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*“Working to protect the
natural environment
of the Tongass,
and Sitka’s quality
of life – Since 1967”*

Michael Menge, Commissioner
Department of Natural Resources
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March 27, 2006

**Re: Appeal to Final Finding and Decision on Aquatic Farm Application ADL
107360**

Dear Commissioner Menge:

In accordance with 11 AAC 02, the Sitka Conservation Society hereby appeals the Department of Natural Resources (DNR) issuance of permit ADL 107360 allowing Peter Metcalfe DBA Rocky Pass Company to place an aquatic farm site at Mielkoi Cove in the Sitka area. The decision on this permit was authored by Regional Director Richard Thompson on March 6, 2006. The Sitka Conservation Society commented during the public review process on this project and therefore is a meaningful participant entitled to appeal this decision. This appeal is delivered by FAX and first class mail within 20 calendar days as defined by 11 AAC 02.040.

The Sitka Conservation Society (SCS) is a not-for-profit public interest organization dedicated to promoting the conservation and preservation of the natural environment in Southeast Alaska and protecting Sitka’s quality of life. SCS has more than 500 members, most of whom are Sitkans. Our diverse membership includes commercial and sport fishermen and divers, subsistence users, recreational users and many others who use the waters, tidelands and uplands of southeast Alaska for a variety of commercial and sport activities. For this reason, SCS is extremely concerned about the aquatic farm site in Mielkoi Cove. While SCS recognizes southeast Alaska’s mariculture business is a valuable part of the region’s economy, the location of these facilities is inappropriate in areas with significant user conflicts. The Mielkoi Cove area is such an area.

This appeal is being filed as DNR has not complied with the applicable law or the standards it established in its own regulations in leasing this farm site. It has not met its obligation to ensure that permitting this farm site is in the State’s best interest and will not harm the environment, and meets the State’s public trust responsibilities. Should this farm be allowed it will directly and adversely affect the area on which Sitkans depend for subsistence, cultural, and commercial uses. This appeal raises several legal deficiencies

and issues that are not adequately address in the best interest finding. Based on these flaws, the best interest finding should be reversed.

THE BEST INTEREST FINDING IS ARBITRARY AND CAPRICIOUS

DNR's tideland lease regulations require DNR to find that it is in the "best interests" of the state to lease tidelands. 11 AAC 62.690; 11 AAC 63.050. DNR cannot make a positive finding here, where the tidelands lease is proposed solely for the purpose of creating economic gain for one individual at a cost to an entire community. This purpose does not serve the public's best interests and therefore is arbitrary and capricious.

1. The Final Finding and Decision failed to consider both the advantages and disadvantages of this proposal as required by 11 AAC 63.050(b)

The Final Finding and Decision fail to demonstrate that both the advantages and disadvantages of this project have been properly considered. In fact the document does not detail any advantages of leasing this farm to the state or the public minus the small annual fee from the lease site. It has not weighed this fee with the cost to the State in permitting and oversight of the farm nor has it considered the economic, social and cultural losses to Sitkans and others.

Specifically, this farm site will interfere with numerous existing commercial operations that bring economic gain to Sitka and the State including fisheries for Dungeness crab, herring, geoduck, salmon (gillnetting and trolling), and numerous tourism operations include wildlife viewing and kayak tours. *See* for example affidavit of Lubin. The Finding and Decision give no indication that the economic impact to these other industries was considered in making a BIF. Further, When balanced it is clear that the disadvantages of losing this popular recreation and subsistence use area far outweigh the small economic benefit the State will gain from leasing this site and therefore it is not in the best interest of the State to permit this facility.

2. The project is incompatible with land management policies for the area as required by 11 AAC 63.050(b)(4)

The Mielkoi Cove lease site falls within the Sitka Sound Local Area Management Plan which was developed by the Sitka Fish and Game Advisory Board, adopted by the North Pacific Fisheries Management Council in 1998 and approved and signed by the Secretary of Commerce shortly thereafter. While DNR is partially correct that the Plan was developed to restrict commercial uses of halibut to enhance subsistence use, the Agency has failed to recognize and give credence to the fact that the Plan has also been used as a management tool to limit other commercial uses in the Sitka area which may adversely impact subsistence use for Sitkans. This farm falls into this later category.

