Buck & Gordon LLP
Attorneys at Law

2025 First Avenue, Suite 500
Seattle, WA 98121-3140
206-382-9540
206-626-0675 Fax
www.buckgordon.com

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Mr. James K. Pharris
Assistant Attorney General
Office of the Attorney General
State of Washington
1125 Washington Street S.E.
P. O. Box 40100
Olympia, WA 98504-0100

RE: Pacific Coast Shellfish Growers Association – Response to Request for Attorney General Opinion by Representative Lantz

Dear Mr. Pharris:

Representative Pat Lantz has requested, and the Attorney General is accepting comments regarding, a formal Attorney General Opinion on two issues:

(1) Under RCW 77.55.021, should the Department of Fish and Wildlife require private parties engaged in the practice of planting, growing, and harvesting farm raised geoduck clams as part of an aquaculture operation to obtain a hydraulic project approval permit?

(2) Under RCW 90.58.140, should local governments require private parties engaged in the practice of planting, growing, and harvesting farm raised geoduck clams as part of an aquaculture operation to obtain a substantial development permit, and if so, how should local governments and the Department of Ecology manage existing operations?

These comments, prepared on behalf of the Pacific Coast Shellfish Growers Association ("PCSGA"), address both of these issues in the context of Representative Lantz's request. With regard to the first issue, RCW 77.115.010 makes clear that private parties engaged in geoduck culture are not required to obtain a hydraulic project approval permit ("HPA") for their operations. With regard to the second issue, RCW 15.85.010 makes clear that private geoduck farms are agricultural operations; as such, these farms are exempt from the definition of

"substantial development" under the Shoreline Management Act's ("SMA") agricultural exemption in RCW 90.58.030(3)(e)(iv). Furthermore, even if, despite the plain language of RCW 15.85.010, geoduck farms are not deemed a branch of agriculture, the question of whether they are "development" is a fact-specific question that should be decided by local governments.

Regarding both of Representative Lantz's questions, it bears emphasizing that PCSGA represents numerous shellfish farmers growing all species of mollusks. While geoduck cultivation takes place on only a small percentage of the total tideland acreage operated by Association members, Representative Lantz's questions, and the Attorney General's Opinion, are of great significance to all shellfish farmers in the State of Washington. It is difficult to distinguish the activities involved in geoduck culture from other forms of shellfish farming, such as oyster farming, clam farming and mussel farming. Thus, this Attorney General's Opinion, while perhaps not directly addressing other forms of shellfish aquaculture, has ramifications for the entire shellfish-growing community.

I. The Aquaculture Marketing Act, Ch. 15.85 RCW.

In 1985 the Washington Legislature enacted RCW Chapter 15.85 as part of a comprehensive legislative package intended to reform Washington State's regulation of the aquaculture industry. *See* RCW 15.85.010; Final Bill Report, S.B. 3067, 49th Leg., Reg. Sess., at 1 (Wash. 1985). Citing concerns of aquatic farmers that their industry was hindered by over-regulation, the Legislature carved out a comprehensive regulatory scheme that treats aquaculture as a branch of the agricultural industry, encourages promotion of aquacultural activities, programs, and development, and prevents aquaculture disease problems. *See* RCW 15.85.010; Final Bill Report, S.B. 3067, 49th Leg., Reg. Sess., at 1 (Wash. 1985).[1] As stated in the Aquaculture Marketing Act, the policy of Washington State is to encourage the development and expansion of aquaculture in Washington State. The Legislature recognizes Washington as a major center for aquatic farming in the United States and recognizes the economic benefits of the aquaculture industry. RCW 15.85.010.

Washington's 1985 Aquaculture Marketing Act was preceded by the National Aquaculture Act, in which Congress established the following policy:

> It is, therefore, in the national interest, and it is the national policy, to encourage the development of aquaculture in the United States.

16 U.S.C. § 2801(c). In adopting this policy, Congress found:

> (7) Despite its potential, the development of aquaculture in the United States has been inhibited by many scientific, economic, legal, and production factors, such as inadequate credit, diffused legal jurisdiction, the lack of management information, the lack of supportive Government policies, and the lack of reliable supplies of seed stock.

[1] In adopting that legislative package, the Legislature recognized that the federal National Aquaculture Act considers aquaculture as a branch of the agriculture industry. Final Bill Report, S.B. 3067, 49th Leg., Reg. Sess., at 1 (Wash. 1985).

> (8) Many areas of the United States are suitable for aquaculture, but are subject to land-use or water-use management policies that do not adequately consider the potential for aquaculture and may inhibit the development of aquaculture.

