuskokwim Region
333 Raspberry Road
Anchorage, Alaska 99502

(3) "fish pathology section" means the Alaska Department of Fish and Game, Fisheries Rehabilitation, Enhancement and Development Division, Fish Pathology Section, located at 333 Raspberry Road, Anchorage, Alaska 99502, telephone (907)344-0541;

(4) "ornamental fish" means a fish commonly known as "tropical fish," "aquarium fish," or "goldfish" which are imported, cultured, or sold in the state customarily for viewing in aquaria or for raising in artificial systems, and not customarily used for sport fishing or human consumption purposes;

(5) "permit" means a fish transport permit, including any amendment or condition issued or approved by the commissioner or his authorized designee, which has not been suspended, terminated or expired;

(6) "permittee" means the holder of a permit and includes anyone employed, contracted, or assigned by the person to whom the permit was issued.

Authority: AS 16.05.251(a)(4),(8)and(10)

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

June 7, 1988

STEVE COWPER, GOVERNOR

P.O. BOX K—STATE CAPITOL
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COMMISSIONER'S OFFICE
RECEIVED
JUN 9 1988

DEPARTMENT OF FISH AND GAME

Honorable Steve Cowper
Governor
State of Alaska
P.O. Box A
Juneau, Alaska 99811

Re: HCS CSSB 514(R1s) -- aquatic
plant and fish farming
Our file: 883-88-0143

Dear Governor Cowper:

At Judy Fleming's request on your behalf, we have reviewed HCS CSSB 514(R1s), relating to fish farming. The bill establishes a statutory framework for shellfish and aquatic plant farms and hatcheries which involves a redistribution of some authority from the Board of Fisheries to the Department of Fish and Game. It also assigns some responsibilities with respect to those farms and hatcheries to the Department of Environmental Conservation and the Department of Natural Resources, extends the existing finfish farming moratorium until July 1, 1990, and provides for a finfish farming task force. The bill presents policy issues, but no major legal problems.

Section 2 of the bill adds new statutes to AS 16.40¹ which would govern aquatic farms and hatcheries. When read in combination with the definitions in proposed AS 16.40.199 (in the bill's sec. 2), these statutes are restricted in coverage to shellfish and aquatic plants, and would not apply to finfish farming.

Proposed AS 16.40.100 prohibits shellfish or aquatic plant farms or hatcheries absent a permit issued by the commissioner of fish and game. 1/ The commissioner has already

1/ Proposed AS 16.40.100(d) would prohibit the issuance of a
(Footnote cont.)

adopted regulations governing shellfish farming (5 AAC 41.200 -- 5 AAC 41.400), but they do not apply to shellfish hatcheries, nor to aquatic plant farms or hatcheries. One of the regulations, 5 AAC 41.240(b), contains criteria that the commissioner has said he will use in determining whether to issue a shellfish farming permit. Those criteria are mirrored in proposed AS 16.40.105, which sets out the criteria the commissioner is to use in acting on requests for aquatic farm and hatchery permits. The proposed statutory standards and the existing regulatory standards appear to be virtually identical. The application procedures set out in proposed AS 16.40.110 are similar to those contained in the current regulations on shellfish farming (5 AAC 41.220 and 5 AAC - 41.230) although one obvious difference is that proposed AS 16.- 40.110(b) requires a report on the disease history of a farm or hatchery for which renewal or transfer is sought, while that requirement is not specified in the current regulations. (It is possible that it is required on the current application form, however.) It would be advisable for the Department of Fish and Game to review the requirements of the current shellfish farming regulations against the mandates of proposed AS 16.40.100 -- 16.40.110, if the bill becomes law, to enable it to modify the content and scope of the regulations if necessary or desirable.

