

STATE OF ALASKA DEPARTMENT OF NATURAL RESOURCES
DIVISION OF MINING, LAND AND WATER

PRELIMINARY DECISION

ADL 107075

Paul Fuhs dba Paul Fuhs Professional Services

Application for Aquatic Farm Site Lease
AS 38.05.070 & AS 38.05.083

This Preliminary Decision is the initial determination on a proposed disposal of interest in state land and is subject to comments received during the Public Notice period. The public is invited to comment on this Preliminary Decision. The deadline for commenting is **5:00 PM October 31, 2014**. Please see the Comments Section on page 8 of this decision for details on how and where to send comments for consideration. Only the applicant and those who comment have the right to appeal the Final Finding and Decision.

Requested Action:

The Department of Natural Resources (DNR), Division of Mining, Land, & Water (DMLW), Southcentral Regional Office (SCRO) has received a lease application from Paul Fuhs requesting a 10-year lease authorization for this existing aquatic farm site. This lease was first issued to Pac Alaska LLC in July 2004 with an expiration of July 2014. Mr. Fuhs, a member of Pac Alaska LLC, decided to apply for this site individually. At the time of this Decision, Pac Alaska does not object to this action.

This proposed lease will allow for the continued sub-tidal aquatic farming activities of geoduck clams near Ketchikan in Southeast Alaska.

Authority:

These lease applications are being adjudicated pursuant to AS 38.05.035(b)(1) Delegation of the Powers and Duties of the Director; AS 38.05.035(e) Written Findings; AS 38.05.070 Leasing of Land; AS 38.05.083 Aquatic Farming and Hatchery site leases; and AS 38.05.945 Public Notice.

The authority to execute the Preliminary Decision, Final Finding and Decision, and the leases, has been delegated to the Regional Managers of DMLW.

Administrative Record:

Case file ADL 107075 constitutes the administrative records for Paul Fuhs's aquatic farm site application.

Legal Description, Location, and Geographical Features:

The state land where this proposed lease site is located is described as follows:

- **Site nickname:** Point Alava Extension
- **Legal description:** Section 14, Township 77 South, Range 94 East, Copper River Meridian
- **Geographical location:** The proposed farm site is located on state-owned tide and submerged lands one mile west of Point Alava and approximately 19 miles southeast of Ketchikan, and further described as a rectangle shaped area measuring 375 feet by 861 feet and containing approximately 4.71 acres

- **Approximate Latitude/Longitude:**
 - Parcel 1
 - NE Corner: 55°11.640'N, 131°13.059'W
 - SE Corner: 55°11.523'N, 131°12.926'W
 - SW Corner: 55°11.490'N, 131°13.017'W
 - NW Corner: 55°11.606'N, 131°13.155'W
- **USGS Quad:** Ketchikan A-4
- **Municipality/Borough:** Ketchikan Gateway Borough
- **Native Corporations/Federally Recognized Tribes:** Sealaska Corporation

Title:

A DNR Title Report issued from DNR's Realty Services state that the State of Alaska holds title to the subject tidelands under the Equal Footing Doctrine and the Tide and Submerged Lands Act of 1953. An updated Title Report has been requested, but was not available at the time of issuance of this Preliminary Decision. SCRO reserves the right to modify the Final Finding and Decision based upon information contained within the updated Title Report.

Third Party Interests:

No third party interests are known at this time.

Classification and Planning:

The project area is subject to the Central/Southern Southeast Area Plan, Region 5, Ketchikan Central (Map 3-23). The area classification for this site is designated as General Use (Gu). General Use land is defined as land that contains one or more resource values, none of which is of sufficiently high value to merit designation as a primary use, or, because of the size of the parcel, a variety of uses can be accommodated with appropriate siting and design considerations. This designation applies to both uplands and tidelands. When pertaining to tidelands, this designation applies to lands not designated for specific, habitat, harvest, economic, or recreation functions. This does not mean that the tideland or submerged land lacks value, but that the appropriateness of whether and how a tideland parcel is to be used will be decided through formal state and federal permitting procedures. As part of the adjudication process DMLW looked at activities and resources occurring in the areas around the proposed sites and has determined the sub-tidal cultivation and harvest of shellfish would not have a significant adverse impact in those area.

Access:

Access to these sites is via boat traffic or float plane.