16 U.S.C. § 2801(a). The state of Washington embraced a similar policy in the Aquaculture Marketing Act, and then took the additional step of removing some of the regulatory impediments to aquaculture development.

The Aquaculture Marketing Act restructures and redefines WDFW's and the Department of Agriculture's regulatory authority over shellfish aquaculture. The Act accomplishes this purpose in four primary ways. First, the Legislature made declarations, discussed above, articulating the state's policies regarding aquatic farming. Laws of 1985, ch. 457, § 1 (codified at RCW 15.85.010). Second, the Act authorized the Department of Agriculture to create and principally administer a marketing program for shellfish aquaculture, and clarified the Department of Agriculture's authority over private sector cultured aquatic products. *See, e.g.*, Laws of 1985, ch. 457, §§ 4, 14-16. Third, the Act authorized the Department of Agriculture and WDFW to jointly develop a program of disease inspection and control for aquatic farmers, to be managed by WDFW. Laws of 1985, ch. 457, § 8 (codified at RCW 77.115.010). Finally, the Act redefined and limited the scope of WDFW's authority over aquatic farming by exempting private sector cultured aquatic products from regulation under various statutes administered by WDFW, including licensing and permit requirements, and by enacting language affirmatively limiting the scope of WDFW's authority: "The authorities granted the department by these rules and by RCW 77.12.047(1)(g), 77.60.060, 77.60.080, 77.65.210, *77.115.020, 77.115.030, and 77.115.040 constitute *the only authorities of the department* to regulate private sector cultured aquatic products and aquatic farmers as defined in RCW 15.85.020." *See* Laws of 1985, ch. 457, §§ 1, 8, 17-25 (quoted language is current provision, codified at RCW 77.115.010(2)) (emphasis added). Taken as a whole, this Act demonstrates an intent to reform the structure of Washington State's regulation of the aquaculture industry and to treat aquaculture as a branch of agriculture by decreasing the scope of WDFW's authority and increasing the scope of the authority of the Department of Agriculture.

Shellfish farmers, including geoduck farmers, are included in the Act's coverage. The Legislature defines "aquatic farmer" for purposes of RCW Chapter 15.85 and other laws governing shellfish aquaculture as "a private sector person who commercially farms and manages the cultivating of private sector aquaculture products on the person's own land or on land in which the person has a right of possession." RCW 15.85.020(2). "Private sector cultured aquatic products" are defined as "native, non-native, or hybrids of marine or freshwater plants and animals that are propagated, farmed, or cultivated on aquatic farms under the supervision and management of a private sector aquatic farmer." RCW 15.85.020(3). Private sector geoduck aquaculture farmers are "aquatic farmers" and their products are "private sector cultured aquatic products" under the Aquaculture Marketing Act.

II. A Hydraulic Project Approval Permit is Not Required for Geoduck Farms.

As discussed above, the 1985 Act relating to aquatic farming amended RCW 77.115.010(2) to specifically define the scope of the Washington Department of Fish and Wildlife's ("WDFW") regulatory authority over private sector cultured aquatic products and aquatic farmers, including geoduck farmers. RCW 77.55.021, which requires a WDFW-issued HPA for a variety of construction and work projects, is not included in RCW 77.115.010(2)'s exclusive list of WDFW's regulatory authorities applicable to aquatic farmers. Thus, under the plain language of the statute, WDFW cannot require that aquatic farmers, including geoduck farmers, obtain an HPA.

We believe that RCW 77.55.021 (the HPA requirement) and RCW 77.115.010(2) (the limitation on WDFW authority over shellfish farms) do not conflict, and the plain language of RCW 77.115.010(2) should be enforced. As such, reference to tools of statutory construction is not necessary. However, even if, as Representative Lantz asserts, these statutory provisions are inconsistent, well-established canons of statutory construction support giving effect to RCW 77.115.010(2)'s limitation on WDFW's authority.

A. RCW 77.115.010(2) clearly articulates the scope of WDFW's regulatory authority over private sector cultured aquatic products and aquatic farmers.

The plain language of RCW 77.115.010(2) lists the only WDFW regulatory provisions applicable to aquatic farmers:

> The authorities granted the department by these rules [rules pertaining to aquaculture disease control implementing Ch. RCW 77.115] and by RCW 77.12.047(1)(g), 77.60.060, 77.60.080, 77.65.210, 77.115.020, 77.115.030 and 77.115.040 constitute *the only authorities of the department* to regulate private sector cultured aquatic products and aquatic farmers as defined in RCW 15.85.020.[2]

RCW 77.115.010(2) (emphasis added). The plain language chosen by the legislature in RCW 77.115.010(2) is exclusive: the list contains the *only* authorities WDFW is permitted to use to regulate aquatic farmers. RCW 77.55.021, requiring a department-issued Hydraulic Project Approval ("HPA") for certain projects, is not included in RCW 77.115.010(2)'s list of regulatory authorities. Therefore, WDFW cannot require that aquatic farmers, including geoduck farmers, obtain HPAs.