Proposed AS 16.40.120 governs aquatic stock acquisition permits, and places responsibility for the issuance of those permits with the commissioner of fish and game. Proposed AS 16.- 40.120(d) mandates that such permits not be issued if sustained yield would be impaired or if established commercial, sport, personal use, or subsistence uses would be unreasonably disrupted. That subsection also requires the commissioner to inform the Board of Fisheries of any denials because of unreasonable disruption, and of any action taken on permit applications for species subject to commercial limited entry. Additionally, proposed AS 16.40.120(e) authorizes the Board of Fisheries to adopt regulations for the "conservation, maintenance, and management of species for which an acquisition permit is required." That is apparently in addition to the commissioner's authority under (d) of that section, because proposed subsec. (f) states that "Except as provided in (d) of this section or in a regulation adopted under (e) of this section," the commissioner shall issue an

(Footnote cont.)

permit for the farming of, or hatchery operations involving, Atlantic salmon, under that statute. That subsection is a bit of an anomaly, since, by its own terms, AS 16.40.100 would only apply to shellfish or aquatic plant farms or hatcheries.

acquisition permit in four specified situations. Thus, unless sustained yield would be impaired, established uses would be unreasonably disrupted, or a Board of Fisheries' regulation adopted under AS 16.40.120(e) would be contravened, a permit must be issued if the wild stock is necessary to meet the initial needs of the farm or hatchery, if there are technological limitations on propagating cultured stock, if wild stock is not being fully used, or if wild stock is needed to maintain the gene pool of the hatchery or farm.

It is important to note that sec. 7 of the bill would amend the general regulatory authority of the Board of Fisheries in AS 16.05.251. The amendment would specify that except as "expressly provided in AS 16.40.120(d) and (e), 2/ the board may not adopt regulations or take action regarding aquatic farming or hatchery permits or stock acquisition permits, the construction or operation of aquatic farms or hatcheries, or harvest with a stock acquisition permit. This means that board regulations currently in effect, adopted under its authority to regulate the "live capture, possession, transport, or release of ... fish or their eggs," AS 16.05.251(a)(9), 3/ and the regulations adopted under its authority to regulate a harvest of aquatic plants, AS 16.05.251(a)(10), 4/ would not apply to the issuance of stock acquisition permits under proposed AS 16.40.120 unless readopted by the board under its authority in proposed AS 16.40.120(e). (Of course, the board could also adopt other regulations under proposed AS 16.40.120(e), if the existing regulations were not deemed appropriate to apply to stock acquisition permit

2/ The amendment in sec. 7 to AS 16.05.251 also notes that except as expressly provided in AS 16.40.130, the board may not adopt regulations with respect to aquatic farms or hatcheries, or acquisition permits. Proposed AS 16.40.130 prohibits the importation into the state of aquatic plants or shellfish for aquatic farming or hatchery purposes, unless authorized by a regulation of the board. Section 7's proposed amendment would thus **require** positive regulatory action by the board to allow importation for those purposes. (Under the board's existing authority in AS 16.05.251(a) it has prohibited importation of fish into the state for virtually all purposes. 5 AAC 41.070.)

3/ Those activities are governed by regulations in 5 AAC 41.001 -- 5 AAC 41.100.

4/ Those regulations are in 5 AAC 37.100 -- 5 AAC 37.900.

situations.)

We note that sec. 7's reference to proposed AS 16.40.-120(d) is unnecessary and inaccurate. The reference is in relation to Board of Fisheries "action regarding the issuance, denial, or conditioning" of a permit under proposed AS 16.40.120(d). Although that proposed subsection did contain provisions regarding such board action in the original version, this final version of the bill does not. Section 7's reference to proposed AS 16.40.120(d) should have been deleted in this final version. Failure to do so does not create a legal problem, but is confusing.

Proposed AS 16.40.140 would govern sale and transfer of stock and products from aquatic farms or hatcheries. The proposed section would allow an aquatic plant or shellfish hatchery to sell or transfer stock to another permitted hatchery or farm, or to aquatic farms or hatcheries outside the state. This contrasts with existing AS 16.10.420(7), governing private nonprofit salmon hatcheries, which states that surplus eggs from salmon returning to the hatchery must be made available for sale first to the department, and then only to operators of other authorized private nonprofit salmon hatcheries.

Proposed AS 16.40.150 gives the Department of Fish and Game the authority to quarantine or destroy diseased hatchery stock, and provides for inspections.

