

Mariculture Regulation Review Committee
Minutes for 12/19/2003 teleconference

Attending:

Jon Agosti, David Bedford, Greg Cushing, Julie Decker, Bob Hartley, Kyle Hebert, Ron Long, Steve McGee, Ted Meyers, Dan Moore, Sid Morgan, Rodger Painter, Ray Ralonde, Jim Seeb, Jackie Timothy, Glen Wilbur, Gary Zaugg.

David Bedford, who chaired the meeting, noted that the committee's intent was finding ways to modify the existing mariculture regulations. Rodger Painter pointed out it was the Alaska Shellfish Growers Association that suggested improvements in the regulations. He said he would go through the regulatory changes section by section. Bedford suggested that **5AAC 41.245** (i.e., acquisition of wild resources) be addressed at the end.

Addressing **5AAC 41.220** (aquatic farm and hatchery operation permit application), Painter said it was his intention to list the specific items he wanted removed from the regulation. He said there were 3 1/2 pages of specific requirements for an application, and the submission of a single multi-agency application would streamline the process. He noted that he had provided a detailed discussion paper, and some aspects of the regulation needed to be eliminated altogether. Bedford said that they had to agree with other agencies when they drafted the permit application, noting it was up to the agencies involved to determine how the application is presented and what is needed. Ray Ralonde said the application was overbearing and many of the specifications were difficult to verify; e.g., changes in substrate and eel grass. He said it was not necessary to place these requirements in regulation to that level. Bedford said there would still be requests for certain types of information, and state agencies needed to know specifically those requests that are unreasonable.

Ralonde said one example would be cross-sectional drawings of each proposed site, asking if it was really practical to include port facilities and anchoring systems. He said information like that could be addressed more generally; e.g., "the farming systems could be anchored and made secure." He said he didn't know, for example, why a bottom

profile would be necessary for a suspended type of application. Ralonde said it was also cumbersome to list all the specifics at the site; e.g., planting schedules. He said in some instance they didn't know what that schedule is, because sometimes it was based on recruitment. He said that in terms of the methods and means of farming, a general statement could be used by the applicant, because farmers change gear all the time. Ralonde said that in terms of a means of measuring success, the real issue is that there are successes and failures in the business. What they really wanted to determine is whether the farm is being farmed, and if they are farming unsuccessfully then they were going to go out of business. He said they should be measuring the effort not success.

In terms of locating any lake, river, or stream within 300 feet of the site's boundaries, Ralonde said there already were existing stipulations as to how to deal with anadromous streams in the leasing agreements and to place it again in .220 was redundant. He said that the supplemental feeding provisions were not suitable for shellfish because no one fed shellfish. He said many of the required functions were not verifiable and in certain cases were not feasible to the operator. He said they needed general terms, not ones with so much specificity.

Hartley said they needed to have three different forms applicable to different types of culture: (1) suspended, (2) subtidal on the bottom, and (3) intertidal on the bottom. Gary Zaugg said he felt everyone so far was sounding on point; he agreed that specificity did not belong in the regulations, rather it belonged in the application, and if the state had specific comments and questions then they could be dealt with on a case-by-case basis. Bedford said the committee was looking at the regulations where the interests of the state are being addressed, and they were trying to find the dividing line between where those state interests transitioned with the operator interests. Painter said there was a lot of concern how development plans are structured, because they were laid out on a quarterly basis, and it has caused a lot of work to be charged to the farmers.

5AAC 41.240. Review and determination. Painter said he had taken a lot out of this section. He said he was suggesting that the specifics that makes up uses for these

resources be taken out. He said he removed the section talking about the commissioner making certain determinations, e.g., gear suitability, predator densities. He said in some instances and for some species they didn't really know what a suitable gear is, and the department should not be prohibiting development of experimental techniques, because once they put their nets in the water, they were going to find species they didn't know existed. One of the problems related to farming techniques was how to take care of the problem species. A discussion followed concerning Judge Thompson's decision on geoducks. Painter said insignificant populations at a specific site should be able to be used by the farmers. Bedford said he didn't feel 41.240(2)(1)(F)(i) was inconsistent with the court's ruling. Painter said he thought it was too narrow. Bedford followed up with some general comments: He said the department was not opposed to changes in the regulations, but they needed to find out where people stand on the proposed changes, and he said they needed to look at the next step; i.e., where the department is in terms of these changes. He said there was a question why commercial fisheries get more scrutiny than the other common property fisheries--he explained it was the profit motive that needed more oversight, and together they needed to analyze that level of state oversight.

Gary Zaugg said a lot of the requirements for 41.240 could be better addressed in 41.220 by putting it into the application itself and that 41.240 basically restated AS 16.40.105. He said the purpose of 41.240 was to implement the court ruling and they were still at the point where they were dealing with the issue of significance—and the one thing that needs to be done is to define significance.