The plain meaning of RCW 77.115.010(2) is supported by the language of RCW 77.12.047(3), which is cross-referenced in RCW 77.115.010(2). RCW 77.12.047 grants the Fish and Wildlife Commission broad rulemaking authority to adopt rules regulating the taking, possession, transportation, and sale of wildlife, fish, and shellfish. Of the fifteen sub-sections contained in this grant of authority, private sector cultured aquatic products are exempted from

[2] As discussed in Section I, above, shellfish farmers, including geoduck farmers, are included within "aquatic farmers" and farm-raised geoducks are included within the term "private sector cultured aquatic products."

all but one – the authority of WDFW to adopt rules specifying the statistical and biological reports required from fishers, dealers, boathouses, or processors of wildlife, fish, or shellfish. RCW 77.12.047(3). The legislature clearly intended to place strict limitations on WDFW's authority to regulate aquatic farmers.

To ascertain the meaning of a statute, courts look first to its language; if the language is unambiguous, the plain meaning of the statute is given effect. Tools of statutory construction are employed only if the language of the statute is ambiguous. *Cerillo v. Esparza*, 142 P.3d 155, 158 (2006). The language of RCW 77.115.010(2) is clear and unambiguous. Thus, that language should be given effect. To require aquatic farmers, including geoduck farmers, to obtain HPAs would be equivalent to amending the statute to include "RCW 77.55.021" in the list of WDFW regulatory tools applicable to aquatic farmers. Only the legislature can make such an amendment.

B. Even if RCW 77.55.021 and RCW 77.115.010(2) are inconsistent, accepted tools of statutory construction favor giving effect to the limitations in RCW 77.115.010(2).

i. RCW 77.55.021 and RCW 77.115.010(2) should be harmonized by reading RCW 77.115.010(2) as creating an exemption from WDFW's HPA requirements for aquatic farmers.

Representative Lantz claims that RCW 77.55.021 (the HPA requirement) conflicts with RCW 77.115.010(2) (the limitation on WDFW's authority over aquatic farmers). Courts construe statutes pertaining to the same subject matter by assuming that the legislature does not intend to create inconsistencies. Thus, whenever possible, statutes are construed harmoniously. *See, e.g., State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 245-46 (2004). Statutes may be harmonized by putting them in historical context. *See Wright v. Miller*, 93 Wn. App. 189, 197-198 (1998). ("[P]rovisions may be harmonized by putting them in historical context . . . . The Legislature is presumed to be aware of prior statutes and their judicial construction. Absent an express indication otherwise, new legislation will be presumed to be consistent with prior legislation. Two statutes that relate to the same subject and are not actually in conflict are interpreted to give meaning and effect to each.").

The Supreme Court's decision in *CAT* is instructive. There, the Court considered an argument that the Public-Private Transportation Initiatives Act ("PPI"), which created an alternative process to bidding requirements under state bidding laws, conflicted with state bidding laws. The Court harmonized the applicable statutory provisions by holding that the PPI created an exemption to the state's general bidding laws. *CAT*, 151 Wn.2d at 244-46 (citing *Nat'l Elec. Contractors Ass'n, Cascade Chapter v. Riveland*, 138 Wn.2d 9 (1999); *Washington Waste Systems, Inc. v. Clark County*, 115 Wn.2d 74 (1990); *Shaw Disposal, Inc. v. City of Auburn*, 15 Wn. App. 65 (1976)). Similarly, RCW 77.55.021 and RCW 77.115.010 should be read harmoniously such that RCW 77.115.010 creates an exemption to the HPA requirement in RCW 77.55.021 for aquatic farmers. Such a reading gives effect to both statutory provisions.

ii. The canons of statutory construction relied upon by Representative Lantz support exempting geoduck farmers from WDFW's HPA requirements.