Public Trust Doctrine:

Pursuant to AS 38.05.126 all authorizations for this site will be subject to the principals of the Public Trust Doctrine; specifically, the right of the public to use navigable waterways and the land beneath them for: navigation, commerce, fishing, hunting, protection of areas for ecological studies, and other purposes. These rights must be protected to the maximum extent practicable while allowing for the development of this project. As such, SCRO is reserving the right to grant other authorizations to the subject area consistent with the Public Trust Doctrine.

Agency Notice:

An Interagency Review will be conducted on 10/02/14 and run concurrently with the Public Notice as required by AS 38.05.945. The deadline for agency comments will be 10/31/2014.

The following agencies were included in the review:

- DNR DMLW-Mining
- DNR DMLW-Water
- DNR DMLW-SE Region Office
- DNR Office of History and Archaeology/SHPO
- DNR Contract Administration

- Department of Fish and Game-Commercial Fishing
- Department of Fish and Game-Sport Fishing
- Department of Fish and Game-Habitat
- Department of Environmental Conservation
- Department of Transportation and Public Facilities
- USFS—Misty Fjords Ranger District
- USFWS
- USACE
- CCED

Management Analysis:

The scope of this review is to evaluate and determine if a subsequent lease authorization for the above mentioned site is in the best interest of the state and supports the overall intent of the Aquatic Farm Act.

In 1988 the legislature adopted statutes referred to collectively as the Aquatic Farm Act. The legislature, through the adoption of the Aquatic Farm Act, established in statute the state could proceed and indeed encourage development in the area of shellfish farming. The two central tenets of the state's aquatic farming policy are:

1. The state should encourage the establishment and responsible growth of an aquatic farming industry; and,
2. Development and siting of aquatic farming operations should be made with full consideration of established and ongoing activities.

With these considerations, Aquatic Farm Leases were designed to achieve commercial production and develop a foundation for an aquatic farming industry in the State of Alaska.

Management Goals for Aquatic Farms:

The overall intent of the Aquatic Farm Program is to provide Alaskan citizens access to public lands and resources with the goal of creating an industry which will foster the state's economic growth through the creation of employment opportunities and development of an Alaskan grown shellfish products.

Three main state agencies, the Alaska Department of Fish and Game (ADF&G), DNR, and the Department of Environmental Conservation (DEC) oversee the regulatory responsibilities for the commercial operation of Alaskan aquatic farms. These agencies work cooperatively to ensure the state's public lands and resources are being used in such a manner as to positively contribute and benefit the residents of the State of Alaska through means such as economic growth and the availability of locally grown products.

As part of the lease conditions the applicant/lessee is required to submit two documents which the agencies will use to measure the aquatic farm's viability and determine if it is the state's best use of the land and resources. Evaluative measures are derived from a variety of sources including, but not limited to, current industry standards, comparable farms in the area, and research and technology based trends on both the local and regional scale.

The first document an applicant/lessee is required to submit is a Development and Operations Plan describing a basic business strategy for the aquatic farm site. This includes general information such as, location information and infrastructure (i.e. work rafts, covered processing facilities, flupsys, etc.) to be used on the farm site. It also contains measurable goals established by the applicant/lessee, to include information on startup and projected stocking, species to be cultured, anticipated seeding schedules and production and harvest levels for each 12 month cycle. In addition, it specifies business practices such as methods used to improve the productivity of the species being raised (i.e. predator exclusion controls,

seeding schedules, etc.), cultivation and harvesting techniques, equipment used for cultivation and harvesting, number of people on site, projected number of days the site is actively being farmed, and methods of accessing the farm site. As the business market is a fluid entity DNR is under the expectation this Development and Operation Plan will be modified (with prior department approval) over the life of a lease.

Annual reports are the second required document a lessee must submit for an aquatic farm site to remain in compliance with lease terms. These reports are used as an evaluative tool by DNR, ADF&G, and the lessee to measure the productivity of an aquatic farm site, the current feasibility of the Development and Operation Plan, and to identify any problems (i.e. seed shortage, environmental factors, etc.) that have been encountered over the course of a 12 month period. In addition to identifying any difficulties an individual farm may be encountering, these annual reports will provide the regulatory agencies a method of identifying larger scale or industry wide problems and trends.

