

**Description of Proposed Changes to
Regulations Governing Aquatic Farming of Shellfish
(July 11, 2005)**

The Alaska Department of Fish and Game proposes regulations to implement House Bill 198, an act that, among other things:

- 1) authorizes the department to permit shellfish farmers to harvest insignificant amounts of wild stock shellfish of the species intended for culture from a farm site;
- 2) prohibits issuance of a permit for a farm that includes more than an insignificant population of a wild stock of shellfish species intended for culture; and
- 3) authorizes the commissioner to allow a shellfish farmer to harvest a significant amount of common property shellfish from a farm site provided that:
 - a. removal from the site of that portion of the wild stock that exceeds an insignificant population would benefit the public;
 - b. removal of the stock by a person other than the permittee would unreasonably interfere with the operation of the aquatic farm; and
 - c. the permittee pays reasonable compensation, as defined by the department, for the harvest and sale of the excess wild stock.

The legislation defines an insignificant population as an amount of shellfish that would not attract and support a commercial fishery for that species of shellfish and the harvest and sale of the shellfish would not result in significant alteration in traditional fisheries or other existing uses of fish and wildlife resources if the population were included within an aquatic farm site.

House Bill 198 was introduced, at the request of the Alaskan Shellfish Growers Association and Southeast Alaska Regional Dive Fisheries Association, by Representative Elkins with companion legislation offered by Senator Stedman. The Department of Fish and Game supported the legislation, which implements a decision by the Superior Court interpreting the Alaska Constitution to call for permitting shellfish farms in locations that include an insignificant population of resident shellfish stock while prohibiting permitting of farms in locations that have a significant population of shellfish. The court defines a significant population as one that would attract and support a commercial fishery.

The regulations, which implement House Bill 198, propose the following:

5 AAC 41.220(b). Aquatic farm and hatchery operation permit applications is proposed to be amended to state that a proposed aquatic farm site may not include more than an insignificant population of wild stock, on the site, of a shellfish species intended to be cultured. This incorporates in regulation the limitation from statute on the amount of wild stock that a farm may include and meets the requirements of the court regarding access to wildstock by shellfish farmers.

5 AAC 41.220(e). Aquatic farm and hatchery operation permit applications would establish fees due from applicants for farm sites that are necessary to fund surveys of proposed farm sites in order to meet the statutory obligation that a site include less than a significant population of shellfish of the species intended for culture. The fees would be limited to actual costs and may not exceed \$5000 per day for a survey of a proposed subtidal farm site and a maximum of \$2000 per day for a survey of a proposed intertidal farm site.

For example, no survey would be required to determine the population of wild stock geoducks for an intertidal geoduck site because that species does not occur naturally in intertidal habitats in Alaska and consequently an intertidal farm site cannot have a significant population of geoducks. Similarly, if other circumstances or knowledge give the department confidence that a proposed site does not include a significant amount of geoducks a survey of wildstock on the farm site will not be required. Survey fees will not include costs of bringing the survey vessel from port to the site. Fees will be due when an application is submitted. An applicant may propose means to reduce survey costs, however a survey conducted by the department using a department vessel will very likely require a fee of \$5000 per day.

5 AAC 41.220(f). Aquatic farm and hatchery operation permit applications would provide that the commissioner may determine the order in which applications are reviewed and surveys conducted.

5 AAC 41.240. Review and determination is proposed to be amended to implement House Bill 198 by requiring the commissioner to issue an aquatic farm permit if he determines, among other things, that the site contains an insignificant number of the species intended for culture. The proposed amendment also states that a site will be considered to contain an insignificant population of the species intended for culture if the site does not contain an abundance that would support a limited entry commercial fishery.

The section would implement the requirement from House Bill 198 and the Superior Court that the commissioner authorize a farm site only if the site does not include more than an insignificant population of a species of shellfish intended for culture. Consequently this section would allow sites with insignificant populations while prohibiting sites with significant populations. It would also put in regulation the definition of insignificant population included in statute, specifically, that “‘insignificant population’ means a population of shellfish that, in the determination of the commissioner, would not attract and support a commercial fishery for that species of shellfish.”

5 AAC 41.246. Acquisition of an insignificant amount of wild resources on an aquatic farm site would be added to permit an aquatic farm operation permit holder to take, harvest, and sell, in the course of operating an on bottom aquatic shellfish farm, an insignificant number of wild stock of the species approved for culture and occupying the aquatic farm site. An insignificant number of wild stock is characterized as an abundance that the commissioner determines would not support a commercial fishery. For geoducks that amount is less than 12,000 pounds.