Under secs. 8 -- 12 of the bill, various segments of AS 16 are rendered inapplicable to the activities associated with aquatic plant and shellfish farms and hatcheries. The proposed amendment to AS 16.05.930 in sec. 8 would make the sportfishing, commercial fishing, and even fish farming license 5/ requirements inapplicable. Proposed AS 16.10.269 in sec. 10 would exempt activities relating to shellfish or aquatic plant farms or hatcheries from the provisions governing the sale of commercially harvested fish. The proposed amendment to AS 16.43.140 in sec.

5/ Currently, AS 16.05.340(a)(14) establishes a \$200 fee for a fish farming biennial license, and AS 16.05.330(a) prohibits fish farming without such a license. If finfish farming is authorized in the future, those requirements would still apply to that activity; this conclusion is bolstered by the proposed amendment to AS 16.05.940(14) contained in sec. 9, which would modify the definition of "fish farming" to exclude shellfish farming.

11 would exempt those activities from the limited entry statutes, and the proposed amendment to AS 16.51.180 in sec. 12 would exempt those activities from the statutes governing the Alaska Seafood Marketing Institute.

Sections 13 -- 17 of the bill specify some statutory responsibilities of the Department of Natural Resources with regard to aquatic plant and shellfish farms and hatcheries. Proposed AS 38.05.083 authorizes leasing of sites for such operations, proposed AS 38.05.855 establishes a procedure for the identification of sites available for such operations, and proposed AS 38.05.856 authorizes tideland and land use permits for such operations. Proposed amendments to AS 38.05.945 and AS 38.05.946 establish notice and hearing requirements associated with those leases, identifications, and permits.

Although secs. 18 and 19 of the bill do not add or change statutory language, they do relate to the responsibilities of the Department of Natural Resources. Section 18 provides that a person who is lawfully operating an aquatic farm or related hatchery in the state on the effective date of the bill is entitled to continue lawful operations at that site. Section 19 requires the Department of Natural Resources to submit a report to the legislature by January 30, 1989, detailing the department's implementation of the statutory responsibilities relating to aquatic farms and hatcheries.

Department of Natural Resources' staff raised a question regarding sec. 18, which provides in part: "Notwithstanding any other provision of law, a person who is lawfully operating an aquatic farm or related hatchery in the state on the effective date of this Act is entitled to continue lawful operations at the existing site." (Emphasis added.) The question is whether this language merely authorizes continued operations for a reasonable time while the operator applies for the permits that will be required if the bill becomes law or, alternatively, authorizes, in perpetuity, all current lawful operations regardless of whether the permits and leases that the bill would require for new operations are obtained.

We believe that the first interpretation more accurately reflects the legislature's intent. We cannot state with certainty, however, that the second interpretation could not be found by a court to be the correct one. We reach this conclusion for the following reasons.

An existing lawfully operated aquatic farm or related hatchery must have a Department of Natural Resources multiple

land use permit ("MLUP") under 11 AAC 96. A Department of Natural Resources MLUP is for a term not to exceed one year, although it may be extended for additional one-year periods, (11 AAC 96.040); is revocable at will and does not convey any property interest to the permittee (see generally 1980 Inf. Op. Att'y Gen. (December 22; 661-81-0232)); and does not require public notice (AS 38.05.945(d)). We are informed that some of the required permits for existing aquatic farms and related hatcheries were issued under 11 AAC 62.710, which provided specifically for tideland permits. 11 AAC 62.710, however, was repealed in 1977. Permits issued under its authority after its repeal probably have no legal effect, although it is likely that persons acting under them in good faith would not be found by a court to be trespassers. We also are informed that some of these tideland permits are for terms of three or even five years. We do not believe that these longer terms change our analysis.