Lease Management Discussion

Though fairly well established in Washington State and to a lesser extent, Vancouver BC, geoduck farming is still in its infancy in Alaska. Ongoing research is being conducted, but as of yet there is no concrete data available to be used in the establishment of formal statewide industry standards. As such, aquatic farmers have relied on their own experimentation to determine viable methods of culturing this species of clam, both in the intertidal environment and sub-tidally. Some of the problems that have been encountered to date that have challenged geoduck farm productivity include: paralytic shellfish poisoning (PSP) events which have closed harvest windows, lack of available quality seed/spat from certified seed sources, colder water temperatures which equates to slower growth rates, and high mortality due to predation. In Washington, it takes 3-5 years for a geoduck to reach a marketable size (around 2.2 pounds) when cultivated in an inter-tidal setting. However, a pilot project conducted by the Alaska Sea Grant Marine Advisory between 2002 and 2011 off Annette Island in Southeast Alaska seems to indicate that it takes substantially longer, upwards of 10 years, for an inter-tidally cultivated geoduck to reach a marketable size. To date there is no data available to determine the sub-tidal growth rate for geoduck.

As industry standards and best practices are developed for the culture of geoduck, methods and technologies currently used will either be enhanced or discarded depending on their success rates in the Alaskan environment. Information gathered through experimental studies, information contained in the lease Annual Reports, and knowledge sharing among the aquatic farmers and agencies will help create sustainable business practices for all aspects of aquatic farming, including the culture of geoducks. And as a result, new statewide industry standards can be developed that will help guide aquatic farmers into developing a profitable business and provide the regulatory agencies effective methods to evaluate the viability and productivity of aquatic farms. But in the meantime DNR must evaluate individual farms within the confines of the existing regulatory processes in place at this time.

Development Plans

For the past 10 years Paul Fuhs has held an interest in this sub-tidal aquatic farm site through his association with Pac Alaska LLC. For this next lease term, Pac Alaska is relinquishing their interest in this site to Paul Fuhs. An updated Development and Operation Plans was submitted with the new application and indicates farming activities will take place in the following manner:

Seed will be manually planted seasonally and covered with vexar mesh for the first 12 month. This mesh will be held in place with concrete blocks and anchor pins. The applicant intends to plant the first five years and then monitor the sites to determine growing conditions and stock maturation. Harvest activities will occur in the remaining five years. It is not anticipated he will have much in terms of marketable size product until the 8th year of planting; however there should still be some harvest of farmed stock beginning in the first 5 years of these leases as residual product from the previous 10 year's activities. Harvest will be done seasonally and will be conducted by divers using a variety of methods, including hydraulic wands. During this time boat traffic will increase to a maximum of 3 dive boats. The site will be marked with buoys and anchors to delineate the lease tract, but no other permanent infrastructure will be on the lease area.

Copies of the Development and Operations Plans are available upon request. Please see page 8 of this Decision for contact information.

Compliance with existing regulations and lease stipulations

DNR recognizes there are many challenges faced by aquatic farmers in Alaska. One such challenge is cooler water temperatures which lead to slower growth rates and more time on the farm before the product attains marketable size. In addition, difficulty obtaining seed during portions of the last few years has presented challenges for farmers attempting to maintain their stock at an optimal or projected level. Harvest window closures as a result of Paralytic Shellfish Toxin and *Vibrio* outbreaks also reduce the overall productivity of aquatic farms.

This said DNR still has the responsibility to appropriately manage lands held in trust for the residents of the State of Alaska and to ensure the authorized aquatic farms are operating in accordance with the intent of the Aquatic Farm Act. The primary method used to accomplish this is the adoption of regulations governing how laws are to be implemented.

Key regulations for the management of aquatic farms are identified below:

11 AAC 58.510, Lease Utilization

This regulation states the land being leased must fall within the scope of what is being proposed by the applicant and approved by DNR. Failure to develop the lease site in accordance with the approved development plan within five years of lease issuance will result in non-compliance and subject the lease to cancellation.

11 AAC 63.030(b), Commercial Use Requirement (CUR)

The CUR is one method DNR has available to determine whether or not the aquatic farm is being farmed to a commercial benchmark. The CUR was adopted in the 1988 regulations as a quick and quantifiable measurement of productivity by the fifth year of operations (and beyond) and it provides DNR and ADF&G a means of identifying farms that may need closer monitoring. At the time the CUR was adopted, the primary species being farmed was the Pacific Oyster which had an established record of growth data in Alaskan waters available to regulators and industry members.