The lease site also falls under the management guidelines for the Sitka Sound Tidelands Resource Management Zone for Marine Waters and Tidelands in the DNR Northern

Southeast Area Plan. In response to comments raised by the City and Borough of Sitka and others on this issue, DNR responded that the proposal is within lands designated general use, not the Sitka Sound Tidelands Resource Management Zone. We have again reviewed the Northern Southeast Area Plan and believe DNR is incorrect in their finding. Attached to these comments is a map defining the Sitka Sound Tidelands Resource Management Zone. It is indisputable that the Mielkoi site falls within the zone boundaries.

The Northern Southeast Area Plan specifically recognizes the exceptional value of the Three Entrance Bay (Mielkoi Cove) portion of this Special Management Area by stating:

Pirate's Cove, Samsing Cove, and Three Entrance Bay are all near Cape Burunof about six miles south of Sitka. They are all scenic and are very popular day use areas for small boats as well as anchorage for numerous fishing vessels and receive especially intensive use in the summer. Three Entrance Bay, south of the Cape, has a sandy beach and an abundance of steamer clams and is widely used for picnicking, camping, and hunting.

The intent of the Sitka Sound Tidelands Resource Management Zone for Marine Waters and Tidelands designation is to protect sensitive resources such as fisheries, marine mammals, shorebirds and waterfowl concentrations, anadromous streams as well as deer and brown bear intertidal habitat. Further, these areas were also designed to "protect customary, traditional, recreational, personal use resources and public access to these resources." DNR is required to ensure that any authorization issued within this area does not conflict with the traditional, recreational, personal use activities, or public access to areas where these activities occur.

While the Plan does not outright prohibit farm sites in these designated areas, it does state that they are to be considered on a case- by- case basis and that they are less desirable where high public use for tourism and recreation, anchorages and important habitat exists. As detailed throughout these comments, this farm site has not just important existing use, but in fact is the exact situation for which this policy statement was designed. The Mielkoi Cove area is a high public use area for tourism and recreation, is an important and frequently used anchorage and has important fish and wildlife habitat. For the above reasons leasing this site is in direct conflict with the Sitka Sound Tidelands Resource Management Zone for Marine Waters and Tidelands in the DNR Northern Southeast Area Plan.

Further, the Mielkoi Cove area is designated as "Undeveloped Recreation." Having a commercial farm site at this location is inconsistent with this designation,

Lastly, the Alaska Board of Fisheries has made a "traditional and customary use finding" for this high use subsistence area. Such findings are made when fisheries resources in areas are historically used for subsistence activities. Such areas are to be managed with subsistence use as the first priority. It is clear from oral and written comments submitted by the Sitka Tribe of Alaska on this proposal that the Mielkoi Cove area is their ancestral land and that tribal members and others carry out hunting, fishing and gathering activities

there (*See* declaration of Reid). We strongly believe that an aquatic farm site at this site is not compatible with the traditional and customary finding.

Because of the special designations outlined above, the City and Borough of Sitka Coastal Zone Management Program Coordinator has requested this project not be approved for the location. These special designations were intended to best manage the unique resources in this area and were specifically designed to prevent uses inconsistent with protecting these unique tidelands. For these reasons leasing of this site is not in the state's best interest.

3. An Aquatic farm site at this location conflicts with existing uses of the site and adjacent upland as discussed under 11 AAC 63.050(b)(5)

As recognized by the DNR Plan Special Management Zone classification- the Three Entrance Bay/ Mielkoi Cove areas and the adjacent uplands are popular areas for Sitkans. The narrow navigational channel and submerged lands where this site will be located are heavily used by hundreds, if not thousands, of recreational, tourism and commercial boaters. The area is extremely close to Sitka and has a heavy historical and existing use by Sitkans for anchoring, recreation, tourism, commercial and subsistence use. Numerous SCS's members have reported using this area to anchor their boat and hike, hunt, clam, picnic and wildlife watch. Others members report kayaking, camping and collecting Dungeness crab in this area. A quick visit to the uplands shows signs of this site's popularity with informal hiking trails, camping spots and fire pits. Lastly, many Sitkans use this area for subsistence hunting and fishing of deer, salmon, halibut and crab (For example, *see* declarations of Muller, Nelson, Lubin and Reid). An aquatic farm at this location conflicts with these existing uses.

a. Impacts to Sitka

One of the factors that must be considered in making a best interest finding is impacts to communities. 11 AAC 63.050(b)(5)(A). As explained above this area has important value to Sitkans for recreational, cultural, subsistence and commercial purposes. It is this high value that prompted the City and Borough of Sitka Assembly to unanimously pass a resolution opposing placement of a geoduck farm at this site as well as other sites within the special management zone around Sitka. Further, due to concerns over this project, the City Coastal Management Program requested this project be rejected. Strong written and oral testimony from a diverse range of citizens and advocacy groups in Sitka, echoed these same concerns. The Sitka Tribe of Alaska, representing more than ¼ of Sitkans, also strongly opposed this project in its written and oral comments as it threatens cultural and historical uses of this area. Lastly, during the public hearing DNR held in Sitka of the more 60 people in attendance, not one person except the applicants, spoke out in support of permitting a farm site at this location.