This bill, on the other hand, would grant substantially greater property rights, and for a longer term, than an MLUP and, simultaneously, provide much more substantial safeguards of the public interest in recognition of the greater property rights being conveyed. For example, the bill would establish detailed procedures for (1) identification of appropriate sites for aquatic farms (proposed AS 38.05.855); (2) public notice and hearings before permits or leases are issued (proposed AS 38.05.855(d), 38.05.856(b), 38.05.945(a)(5) and (6), 38.05.-945(g), and 38.05.946(b)); (3) a three-year time limit on permits (proposed AS 38.05.856(a)); (4) leasing of an aquatic farm and related hatchery site (proposed AS 38.05.083); and (5) requiring a performance bond as a condition for the issuance of a permit (proposed AS 38.05.856(d)) or lease (proposed AS 38.05.-083(d)).

In addition, an existing lawfully operated shellfish farm must have a Department of Fish and Game permit under 5 AAC 41.210. As noted above, however, that regulation does not apply to shellfish hatcheries or aquatic plant farms and hatcheries. This bill would require a Department of Fish and Game permit for all those operations (proposed AS 16.40.100(a)); require permittees to report any outbreak or incidence of disease (proposed AS 16.40.150(a)); authorize the department to quarantine or destroy a permittee's diseased stock or products to protect wild stocks (id.); and provide for inspection of the operations by the department to accomplish these tasks (proposed AS 16.40.150(b)).

We cannot imagine that the legislature would establish these detailed procedures and safeguards for proposed new aquatic farms and related hatcheries while, at the same time, providing

that none of those procedures and safeguards would ever apply to existing lawfully operated aquatic farms and related hatcheries. Such an interpretation is simply unreasonable, and would fly in the face of the "golden rule of statutory construction that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." 2A N. Singer, Sutherland Statutory Construction, sec. 45.12 at 54 (1984) (footnote omitted). We accordingly reject an interpretation of sec. 18 under which a person lawfully operating an aquatic farm or related hatchery on the effective date of the bill would be entitled to continue operating it in perpetuity without, at some point, becoming subject to the remaining provisions of the bill.

A more reasonable construction is that the legislature intended sec. 18 to permit those aquatic farms and related hatcheries that were being lawfully operated on the effective date of the bill to continue operation for a reasonable period of time while the operators sought to obtain the permits and leases that would be necessary under the bill for continued long-term operation. In other words, we believe that the legislature included sec. 18 to ensure that the requirements for permits and leases that the bill would establish would not, immediately upon taking effect, give the Department of Natural Resources or the Department of Fish and Game new grounds (beyond any authority they previously might have had under permits already issued) to terminate operations that have already started under current law. Instead, those departments should afford those persons lawfully operating aquatic farms and hatcheries on the effective date of the bill a reasonable time to obtain the permits and leases contemplated in the bill for continued long-term operations.

If the bill becomes law, we would urge the two departments to establish the length of that reasonable time period by regulation. Proposed AS 16.40.160 would give the commissioner of fish and game the authority to adopt regulations necessary to implement the bill; proposed AS 38.05.856(e) would require the commissioner of natural resources to adopt regulations establishing criteria for the approval or denial of land use permits and for limiting the number of sites for which permits may be issued in an area, and current AS 38.05.020(b)(1) gives that commissioner authority to adopt regulations necessary to implement AS 38.05, the Alaska Land Act, of which the land use provisions of this bill would become a part. If a current operator did not apply for and receive the necessary permits or lease within that time period, the departments could then move to terminate the operation.

Sections 3, 4, and 5 of the bill give the Department of Environmental Conservation certain responsibilities with respect to shellfish and aquatic plant farms and hatcheries. The proposed amendment to AS 03.05.011(a) gives the commissioner of environmental conservation the authority to establish standards and conditions for the operation and siting of aquatic farms and hatcheries and to monitor those operations to ensure compliance with the state's environmental laws and the Food and Drug Administration's national shellfish sanitation program manual of operations. The proposed amendments to AS 03.05.040(a) authorize inspections by the Department of Environmental Conservation of aquatic farms or hatcheries, or their products.

With respect to the state's environmental protection laws, the House and Senate both adopted a letter of intent that specified that the requirements in proposed AS 38.05.083(d) and AS 38.05.856(d) with respect to the posting of a performance bond with the Department of Natural Resources

be limited to coverage of site clean-up and restoration of physical improvements such as buildings, equipment or other facilities. It is not the intent that the performance bond or other security requirements expand or reduce the scope of existing statutes or regulations relating to environmental protection.