DNR is cognizant that geoduck clams grow more slowly in Alaska due to colder water temperatures and so may take more time to reach a commercial market size. As such, while this regulation works well for oysters, it may not be practical to apply to geoduck production in the fifth year. However, since this farm has been in existence for 10 years, DNR expects this CUR will be applied to this second lease term as previous term planting efforts should reach a marketable size at some point within the next five years.

11 AAC 63.110(7), General Lease Provisions, Development and Operations Plan

In the updated Development and Operations Plans that was submitted with the application for a new lease, the applicant did provide basic estimates of the amount of hatchery seed he anticipates planting, the projected sales, and the number of marketable animals/pounds produced over the next 10 year term. These estimations were accompanied along with a caveat this data is difficult to project out long term due to the inconsistencies of geoduck seed/spat availability and the dynamic environmental conditions faced in SE Alaska. DNR is aware of some of the issues faced by farmers when trying to establish any realistic long term projections. This is why the Development and Operation Plan is considered a fluid document and subject to change (with department approval) over the life of the lease in reaction to unanticipated changes in the basic business plan. Leaseholders are encouraged to communicate changes to plans with DNR frequently to communicate how farming activities are progressing.

11 AAC 63.110(7), General Lease Provisions, Annual Reports

Annual Reports are valuable documents for both DNR and ADF&G. They are the main tool both agencies use to identify and understand issues the aquatic farmer may be encountering which could inhibit the productivity of an aquatic farm site. Reports also communicate if the site is being utilized in accordance with the Development Plan. By failing to submit complete and timely Annual Reports, the lessee not only falls out of compliance with aquatic farm regulations, but also inhibits DNR's constitutional responsibility to ensure the land is being utilized in accordance with the best interest of the residents of the state.

Proposed Action

A central tenet of DNR's Mission Statement is to responsibly develop state resources by making them available for maximum use consistent with public interest. In keeping with this statement and because the farming of geoduck is still in its infancy here in Alaska coupled with the fact geoduck farmers have encountered some unanticipated hardships, DNR proposes to issue Paul Fuhs a 10 year lease implemented in two (2) five year phases. This will enable DNR to adequately assess progress meeting the following regulations:

- 11 AAC 63.110 (7) requires compliance with an approved Development and Operation Plan and the timely submission of Annual Reports
- 11 AAC 63.110 (11)(B) requires the lessee to provide the department with any records it has determined are necessary to verify the lessee's compliance with the lease provisions
- 11 AAC 63.030(b) progress shown toward being able to meet the CUR prior to the end of the lease term (this can be done by supplying ADF&G and DNR data on growth rates)
- 11 AAC 58.510 requires lessee to make substantial use of the land within 5 years of the lease term and develop it in accordance with the approved Development and Operation Plan

If the applicant does not meet the regulatory conditions outlined above within the first phase (5 years), appropriate actions may be implemented to terminate the lease. However, if the applicant does fulfill the regulatory requirements and remains in "good standing" with the terms and conditions of the lease at the conclusion of the first 5 years, the sites may be eligible for the remaining 5 year phase; making the overall lease term 10 years.

Hazardous Materials and Potential Contaminants:

The Development Plan indicates no hazardous materials or potential contaminants will be stored or used on either one of these sites.

Lease Performance Guaranty (bonding):

In accordance with 11 AAC 96.060, Paul Fuhs will be required to submit at least one performance guarantee for each lease site.

- **\$2,500 Performance Bond per site:** Currently, Pac Alaska LLC has a \$2,500.00 performance bond in place for this existing lease. Mr. Fuhs will need to secure a bond in the same amount for this site. This bond will remain in place for the life of this proposed lease. The bond amount is based upon the level of development and the perceived liability to the state. This bond will be used to insure compliance with the terms and conditions of the lease issued for their project. This bond amount will be subject to periodic adjustments and may be adjusted upon approval of any amendments, assignments, re-appraisals, changes in the development plan, changes in the activities conducted, or changes in the performance of operations conducted on the authorized premises, and as a result of any violations to any one or more of the authorizations associated with this project.
- **Reclamation Bond:** SCRO is reserving the right to require a reclamation bond due to non-compliance issues during the term of the lease or near the end of the life of the aquatic farm lease.

Insurance:

As per 11 AAC 96.065, Mr. Fuhs will be required to submit proof of liability insurance to SCRO, with the State of Alaska listed as a "NAMED" insured party, prior to lease issuance. Mr. Fuhs will be responsible for maintaining such insurance throughout the term of the lease.