Despite this widespread concern the Final Finding dismisses it as insubstantial (Finding at 10). This statement is arbitrary and capricious and completely unsupported by the record. It is clear that this project will have strong negative impacts to Sitka and no

demonstrated benefit. Because of the negative impacts of this project to the community of Sitka it is not in the best interest of Sitka or the State to lease this farm site.

b. The farm site will impact traditional and existing uses of the area including commercial fishing, sport fishing, subsistence activities, use as an anchorage, navigation, recreation, sightseeing, and tourism as identified in 11 AAC 63.050(b)(5)(B)

The Mielkoi Cove site threatens an area and resources on which Sitkans depend upon for traditional, subsistence, commercial, recreational, and other uses. We are disturbed by DNR's insistence that comments and testimony submitted to date on this proposal do not constitute "convincing evidence." We are unclear why statements explaining these concerns from the City and Borough of Sitka Assembly, the Sitka Tribe of Alaska, members of the NSRAA and many others are not convincing enough for the agency. Attached you will find several affidavits from Sitkans documenting some of the traditional and existing uses of this area and the direct impact leasing of the property will have on these individuals. This is a very small sample of the many, many Sitkans who will be similarly impacted by this project. We hope this offers the "convincing" evidence the agency seems to be in need of.

According to the information packet provided by DNR, the Mielkoi Cove site will be placed in the north-south navigational channel south of Cape Burunof. This is a narrow, rocky pass that is perhaps one of the heaviest used boat traffic areas around Sitka. From the maps provided and a recent visit to the site we believe that this site will partially or fully block this major navigation route and thereby create a grave safety risk to boaters. This area already poses specific navigation risk as there are many islets as well as visible and submerged rocks located in these areas and therefore requires careful navigation. Further, the many rocks and shallow muddy areas leave only a small channel for boat traffic to travel. This facility will make navigation in the area even more difficult and push boaters into potentially dangerous waters. Give the high navigational risk poses by this project we find DNR's dismissal of this safety issue unjustified.



Photo of Mielkoi Cove showing narrow navigational passage and many rocky islets

Further, DNR has stated that anchorages are not suitable sites to place aquatic farm sites (For example, *See* Final Finding on ADL 107361 at 8). The Mielkoi Cove site is a well know and commonly used as an anchorage by recreational as well as commercial boats (*See* Declarations of Nelson and Lubin). Based on the fact that both of these sites are popular anchorages, it appears that DNR is not using consistent criteria to make determinations of what anchorages are appropriate for farm sites and which ones are not. We ask the same criteria applied to the Final Finding on ADL 107361 be applied to this site as well.

The Mielkoi Cove site also has existing commercial value. A commercial sea cucumber dive fishery harvest occurs on this area. DNR's finding recognizes that this farm site will exclude the use of this area as a dive fishery because of the predator netting and that potential conflict between the dive fishery and the farm are possible (DNR Finding at 17). DNR then goes on to make an unsupported statement that an aquatic farm at this site is "not thought to significantly alter this existing use." While we understand that removal of this site from the fishery will likely not harm the overall fishery, it will harm the ability to continue to use this site for this existing use. It is our understanding that the farm site would remove all sea cucumbers (and other bottom dwelling invertebrates) from the site before installing predator netting. Given this we do not see how a cucumber fishery would be able to continue in the area even outside the area excluded by predator netting. Further, the Finding seems to have dismissed the fact that a farm, once established will be extremely valuable and that its owner will want to defend their investment. We can not see how a farm site at Mielkoi Cove will be compatible with the current commercial sea cucumber harvest in this area.

Commercial salmon fishing, gillnetting and trolling, also occur in the Mielkoi Cove area. We are unable to determine to what extent this project may impact these economic interests as the Final Finding states the following:

The landings for salmon gillnetting for this area totaled 1,406,134 lbs. This is approximately, 23% of the total gillnet salmon harvested in the **Petersburg/Wrangell management area**. Landings for salmon using trolling gear totaled 33,109 lbs. This is approximately, 1% of the total trolled salmon harvested in **the Petersburg/Wrangell area** (Final Finding at 17-18).