1988 H. Jour., pp. 3716, 3733; 1988 S. Jour., p. 3762.

In addition to the statutory changes described above, in sec. 20 the bill establishes a finfish farming task force, which is to be appointed by the governor. The group is to make an interim report to the legislature by January 30, 1989, and a final report by January 30, 1990. The report is to address various policy questions relating to finfish farming in the state and freshwater, in marine environments, and in tanks or other enclosed structures, as well as related hatchery operations.

Finally, in sec. 21 the bill would extend the finfish moratorium established in ch. 70, SLA 1987, from July 1, 1988, to July 1, 1990. That moratorium was established by providing in sec. 1(a), ch. 70, SLA 1987, that eight specified licenses, permits, leases, or authorizations could not be issued for the construction or operation of a commercial finfish farm. In contrast, sec. 1(b) of that Act provided that

a fish farming license and a fish transport permit

may be issued for commercial finfish farming in a privately owned fresh water body that has no outlet to state water.

Under the then-existing wording of 5 AAC 41.001 and 5 AAC 41.005, the Board of Fisheries' regulations governing the possession and transportation of live fish, the possession of fish for commercial farming purposes -- finfish or shellfish -- was not permitted. 1985 Inf. Op. Att'y Gen. (Jan. 31; 663-84-0187); 1987 Inf. Op. Att'y Gen. (July 8; 663-87-0454). The language of the moratorium just quoted left the board free to amend its regulations to allow finfish farming in privately owned freshwater bodies with no outlets to state water, just as the language allowed the boards to amend the regulations with respect to shellfish.

In the interim, the board has amended the language to allow the transportation and possession of live shellfish for "commercial purposes in conjunction with a shellfish farming operation." No similar amendment has yet been proposed to the board with respect to finfish farming in private ponds. In the same House and Senate letter of intent cited earlier in this letter, it states that "for the period of the moratorium on finfish farming, the farming of finfish in a privately owned freshwater body with no outlet to state water should proceed." 1988 H. Jour., pp. 3716, 3733; 1988 S. Jour., p. 3614. The letter of intent directs the commissioner of fish and game to "work with prospective farmers and the Board of Fisheries to develop appropriate proposals to meet the goals of this legislation." Id.

The extension of the moratorium in sec. 21 of this bill, when combined with the indication of legislative intent, is consistent with the permissive language with respect to the authorization of finfish farming in privately owned ponds in sec. 1(b), ch. 70, SLA 1987. Although not phrased as a mandate, it is fairly clear that the legislature is encouraging the Department of Fish and Game to work with the Board of Fisheries to ensure that regulations be considered which would authorize private finfish farming in private freshwater ponds, notwithstanding the moratorium.

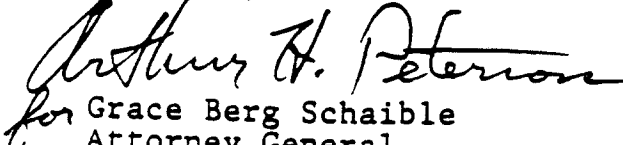
In sum, the bill would establish a statutory framework for shellfish and aquatic plant farming and hatchery operations, and in the process redistribute some of the authority over the capture, transport, and possession of live fish from the Board of Fisheries to the commissioner of fish and game. The bill also would establish statutory responsibilities with respect to shellfish and aquatic plant farms and hatcheries for the Department of

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Natural Resources and the Department of Environmental Conservation. Further, the bill would establish a five-member finfish task force, which would report on various policy questions to the legislature in an interim fashion by January 30, 1989, and in a final form by January 30, 1990. Finally, the bill would extend the moratorium on finfish farming in the state from its current July 1, 1988 expiration date (one year after it was initially enacted), to July 1, 1990. The bill raises policy questions, but no major legal issues.