Ralonde said he had a number of comments on feasibility standards. In terms of shelter and adverse weather 41.240(b)(1)(c), he said there were always projects with gear modifications to put gear in rough water. Of greater concern would be to make sure that a farming site is secure and uses materials that aren't harmful to the environment and that those types of concerns might be more appropriate language to the existing language. In terms of 41.240(b)(1)(d) issues, he said predators and competitors are constantly changing and that this section is problematic to dynamics of ocean systems. He said it seemed to be the mind set that traditional approaches to fisheries are best for coastal

communities; i.e., establishing fisheries for undervalued species of salmon are considered more appropriate than instituting mariculture. He said in terms of the various sections of the regulation, 41.240(b)(1)(E)(i-v) were too specific to put into the regulation; in 41.240(b)(1)(F) they needed to know what the significant numbers were in order to deal with it, and in terms of site feasibility, within that category there was a lot of changes that can take place in a dynamic ocean system; e.g., milling fish, kelp beds. He said that endangered species already had their own sets of protective regulations. He said that the use of general terms would be more useful. He said he supported clustering sites and bringing densities up, and referencing proposed sites 41.240(b)(2)(D)(ii) he said he didn't think it was necessary because it was too general and had no boundaries.

In terms of demonstrating the success of a proposed culture practice, “demonstration” is not the right term because it is a post activity, and they had placed a “past and future” context in that part of the regulation. Ralonde said farmers both succeed and fail and some techniques can't be demonstrated as successful until they're applied; sometimes farmers need to explore techniques that can help their application. He said the whole idea of what a “natural range” represents is problematic. 41.240(b)(3)(B). The range changes from one time to another; e.g., temperature, current, etc., and this should be addressed in fuller detail at another time. He said that 41.240(b)(3)(C) was a “PhD dissertation”—he said in 1995 there had been a moratorium on leasing aquaculture sites, when the Mitchell study (1995) determined a number of techniques that showed the worked sites created a level above natural abundance, the moratorium was lifted. He said supplemental feeding portion of the regulations was not appropriate for bivalves—that it was applicable only in a hatchery setting.

Decker said she agreed with the concept of changing the regulations because the existing ones were too restrictive. She said SARDFa had taken an official position on significance and voted to support a level of 50,000 pounds of geoducks. She said they felt that small pockets of geoducks could be used if the department decided to implement an IFQ program for geoducks. She said the SARDFa Board would take up that issue “today” (i.e., 12/19/03), and that there existed a range of opinion as to how to define

significance. She said there needed to be an accepted definition, because it would help solve a lot of problems. They all needed a standard and it would be a good direction for them to go.

Timothy said according to Judge Thompson's ruling as applied to 241.240, the department definition of significance (i.e., for geoducks) was "if a site contains an abundance that would support a limited entry fishery." She said the department had gone through a public review and had changed 5AAC 41.245. If there's a site without a significant amount of animals, the department can permit it. She said they needed to work together to decide exactly what represented the significant number. As an example, she said that if there were a site with a lot of littleneck clams, then the department was going to provide the opportunity for a lot of people to participate in a fishery there. She said everyone should be aware that the mariculture section had no leeway when they wrote the 2002 revisions to the regulations at 41.240(b)(2)(D)(i), because DNR's were less specific and they had to change theirs to come into alignment with theirs. Timothy noted that in some instances supplemental feeding would come into play; e.g., abalone and red king crab—these species would have to be fed—and feeding is a probable issue.

Decker said that Timothy ought to provide that information at the SARDFa Board meeting. Ralonde said he had a problem with significance; e.g., if there was a small but "significant" number of geoducks that gave some indication the stock is not sustainable because of low recruitment or predation. He said that bed might not be naturally restorable, but if farming were to take place there, it would insure the population would be maintained. He said the same thing would apply to littlenecks, because they were inconsistent when it came to recruitment; e.g., in one 700 square-foot area they had discovered extreme differences in recruitment from one end to the other. He said that populations and habitat were dynamic, and there were "huge differences" between them.

Timothy said the department's determination of significance was when divers determined the biomass and then they made the decision based on the number of animals per square meter; however, that wasn't the complete look they wanted to give each application site.

She said when they looked at the broader spectrum, they could see that other parameters would be useful: (1) size of plot, (2) biomass, and (3) distance from an existing fishery. She said they could all work together to a solution to provide more ground rules with more specificity. Bedford said the department was looking at significance and when they had a draft they would distribute it—they fully intended to comply with the court's orders.