Given that this site is in the Sitka/ Pelican management area, not the Petersburg/ Wrangell management area we are unclear if these numbers are accurate or a sloppy cut and past job from some other document.

Mielkoi Cove is also a commercial Dungeness crab fishery area. Commercial landings have occurred in the area for five out of the last 10 years. The Finding lists several conflicts with this fishery including direct exclusion of fishing because of predator netting, crab mortality from netting, and entanglement of gear in netting. Several SCS members and others in the community have also relayed that subsistence crabbing is

popular in this area as it is one of the few sites near Sitka with a large growth of eel grass. While DNR does not consider the impacts of the farms to subsistence crabbing we believe they are similar to those of the commercial fishery.

DNR is required to recognize and assure opportunities for subsistence usage of coastal areas and resources (6 AAC 80.120), but has failed to do so in the case. As discussed elsewhere Mielkoi Cove is a popular subsistence use area (For example, *See* declaration of Nelson and Reid). ADF&G data shows that salmon, crab, halibut, ground fish, butter clams, berries, shrimp, herring roe, abalone, seaweed and deer all occur in the area. As discussed above, this area has been found to be a “traditional and customary use area” by the Alaska Board of Fish and therefore subsistence should be given first priority in management of this area.

In the context of subsistence, the Final Finding makes the vague statement that an aquatic farm at these sites “is not thought to significantly alter this existing use” (Final Finding at 18). DNR offers no data, evidence or information to back up this unsubstantiated finding. In fact after reviewing the proposal and accompanying map those most familiar with the area-locals Sitkans- strongly disagree with this finding.

Given that numerous existing current use that benefits an entire community are being traded for a use that benefits only one individual we can not see how this possible can be in the best interest in the state, including its goal to promote economic development.

c. The farm site will impact historical and cultural resources as recognized by 11 AAC 63.050(b)(5)(C)

DNR lacks adequate information relating to cultural, heritage and historical sites around Mielkoi Cove. This lack of information partially results from a failure of the agency to consult with the Sitka Tribe of Alaska regarding this and other farm site around Sitka.

Alaska Natives in Southeast Alaska have been engaged in customary and traditional activities—such as clamming, hunting, and gathering—for many thousands of years. The Mielkoi Cove site is an area that has been used for these purposes. Further, the waters of Mielkoi Cove support essential herring spawning habitat, including eelgrass beds and kelp beds. Herring eggs are a subsistence food that has received a Customary and Traditional (C&T) designation under state law Alaska Statute 16.05.258(b).

The Mielkoi Cove site is a traditional herring spawning area. This species is integral to the marine ecosystem of southeast Alaska and its value as a subsistence food for Sitkans can not be overemphasized. Infrastructure associated with the farm site will directly prevent placement of hemlock branches to collect herring eggs. DNR has made preliminary findings on other sites that aquatic farm are not suitable in important herring spawning areas, we request the same finding for this site (*See* Preliminary Finding and Decision on ADL 107338).

In ADF&G's review of this project they specifically recognized concern for herring and stated the following in their consistency determination: "If herring spawn on the site, the herring eggs must not be disturbed or removed. All eggs must be allowed to hatch, even though this may result in loss of aquatic farm products being cultured. The Department of Fish and Game shall be notified, in writing, within five (5) days of the spawning occurrence." (ADF&G at 7) The lease stipulations do not mention this requirement.

Further, the application guidelines for aquatic farm sites recognize that herring spawning areas are deemed "sensitive" and require an extra burden on the applicant to demonstrate how the project will not impair this sensitive resource. We found no such evidence to meet this burden in the application submitted by Mr. Metcalfe for the Mielkoi Cove site. Further, we see nothing in the lease stipulations prohibiting any aquatic farm work during herring spawning period as required. (*See* Final Finding at 14).

Lastly, the Final Finding and Determination for this site regarding herring states: "In this case, the area was found to significantly conflict with existing uses of the resource" (Final Finding at 14). The document continues elsewhere, "There exists a potential conflict with herring spawning at this site"(Id. at 18). Despite these statements DNR concludes, "This aquatic farm proposal is not thought to significantly alter the Pacific Herring sac roe and food bait commercial fishery." (Id.) While we agree that this farm site is unlikely to have a significant impact on the commercial herring fishery, we strongly believe that the site will impact traditional and cultural use of herring at this site. DNR has chosen to ignore this aspect of the conflict all together. If DNR recognizes the farm site will "significantly conflict" with existing uses of herring then it is not only in the State's best interest, but their public trust responsibility as well, to make an incompatible determination.