Sincerely,


for Grace Berg Schaible
Attorney General

GBS:LIS:GTK:cb:d1m

cc: ~~Hon. Don Coffinworth, Commissioner~~
Department of Fish and Game

Hon. Judith Brady, Commissioner
Department of Natural Resources

Hon. Dennis Kelso, Commissioner
Department of Environmental Conservation

ALASKA DEPARTMENT OF FISH AND GAME
SHELLFISH AND AQUATIC PLANT FARM SITE
CRITERIA FOR UNSUITABLE AND GUIDELINE AREAS
USED BY AGENCIES FOR 1990
SOUTHCENTRAL ALASKA AQUATIC FARM SITE PERMITTING

AQUATIC FARM PERMIT GUIDELINES

The following guidelines are offered by permitting agencies to assist in selecting an aquatic farm site that has the best chance for approval. These guidelines are not meant to be all inclusive and are in addition to any prohibitions or mitigating requirements that may be included in a district coastal management plan, a State land use plan, municipal or borough land use plans and/or local ordinances or zoning requirements.

DEC, Environmental Health Certification Guidelines

You must obtain a Growing-Area Certification from DEC, in order to sell an aquatic farm product. Water quality in the growing area must meet the standards of the National Shellfish Sanitation Program and State water quality standards before an aquatic farm product may be sold. This certification process is not covered by the attached Aquatic Farm Application form. You should contact DEC regarding certification requirements so that you can be reasonably sure that your site will qualify. Even though the health certification comes later, the following items need to be taken into consideration prior to completing the application for an aquatic farm permit since they will be a factor for certification of your growing area.

1. Commercial fishing, or personal use fishing/hunting in the immediate area or close proximity to the growing area may cause conditions that will prevent certification of the growing area. Avoid siting facilities near hatcheries.
2. Areas used by boats for recreation, moorage and anchorage, or in close proximity to a proposed growing area may cause conditions that will prevent certification of the growing area.
3. No airplane or boat moorage should occur within the boundary of a growing area.
4. Petroleum and fuel storage and handling must be protected from accidental discharge into a growing area. Storage and handling of these materials is not to be conducted at the growing area site.
5. Facilities should not be sited in areas with waste discharge. Houseboats, floathomes and other boats must be a minimum of 300 feet from the boundary of a growing area if sewage is discharged. A sewage disposal system adequate to protect shellfish from contamination will be required for any caretaker facilities associated with a mariculture operation.

6. All pets and other animals must be excluded from the growing area structures. Waste from these animals must be prevented from discharging into the growing area.
7. Large wildlife populations in the area and/or the presence of anadromous streams may cause conditions that will affect certification of the growing area.

For additional information and assistance regarding these environmental health certification guidelines, please contact the Shellfish Program Coordinator, DEC, Division of Environmental Health at (907) 563-0318.

UNSUITABLE AND GUIDELINE AREAS

The following Unsuitable and Guideline areas are provided by DFG, DEC, and DNR and concern siting issues separate from the health certification guidelines. Please contact the local representatives of these departments if you have questions regarding the following guidelines.

Siting farms in Unsuitable Areas will mean a heavy burden of proof is on the applicant to prove the suitability of the site. Farms will not be approved in areas designated as Guideline areas.

Coastal Habitat maps identifying the location of habitat types which fall in these two categories are available at DNR (Anchorage), and DFG offices in Dillingham, King Salmon, Kodiak, Dutch Harbor, Homer, Soldotna, Anchorage and Cordova. The Catalog of Waters Important to the Spawning, Rearing or Migration of Anadromous Fishes (Anadromous Waters Catalog) and the map atlas to that catalog show documented anadromous fish streams and is available for viewing at all DFG offices.

In reference to the Coastal Habitat maps it should be noted that, although every effort has been made to make the maps as complete as possible, some important habitats which appear in the Unsuitable, and Guideline Areas, are not included on the maps. In addition, because of a lack of complete data, some critical habitats exist that are not shown on the maps. During the project review, as additional information becomes available these critical areas will be treated as Unsuitable or Guideline Areas as appropriate.