Painter said that part of Thompson's ruling had to do with ADF&G's renewal policy, and the judge found unfair application of future use. Bedford said he wanted to keep this teleconference focused on what they could do to change the regulations, and they would be more productive if they addressed this issue during the discussion on significance, noting that they had been required by Department of Law to put some specificity into the regulations; he said that he would ask them if they could put something as general as suggested into the regulations.

5AAC 41.250. Painter said he had just deleted a couple of requirements: (1) removed the clause "separated from cultured species." He said it was a common practice for farmers to keep scallops or butter calms if they come across them while working their sites for "eating later on." He said the provision he deleted seemed unnecessary. (2) eliminated requirements for signs at farms, because he felt the requirements were really excessive. He said all they really needed was a name and phone number. He also said he recommended taking out item number 7 (i.e., prevent injury to or the death of species that are listed as of-concern, threatened or endangered under 16 U.S. C. 1531 or AS 16.20.180., because it created unnecessary paperwork. He said a lot of that stuff was covered in the annual report.

Decker said that SARDFa recommended having some kind of a sign to prevent overlapping of areas. In terms of use of wildstock and having to report that, SARDFa is concerned about necessity of tracking the number of animals that were being taken off the site, etc. She said she didn't consider them as a necessity to place in regulation. Bedford said they needed to have something to identify a mariculture site to prevent

people from coming in and harvesting species there. Painter noted that they were talking about as many as 15 different signs in different locations. Ralonde said he had not problem with signs themselves, only about the amount of information on the signs. He said that if they were worried about a common property resource being squatted on, a nonintrusive sign would be all that was necessary. Ralonde said he was concerned about 41.250(a)(1). He said he'd always advocated a farm should be farmed; i.e., evidence of effort. The way the regulation is written, the department was attaching generic conditions that might not be appropriate to the site. He said it was appropriate to require farmers to farm; e.g., a productivity requirement in the lease agreement. Farmers should be taking regular inventory of their sites; e.g., substrate obstructions, recruitment, culture techniques, etc. In terms of the requirement for separating out species (farmed from wild) after the harvest, that would be impossible to enforce, because it would be difficult to differentiate them, although they could try to make a fair assessment based on size. Long said farmers needed to post signs so the public was aware the site was there.

5AAC 41.245. Painter said what he'd said previously was "straight forward," and he believed it followed Thompson's decision and complied with existing statutes. He said the whole issue is about natural recruitment. He said natural recruitment should go to the farmer, noting he had captured all kinds of shellfish in his gear. He said it was common practice to take mussels attaching on the outside of lantern nets and place them inside and let them grow out. He said when he was culturing littlenecks how would he be able to differentiate between wild and enhanced stocks. Painter said there is a requirement in the statute that mandates farmers replace what had been previously there when they leave a site. He said the statute is clear on the matter, and that didn't belong in the regulation, and whatever species comes into the site during the farming process is the private property of the farmer.

Timothy said that according to existing laws he would not be able to keep crabs in his lantern nets; she asked if he was keeping juvenile crabs. Painter said he was—that the ones that utilize his site, he eats. Painter rhetorically asked about sea cucumbers—whether they were supposed to throw them out; he said he didn't think that was

appropriate—that those clearly belonged to the farmer if they were setting in his nets. Bedford asked how broadly he thought this applied and whether or not he thought it applied to finfish. Painter replied that he couldn't take salmon because the law was explicit about farming salmon without a permit. Painter said that although he couldn't do anything commercially with salmon, he still thought that if wanted to eat them on his property then he thought the law allowed it. Timothy said that he was subject to other state laws when it came to taking finfish. Painter said that if they looked at the statutes, they said that the Board of Fisheries had no jurisdiction over mariculture sites and these sites were not subject to commercial or sport fisheries regulations.

Bedford said that the holding of the Thompson case was that it only applied to geoducks and the regulation they were addressing also applied to geoducks. Painter said part of his concern was not just the standing stocks of geoducks. He said the question was how can farmers farm if they didn't have complete control over their farms, and if they had incidental catchers of other species it wasn't logical to say they couldn't keep them—it didn't make any sense to have to get a permit to keep those animals. Timothy said that existing operating permits allowed any species listed for culture in the permit that floats through the water and sets in the gear to be the property of farmers; however, it didn't apply to other species such as crab or salmon, and they could easily add that provision to the regulations. Painter asked if he caught a crab and if he added it to the permit as a potential cultured species then it would be OK. Timothy said the language would be “float and set” on the gear. Painter pointed out that when crabs come into the gear they are in the larval stage and they indeed float and set like other shellfish species. Timothy said it was interesting to talk about, but maybe Painter needed to place crab culture in his annual plan.