4. The farm site will prevent reasonable public access to tidewaters and uplands as recognized by 11 AAC 63.050(b)(6)

As explained elsewhere the Mielkoi Cove area is a very popular use area for Sitka and visitors alike. While the cove may appear good size on the map provided, local knowledge provides that most of the Cove is muddy and a poor anchorage. There is a narrow deeper inlet when many people anchor their boats. The lease site will encumber much of this area, thereby making it difficult for anchoring and therefore difficult for the public to access the associated uplands (*See* declarations of Lubin and Nelson).

5. The permit violates the public trust doctrine by failing to protect the public's right to use navigable waters and the land beneath them for navigation, commerce, fishing, and other purposes under 11 AAC 63.050(b)(7).

The public trust doctrine has a long history of recognition in Alaska. Over thirty years ago the Legislature made it the policy of the state to:

Develop and manage the basic resources of water, land, and air to the end that the state may fulfill its responsibility as trustee of the environment for the present and future generations.

AS 46.03.010(b) (1971 Sess. Laws of Alaska, ch. 120, § 3) (emphasis added).

Article VIII of the Alaska Constitution protects the public's rights in the state's natural resources. The Department of Natural Resources (DNR) is responsible in large part for implementing the constitutional mandate that the legislature "provide for the utilization, development, and conservation of all natural resources belonging to the State . . . for the maximum benefit of its people." *State of Alaska v. Arctic Slope Regional Corp.*, 834 P.2d 134, 143 (Alaska, 1991) (quoting Alaska Const. Art. VIII, § 2). "Unlike a private enterprise, DNR is not exclusively driven by the profit motive. The agency must also concern itself with the social, cultural and environmental impacts on the state from oil production." *Id.* (citing *Trustees for Alaska*, supra, 795 P.2d at 809-811). Thus, DNR's mandate is to determine the "optimum balance between development and preservation and in maximizing the revenue from leasing state lands." *Id.* at 144.

The DNR lease at issue is for subject tide and submerged lands. Alaska's version of the public trust doctrine protects such tidelands. *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1121 (Alaska 1988). Under this doctrine, tidelands in Alaska are held in trust for the use by all Alaskans for the purpose of navigation, commerce and fisheries. *Id.*; *Hayes v. A.J. Assocs., Inc.* 846 P.2d 131, 133 n 6 (Alaska 1993) (quoting *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971)). Public trust rights embraced in those uses include rights to fish, hunt, bathe, swim, boat, anchor, among others; preservation of public trust tidelands in their natural state for ecological purposes also serves the trust purpose. *Id.* See also, *Brooks v. Wright*, 971 P.2d 1025 (Alaska 1999).

DNR's regulations expressly recognize the existence of this public trust over tidelands. 11 AAC 63.050(b)(7). See also AS 38.05.502 ("all land in the state . . . are the exclusive property of the people of the state and the state holds title to the land and minerals in trust for the people of the state.").

The aquatic farm site lease at Mielkoi Cove does not serve public trust purposes. Indeed, it infringes on rights held in trust for all Alaskans, since the lease will have the effect of excluding members of the public from use of the tidelands in order to allow this private commercial project.

Restrictions on the public's right to use tidelands may also infringe on the public's right to use navigable waters. See AS 38.05.127. Before the imposition of such restrictions, DNR must find that "regulating or limiting access is necessary for other beneficial uses or public purposes." AAS 38.05.127(a)(2). As explained above, this site will restrict the public's right to navigate the waters of Mielkoi Cove and therefore violates the State's public trust obligations.

All evidence in this case points to the fact that the private economic gain that one company will receive from leasing these lands is neither necessary of a beneficial public purpose when it comes at a great cost to the community of Sitka. Leasing of this site would violate the Public Trust Doctrine by taking away from a public resource for the private benefit of one individual.

6. The farm site will have significant social and environmental effects as recognized by 11 AAC 63.050(b)(8).

This farm site is an important fish and wildlife habitat area. It is this richness that makes the area heavily used for subsistence for deer, salmon, halibut, crab, kelp and other resources. Due to the rich kelp beds in the area, many marine mammals (including potential geoduck predators) are found along this shoreline in large concentrations including harbor seals and Steller sea lions. Some marine mammal species also haul out on rocks located in extremely close proximity to this site. Similarly the abundant eelgrass beds in the area are important habitat for crab and other marine life. Lastly, this is an important migratory bird resting area and provides habitat to numerous waterfowl and eagles.