Survey:

In accordance with AS 38.04.045, this short term land lease does not require a survey. However, the State of Alaska reserves the right to require one in the future, should the need arise. The applicant will be required to submit GPS coordinate points for the leased area. These points are the limits of the lease parcel and will be set at the northwest, northeast, southwest and southeast corners. In addition, the lessee will be required to visibly mark the aquatic farm site lease boundaries with buoys in accordance with the U.S. Coast Guard marking requirements. The southerly shoreward corner buoy shall include the lessee's name and DNR's ADL number for the lease site.

Compensation/Appraisal:

DMLW has approved an administrative lease fee schedule for aquatic farm sites that meet the conditions listed within the schedule. The most current lease fee schedule will be used to establish the fair market rental each lessee must pay. At this time the rates for aquatic farms are \$450/acre or partial acre and \$125 for each additional acre or partial acre. In accordance with the Aquatic Farmsite Fee Schedule, Report No. 2522-11, a breakdown of the lease annual fee will be as follows:

ADL 107075: 4.71 acres; $(1 \times \$450) + (4 \times \$125) = \$950.00$

The applicant has the option to have a site-specific appraisal done, at the applicant's expense, before the lease is issued, if they do not wish to use the fee schedule. If an applicant opts for a site-specific appraisal, the division-approved appraisal will establish the rental for the lease and the fee schedule will no longer be an option.

Assignment of Lease:

The proposed lease, if issued, may be transferred or assigned to another individual or corporation **only** with prior written approval from the State of Alaska.

Public Notice of the Preliminary Decision:

Pursuant to AS 38.05.945, the post offices located in Ketchikan, Ward Cove, Metlakatla, Craig, Klawock and Wrangell will be requested to post the notice of the Preliminary Decision per AS 38.05.945(b)(3)(B). The notice will also be posted on the department's web site located at <http://www.dnr.state.ak.us/pic/pubnotfrm.htm> and the statewide public website located at <http://aws.state.ak.us/OnlinePublicNotices/Notices/Search.aspx>. Courtesy notices will also be mailed or e-mailed to neighboring property owners, permit/lease holders, and other interested parties on **October 2, 2014**.

Comment(s):

This decision is subject to both public and agency comments and all comments received by the comment deadline will be addressed in the Final Finding and Decision. Only those who comment and the applicant have the right to appeal this decision.

**Written comments about this project must be received in this office no later than
5:00 PM on October 31, 2014 to be considered.**

To submit comments please choose one of the following methods:

Postal: Department of Natural Resources
Southcentral Region Office
ATTN: Adam Smith
550 West 7TH Avenue Suite 900C
Anchorage, AK 99501-3577
Phone: 907-269-8557
E-mail: adam.smith@alaska.gov
Fax: 907-269-8913

If public comments result in significant changes to the Preliminary Decision, additional public notice will be given. To be eligible to appeal the Final Finding and Decision, a person must provide written comments during the Preliminary Decision comment period per AS 38.05.035(i)

Signature page follows:

Recommendation

DMLW has completed a review of the information provided by the applicant, examined the relevant land management documents, and has found that this project is consistent with all applicable statutes and regulations.

This decision has taken into account the aquatic farm's lack of productivity during this past 10 year term and balanced it with the known problems and difficulties faced by the emerging geoduck industry as a whole in the State of Alaska. For this reason it is recommended the state issue the aquatic farm lease for another 10 year term; to be implemented in two (2) five year phases and with the understanding that if the lessee fails to comply with the submission of the Annual Reports or with any other information the department requests during the first five year phase, this will constitute a violation of the lease terms and steps may be taken to terminate the lease authorization. However, if they remain in "good standing" with the terms and conditions of the lease at the conclusion of the first 5 years, the sites may be eligible for the remaining 5 year phase; making the overall lease term 10 years.


Renee Romsland, Aquatic Farm Program Manager

9/9/14
Date

Preliminary Decision

It is the determination of the Division of Mining, Land, and Water that it may be in the State's best interest to issue aquatic farm leases for 10 years, implemented in two phases, to Paul Fuhs as described above. This application shall now proceed to agency and public notice.


Clark Cox, Region Manager

Southcentral Region Land Office, Division of Mining, Land & Water

8-23-14
Date