Agosti said few people would be keeping crab on their farms and that the applicability of the regulation dealt mostly with bivalves and echinoderms—they would represent 99% of the situation and it was important that they became the property of the farmer (e.g., clams, sea urchins, sea cucumbers) because it was only common sense. He said that salmon was an entirely different issue. Long said there were options out there and they

could change the language to delineate species that become the property of the farmers; language and parameters could also be included in 5AAC 41.290. Decker said she agreed with Agosti and Long; she asked if there was a definition for recruitment. Bedford said there were all sorts of definitions, although there might be some specific application of the term in the regulations that might be helpful.

Zaugg asked if they had problems with recruitment as “juveniles that set and grow” on the gear. He said he was aware that they sometimes got mature animals (e.g., crab) caught up in their gear, and the problem could be solved by referring to recruitment as only juveniles; he said the key point here was utilization. Painter said he was coming from the perspective of natural recruitment of any larval species that sets in a farmers gear becomes his property. He said there were worldwide efforts to farm crab, and he thought that would occur soon; however, they didn’t know yet about crab growth cycles or culture techniques, and the only way they could find out was to experiment with them. He said if he wanted to keep some crab experimentally and later sell them, then he should be allowed to do that. Painter said that research has shown that a king crab can be grown to market size in three years with force feeding. He said each farmer needed to decide for themselves what was economically workable.

Ralonde said he thought the subject of king crab was counterproductive because they would only be incidental animals and there probably wouldn’t be enough of them for a valid study in culturing them from a practical perspective. Concerning other invertebrate species that could have value (e.g., sponges, urchins, etc.) the idea of catching these incidentally in your gear and keeping them is certainly reasonable. Part of the problem here is production plans for incidental catches because they were randomly occurring events. Finfish, particularly salmon, can easily avoid these types of farming structures like lanterns and are a non-issue.

Hartley asked if they were talking about numbers of incidental animals or their economic value. Bedford said that economic value was a background consideration, but they were looking at density, stock size, and geographic location—and they were looking at

geoducks. He said what will attract and support a commercial fishery will vary as to the species being considered, but that they were not looking solely at the price and value of those species. Hartley said that it seemed to him that the value of an organism would be a major consideration for significance. Bedford said they couldn't make an economic assessment over a one-year period; they would need to look at what it would take to support a fishery over time.

Painter said a potential fix for his suggestion would be to substitute the following language: "recruits onto sites of cultured gear." He said that way it couldn't be interpreted as salmon. He said he was specifically talking about larval sets. [Steve - Who's Wilbur?] Wilbur said that lantern nets didn't have much to do with geoducks; he was he was worried about someone going into a site for geoducks.

McGee said that what Painter had to consider was what the legislature intended as a mechanism to convert common property organisms to the private sector. He said that anytime you write regulations, they have to be in compliance with the authorizing statutes, and when he looked at the statutes they didn't say anything about getting broodstock off sight unless there was a stock acquisition permit. Painter said that lawyers will always try to get everything to fit into "neat little boxes." He said the language in the statutes originated with him and his attorneys to allow farmers to go off site to get broodstock and utilize resources that were not being otherwise utilized; however, the language had built-in constraints not to disrupt existing uses—that's what the permits were designed to do. McGee said there was no mechanism to acquire outside stocks other than that.

Painter said the legislative intent in the Aquatic Farm Act is for farmers to have use of natural recruitment—it doesn't specifically say that, but it was intended. McGee said that if it wasn't in the statute then they couldn't rewrite the regulation, although farmers could still get a stock acquisition permit to acquire any organisms that naturally recruit to their sites. Painter said that was the box that the regulations had put them in. Bedford said that McGee had raised the point there was no statutory authorization; therefore, they had

to go to the Department of Law and address those kinds of questions. He said they were ready to move ahead and see what they could do. Ralonde said did that mean then that he had to get a permit to conduct zooplankton research, etc., noting there were some real issues with this. Bedford said that commercial and sport fisheries regulations didn't require acquisition permits. Painter said that if they looked at the constitution and the [Steve – do you know what AFA is?] AFA, mariculture is good for Alaska—and just because ever I wasn't dotted or t crossed didn't mean everything had to be spelled out.

Bedford said they needed to look at the plain language in the statutes to determine latitude and then have it looked at by the Department of Law. He said the regulations needed some more work, but that they needed to operate within the laws of the state. He said they were not adopted with an attitude of trying to be too constraining. Zaugg said that the state already authorized transfer of common property fish to private concerns in AS 16.40.100(b), as well as Thompson's decision. Bedford said he didn't disagree, but speaking directly to Thompson's decision they should allow acquisition of more geoducks and also address McGee's point. Zaugg asked if they shouldn't be looking at the updated version of 5AAC 41.245. Bedford said that was on Steve White's desk and he was on vacation.

Bedford said although they didn't yet have a consensus, he felt they were moving positively ahead. He said they needed to schedule the next meeting: tentative date will be January 5 at 9:00 a.m.