DNR claims that no marine mammal haul outs exist within 1 mile of Mielkoi Cove site. This information is based on ADF&G and NOAA databases. While NOAA does the best job they can tracking marine mammal haul-outs we also recognize that the data has limitations given their limited resources. The last Sitka surveyed was conducted more than 4 years ago. Local knowledge is important in identifying these areas. In the case of Mielkoi Cove local knowledge has clearly shown that additional unrecorded haul-out exists at this site.

NOAA identifies a seal haul out about 1.8 NM to the southwest of this lease site at Povorotni Point. We believe there is not just one, but two additional marine mammal haul-out sites located within one mile of the proposed site. One harbor seal haul-out site is directly north of the proposed site and within a few hundred yards. A second harbor seal haul-out site is located directly west of the proposed aquatic farm site, within one mile. Further, it is common knowledge that sea otters gather in this area as well. In fact many tour boats from Sitka visit this area specifically because of these seasonal haul-outs (*See Declaration of Lubin*). We believe the Sitka Tribe of Alaska and the City and Borough of Sitka have also recognized the existence of these haul-outs in their correspondence with DNR.

Given concern of harbor seals, we urge the ADF&G to visit this area during the appropriate time to correct their records. Further, given local knowledge that haul-outs do indeed exist in this area and that DNR has stated aquatic farms are inappropriate within 1 of such locations, we ask that the decision to permit this farm be reversed.

7. It appears that the site may encumber more than 1/3 of surface area estimated to exist as a mean lower low water of the bay and therefore is inappropriate under 11 AAC 63.050 (c)

While it is very difficult to tell from the poor map provided by DNR whether this site will encompass more than 1/3 of the surface area of the Bay, it certainly appears that it will cover more than 1/3 of the surface area of the narrow navigation channel through this area.

OTHER REASONS THE BEST INTEREST FINDING SHOULD BE REVERSED.

DNR Acted Arbitrarily by Relying on Incomplete Scientific Information

DNR is making this decision in light of much scientific uncertainty and incomplete information. For example, DNR has done no analysis of how large area of predator netting may impact wildlife species such as crab, marten, ermine, mink, river otters, birds, etc. SCS specifically requested this information in our comments on the preliminary finding as we are concerned that these animals could become ensnared in or trapped under the netting and die of starvation or drowning. This request was ignored and the Final Finding provided no information on this issue.

In its review of this proposal, ADF&G expressed concerned about the predator netting and anchoring design given the intense water movements and wind in this area. They further stated that alternative measures to ensure adequate anchoring is provided are necessary. Again as pointed out in our earlier comments, there are no assurances that nettings will be maintained in good condition and that edges will be monitored on a routine basis to insure wildlife does not become trapped under the nets. The lease does not stipulate that the site be dived on at regular intervals to assure the nets are in good condition to insure the netting is in good shape, instead only requiring any incidents of wildlife harm due to nets be reported.

Having a requirement that requires the permit holder to report such incidents does little to assure the public that this is not a problem. Prior experience has shown that DNR does not have the resources to monitor and enforce such standards or to respond when known problems arise.

Furthermore, the Final Finding and Determination were based on a complete lack of information about the wild geoduck stock on the site. The Finding states, "At this time, it is not known whether the proposed sites have populations of geoducks large enough to support a limited-entry commercial dive fishery" ADF&G is obligated to prohibit any proposed farm site that is found to have wildstock that can attract and support a commercial fishery" (Final Finding at 16). To remedy this situation the applicant is required to survey the site to determine the natural existing stock. This is absurd at best as clearly the applicant has an economic incentive to not find any significant stock. Further, the Finding letter states, "If the survey results are completed this summer, the results will be used in the permit determination." We are unclear why the finding was not held off until a State or independent survey for wild stock was performed as if it is significant stock is found then both the State's and public's time and resources have been wasted going through this process.

Further, no information on how farmed geoducks may impact wild geoduck stocks or how the farm would compete with existing fisheries is provided despite our earlier request. Specifically, many farm sites have a history of paralytic shellfish poisoning (PSP). It appears no analysis has been done to determine if a farm site at Mielkoi Cove may increase the risk or presence of PSP or introduce other diseases to natural stocks of geoducks or other shellfish. These are important public interest issues.