UNSUITABLE AREAS

Applications will be accepted in Unsuitable Areas; however, these are sensitive areas where potential conflicts with existing habitats

and uses may occur. If an applicant chooses to apply in an unsuitable area, the application will be processed, but there will be a heavy burden of proof on the applicant to demonstrate that the farm can be sited in this area in accordance with the conditions of the aquatic farm program.

1. Herring Spawning: Avoid siting aquatic farms or facilities within 300 feet of herring spawning areas.
2. Shorebird Concentration Areas: Avoid siting aquatic farms or facilities in shorebird concentration areas.
3. Waterfowl Concentration Areas: Avoid siting aquatic farms or facilities in waterfowl concentration areas.
4. Clam Concentration Areas: Avoid siting aquatic farms or facilities within 300 feet of clam concentration areas.
5. Sea Otter Concentration Areas: Avoid siting aquatic farms or facilities in sea otter concentration areas.
6. Undocumented Anadromous Fish Streams: Avoid siting aquatic farms or facilities within 300 feet of undocumented anadromous fish streams.
7. Kelp and Eelgrass Beds: Avoid siting aquatic farms or facilities within 300 feet of kelp beds.
8. Areas Subject to Significant Predation: Avoid siting aquatic farms or facilities in areas subject to predation or in such a manner as to attract predators.
10. Shallow Areas (less than 40 feet deep): Avoid siting aquatic farms or facilities in shallow areas that serve as nursery areas for fish, crab, and other shellfish.
11. Intensive non-commercial hunting and fishing areas: Avoid siting aquatic farms or facilities in intensive sport and subsistence harvest areas.
12. Intensive Float Plane Access Areas: Avoid siting aquatic farms or facilities in intensive float plane access areas.
13. Black and Brown Bear Concentration Areas and Travel Corridors: Avoid siting aquatic farms or facilities in black or brown bear concentration areas and travel corridors.
14. Poor Current Circulation Areas: Avoid siting aquatic farms or facilities in areas where currents are too weak to disperse biological wastes.

15. Purse Seine Hook Offs: Avoid siting aquatic farms or facilities in purse seine hook off areas.
16. Heavily Used Anchorages: Avoid siting aquatic farms in heavily used anchorages.
17. Subsistence Harvest Areas: Avoid siting facilities within or adjacent to subsistence harvest areas.
18. Recreational or Commercial Harvest Areas: Avoid siting in or adjacent to:

Intensive recreational or commercial harvest areas for fish and shellfish

Intensive non-commercial hunting and fishing areas

Heavily used anchorages within day use areas of communities or other anchorages of local or regional importance

Intensive float plane access areas

19. Oiled Areas: Avoid siting facilities in areas depicted on maps as lightly, moderately or heavily oiled in Southcentral coastal waters.

Applicants are also cautioned to avoid siting in areas adjacent to unsuitable areas due to the oil spill. Applicants that choose to apply for a site within 1/4 mile from oiled areas may be asked to provide additional information in order for the State to evaluate the suitability of the site.

GUIDELINE AREAS

Applications for sites located in a Guideline Area will be rejected or denied. Applications received in areas subsequently determined to be Guideline Areas will not be approved. Please consult the Coastal Habitat maps and contact State agency personnel if you have questions related to this category.

1. Seabird Colonies: No aquatic farms or facilities will be sited within 1-mile of seabird colonies.

2. Bald Eagle Nests: Aquatic farms or facilities must be sited at least 330 feet from bald eagle nest trees.
3. Sea Lion Haulouts and Rookeries: No aquatic farms or facilities will be sited within 1-mile of sea lion haulouts.
4. Harbor Seal Haulouts and Pupping Areas: No aquatic farms or facilities will be sited within 1-mile of harbor seal haulouts or pupping areas.
5. Walrus Haulouts: No aquatic farms or facilities will be sited within 1-mile of walrus haulouts.
6. Anadromous Fish Streams: No aquatic farms or facilities (including upland support facilities) will be sited within 300 feet of anadromous fish streams.
7. Intensive Commercial Fish Harvest and Hatchery Areas: No aquatic farms or facilities will be sited in intensive commercial harvest or hatchery areas.

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