5 AAC 41.250. Permit conditions is proposed to be amended to implement the provisions in House Bill 198 limiting the obligations for an aquatic farm operation permit holder to restore wild stock on a farm site, by clarifying that a permit holder's duty to restore the population of a wild stock of shellfish upon expiration or termination of the permit does not include any shellfish that was removed from an aquatic farming site by a common property fishery conducted after the issuance of the permit for the aquatic farm site.

Another proposed modification to this section of the regulations would provide that farmers will report the amount of wild stock removed from a farm site. This information will assist the department in determining the actions a farmer must take to meet the obligation in statute to restore the wild stock and provides a record of harvest of the public resource.

5 AAC 41.250. Permit conditions is proposed to be amended to implement the provisions in House Bill 198 that allow the commissioner to permit a farmer to harvest and sell, within a reasonable amount of time after the permit is issued, an amount of shellfish from a farm site that exceeds an insignificant amount if the commissioner determines in writing that removal from the site of that portion of the stock would benefit the public and that removal of the stock by a person other than a permittee would unreasonably interfere with the operation of the aquatic farm. Furthermore, the amendment will fulfill the obligation set in statute that the commissioner require reasonable compensation for the harvest and sale of wild stock that exceeds an insignificant population taken from the farm site by requiring, for geoducks, payment of a proportion of which ever is the greater, the average ex-vessel price paid in the most recent commercial fishery or the amount paid for geoducks at the first point of sale. It is proposed that 20% be tendered by a farmer for processed geoducks and 50% for geoducks sold live.

The court found that the Alaska Constitution prohibits taking and selling more than an insignificant amount of wild stock from any shellfish farm. To authorize a farmer to harvest and sell more than an insignificant amount of shellfish, the department must show that the harvest is in the public's interest and that the public will receive fair compensation for the harvest of the public resource. Furthermore, to grant the exclusive right to harvest to the farmer instead of offering the opportunity to harvest to the public, the department must show that harvest by anyone other than the farmer would unreasonably interfere with the operation of the aquatic farm.

A farmer would pay compensation only for sales of geoducks that exceed an insignificant amount. The threshold for insignificance is defined as 12,000 pounds. Thus a farmer may sell up to 12,000 pounds of geoducks from a farm site with no obligation to pay compensation.

Consistent with the court's order, House Bill 198 prohibits issuing permits for more than an insignificant amount of wild stock. Therefore, it is expected that these provisions will apply to farm sites already permitted that have more than an insignificant amount of wild stock.

5 AAC 41.257. Security requirements are proposed to be added to address the obligation in statute for farmers to replace wild stock on a farm site when the farm site is surrendered. The section as proposed would require a certificate of deposit sufficient to cover the cost of restoring the public resource but only if wild stock had been removed from the farm to be sold. As a result, no deposit would be required until the farmer had sought to sell wild stock from the farm site and therefore had a source of revenue. The certificate of deposit would be returned to the farmer after the site is reseeded.

5 AAC 41.270. Fish Ticket; Reporting Requirement and Annual report is proposed to be repealed and readopted to require a farmer to notify the department during business hours and at least twenty-four hours prior to delivering wild stock harvested from a farm site. The section would also authorize department personnel and law enforcement officers to inspect the harvested wild stock. The section would also require completing a fish ticket to facilitate record keeping of the sale of wild stock from the farm site. A farmer will be provided with a Commercial Fisheries Entry Commission mariculture card to imprint on fish tickets to identify harvests attributable to a specific site.

Another proposed change in this section would require that certain records held by the department concerning aquatic farm stocks or production, prices, and harvests of aquatic farm products and wild stocks, and annual statistical reports of individual aquatic farms or hatcheries required by statute or regulation adopted by the department are confidential and may not be released by the department and also identifies four exceptions to the confidentiality requirement that were included in HB 198.

5 AAC 41.400. Definitions is proposed to be repealed and readopted and new paragraphs added to define "aquatic farm site" as any facility or tract of land used for private, commercial production of aquatic products; with each separate geographical facility or tract of land permitted for commercial operations constituting a separate farm site.

It is also proposed that, consistent with HB 198, "insignificant population" be defined as population of shellfish wild stock that, in the determination of the commissioner, would not attract and support a commercial fishery for that species, and the harvest and sale of the shellfish would not result in significant alteration in traditional fisheries or other existing uses of fish and wildlife resources if the population were included within an aquatic farm site and will be determined by evaluation of biomass of the species and density of the population on the farm site. An insignificant population of geoducks would be defined as a population less than 12,000 pounds within an average farm site of six acres.