SCS also specifically asked for information regarding baseline data for marine and terrestrial resource around the proposed farm sites. Yet the finding and determination was made without this vital information. Further, no analysis seems to have been performed to determine how removal of all existing biomass from potential farm sites may impact ecology on a micro or macro scale. No information has been provided to the public to demonstrate the effectiveness of mitigation measures on displaced species such as predators or other invertebrates.

These are important ecological questions that need to be addressed prior to making decisions whether aquatic farm sites are in the best interest of Alaska, yet the Final Finding and Decision dismisses these concerns. Specifically, the decision explains information on fish and wildlife resources are usually provided in the preliminary decisions, “however, due to the Mariculture Coordinator position at DFG being vacant for a time and, once hired, the urgency for the coordinator to develop or revise regulations regarding geoduck farming, the SCRO was not able to obtain this information on time” (Finding at 14). The final Finding and Determination still does not provide this requested ecological information and does nothing to address our concerns.

No Cumulative Impacts Analysis Was Completed

The Finding and Decision Notice fails to address the cumulative impacts of the aquatic farm program across southeast Alaska and to look at other reasonably past, present and future foreseeable projects in the Mielkoi Cove area in particular. DNR, in its decision, has neglected to identify the cumulative impacts that commercial aquatic farms would have on both wildlife and existing uses in the coastal zone.

The Finding is Inconsistent with the Alaska Coastal Management Plan

ACMP Enforceable Policy 3.2 provides: “Recreational access to public uplands, shorelines, tidelines, and wetlands shall be maintained and enforced to the maximum extent feasible and prudent.” As explained in detail above, the Mielkoi Cove site will severely restrict if not eliminate the public’s use of the area and adjacent uplands. Therefore, the issuance of this permit is inconsistent with the Alaska Coastal Management Plan.

The Farm Site is Near a Catalogued Anadromous Stream

An anadromous stream supporting various salmon species including coho salmon, pink salmon, chum salmon and Dolly Varden is located near Site 1. The Final Findings fails to

discuss the impacts of this project on this stream or the fish in the area. Rather its dismisses any concerns because the steam is not within 300 feet of the proposed site. Per the Alaska Department of Fish and Game (ADF&G), the definition of a catalogued stream includes not only the channel of the stream but also the estuary, which is described as the area where sea water is measurably diluted with freshwater. It does not appear that the setback measurement has been considered in this light, rather it was measured from the mouth of the stream.

DNR Failed to Analyze Impacts to Species Protected Under the Marine Mammal Protection Act

The Mielkoi Cove area is rich in marine life include the presence of sea otters, harbor seals and whales. These species are protected under the Marine Mammal Protection Act (MMPA) 16 U.S.C. §§ 1361-1421h. Under the Act it is illegal to take or harass a marine mammal. Take is defined under the Act as: harass, hunt, capture or kill, or attempt to harass, hunt, capture or kill a marine mammal. 16 U.S.C. § 1361. Harass is further defined under the Act as: an act of pursuit, torment or annoyance which has the potential to injure, or disturb by causing disruption of behavioral patterns, a marine mammal or marine mammal stock in the wild (Id). Due to the location of this farm site, we believe that it will be extremely difficult to insure predator netting remains tight and in place. We remain very concerned that marine mammals may get entangled in the netting or stuck underneath result in a drowning. Such an incident would be an illegal take under the MMPA. We also think it is likely that behavioral patterns of these animals may be altered due to the presence of the farms. We were disappointed to see that no analysis was provided regarding impact to marine mammals in the area.

CONCLUSIONS AND REQUEST FOR ACTION

Appellants have identified substantial problems with locating a farm at this site. There is no adequate basis in the permit decision documents to support the conclusion that the aquatic farm site will not cause environmental harm or harm to other users or that the permit conditions will guarantee resource protection. Further, convincing evidence exists to demonstrate that current and existing uses of this area will be harmed by issuance of this permit. Lastly, DNR based its findings upon factual errors including among other things :1) the failure to recognize this farm site falls within the Sitka Sound Tidelands Resource Management Zone; 2) failure to recognize that this site will impact navigation and poses safety risks and; 3)that significant public opposition exists to leasing of this site. Together, these failures show that DNR has not protected the renewable resources in the area as required by law and their public trust obligations.

Lastly, pursuant to 11 AAC 02.060(d), appellants seek a stay of the lease approval until a decision on this appeal is issued. The economic harm that the permit requestor might suffer is outweighed dramatically by the irreversible harm suffered by appellants if the farm is permitted in an area Sitkans depend upon for traditional, subsistence, and commercial. Based on the foregoing discussion, there are serious issues to be considered in this appeal. The best interest finding is arbitrary and capricious, the lease violates the

State's public trust responsibility and is a bad policy decision. Thus, the public interest requires that a stay of the effectiveness of the approval be issued while this appeal is decided.

Please send notice of any decision on this appeal to via email and hard copy to:

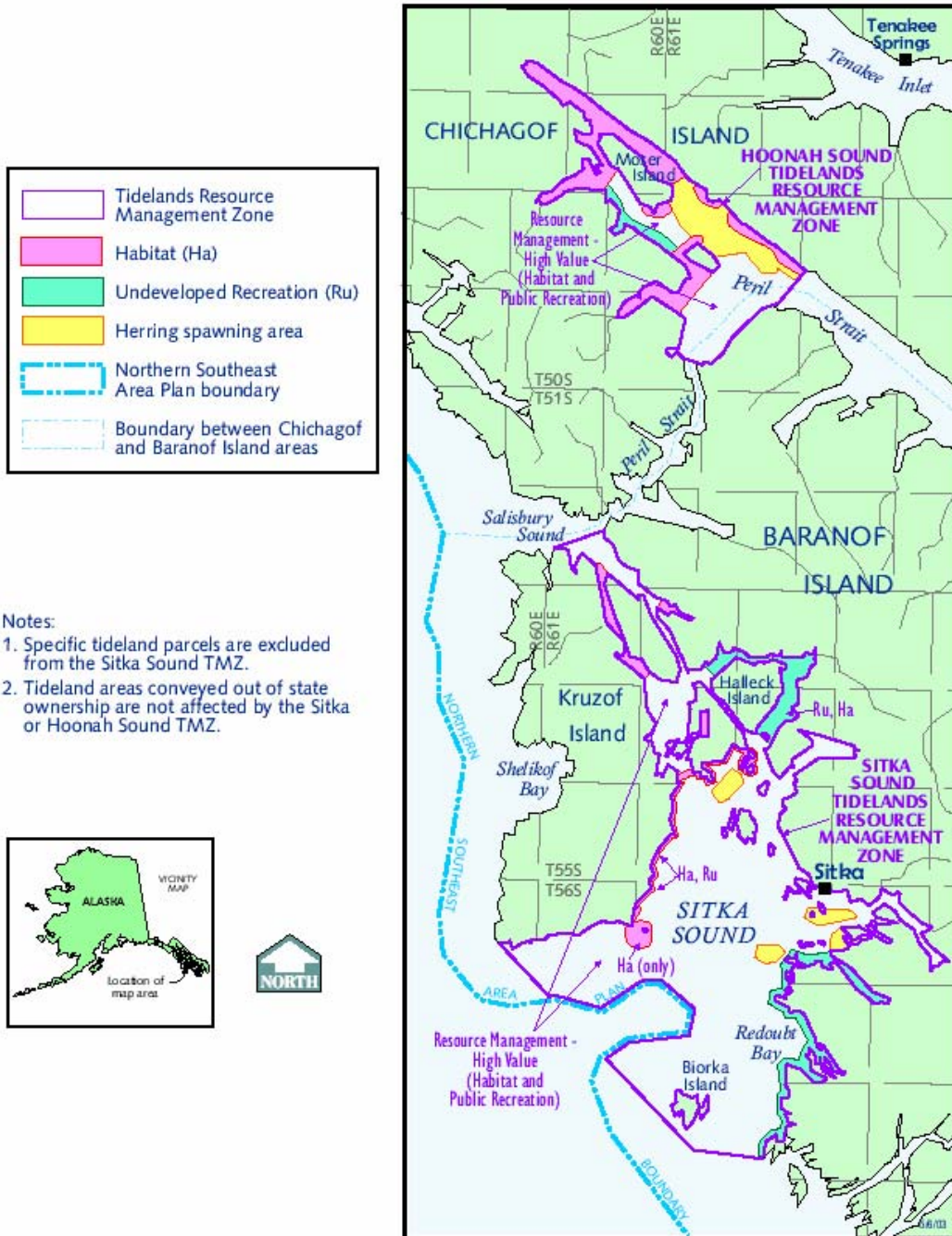
Corrie Bosman
Conservation Director

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Sincerely,

Corrie Bosman
Conservation Director

Map 2-1. Sitka Sound and Hoonah Sound Tidelands Resource Management Zones



NORTHERN SOUTHEAST AREA PLAN
October 2002 - Page 2-19