The canons of statutory construction articulated by Representative Lantz also support a finding that shellfish farmers are exempt from the HPA requirement in RCW 77.55.021. Representative Lantz points to two canons of statutory construction in her request. The first is "the specific trumps the general." The second is "when in conflict, more recent enactments should prevail." Courts typically discuss these canons in conjunction. *See, e.g., Wright v. Miller*, 93 Wn. App. 189, 198 (1998) ("[T]he rules of statutory construction give preference to the later-adopted statute and to the more specific statute if two statutes appear to conflict."); *Bailey v. Allstate Ins. Co.*, 73 Wn. App. 442, 446 (1994) ("Another general rule of statutory construction gives preference to the later adopted statute and to the more specific statute if two statutes appear to conflict."); *ETCO, Inc. v. Dep't of Labor and Indus.* 66 Wn. App. 302, 306 (1992) ("Where two statutes dealing with the same subject matter are in apparent conflict, established rules of statutory construction require giving preference to the more specific statute, and to the latter adopted statute.").

a. "The latter enacted statute controls."

Representative Lantz first argues that RCW 77.55.021's HPA requirement should apply to geoduck farmers because the most recent legislative amendments to the Hydraulics Code "post-date any legislative action on RCW 77.15.010." Representative Lantz erroneously focuses on statutory amendments instead of the actual enactment of the substantive provisions of issue. The Washington State Court of Appeals has elaborated on this distinction:

> The rule giving preference to the later *adopted* statute should not be construed to automatically give preference to the later *amended* statute. The nature of the amendments and their effects should be considered to avoid strained or inconsistent results. For example, amendments are often made for housekeeping purposes, such as for clarity or to change gender-specific language. Such amendments, even if they are more recent, should not give one statute automatic preference over another if the substance that makes the two statutes apparently conflict is not affected by the amendments.

Bailey, 73 Wn. App. at 446 n.3 (emphasis in original). The Court in *Bailey* went on to hold that the latter enacted statute controlled, as opposed to the latter amended statute, where the amendments were "mostly for clarity and did not affect the types of policies covered by that statute." *Id.* at 446 at n.3.

Statutory HPA requirements have existed in Washington since 1949. *See* Rem. Supp. 1949 § 5780-323. While Representative Lantz focuses on the 2005 amendments to the HPA statute, the final bill report makes clear that those amendments had nothing to do with the fundamental applicability of the HPA requirement:

> The state statute governing construction projects in state waters is reorganized and certain sections are repealed and rewritten as new sections.

> A definition section is established, and a new chapter is created for sections relating to fishways, flow, and screening. An obsolete condition limiting the ability of the WDFW to require mitigation for certain filled wetlands is repealed.

Final Bill Report, 2d Substitute H.B. 1346, 59th Leg., Reg. Sess., at 1 (Wash. 2005), *available at* http://www.leg.wa.gov/pub/billinfo/2005-06/Pdf/Bill%20Reports/House%20Final/1346-S2.FBR.pdf. The primary objective of the 2005 amendments was to reorganize and clarify the already existing HPA process.

In fact, while the statutory HPA requirements have been amended and recodified numerous times since 1949, there have been few, if any, substantive changes to the basic approval requirement. The 1949 statute provides:

> In the event that any person or government agency desires to construct any form of hydraulic project or other project that will use, divert, obstruct or change the natural flow or bed of any river or stream or that will utilize any of the waters of the state or materials from the stream beds, such person shall submit to the Department of Fisheries and the Department of Game full plans and specifications of the proposed construction or work, complete plans and specifications for the proper protection of fish life in connection therewith, the approximate date when such construction or work is to commence and shall secure the written approval of the Director of Fisheries and the Director of Game as to the adequacy of the means outlined for the protection of fishlife in connection therewith and as to the propriety of the proposed construction or work and time thereof in relation to fish life, before commencing construction or work thereon.

Rem. Supp. 1949 § 5780-323. Compare that language with the current statute:

> Except as provided in RCW 77.55.031, 77.55.051, and 77.55.041, in the event that any person or government agency desires to undertake a hydraulic project, the person or government agency shall, before commencing work thereon, secure the approval of the department in the form of a permit as to the adequacy of the means proposed for the protection of fish life.

RCW 77.55.021(1). The current definition of a "hydraulic project" also mirrors the language of the 1949 Act:

> "Hydraulic project" means the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state.

RCW 77.55.011(7).

Substantively, the HPA requirement has changed little in over 50 years. According to WDFW's website, "[a]lthough the law has been amended occasionally since it was originally enacted, the basic authority has been retained." http://wdfw.wa.gov/hab/hpapage.htm. Significantly, this HPA requirement was in effect in substantially the same form in 1985, at the time of the enactment of the express limitation on WDFW's regulatory authority over aquatic farmers currently codified at 77.115.010(2).

If, in 1985, the legislature had intended for the Department of Fisheries to retain HPA authority over shellfish aquaculture, the legislature would have included the HPA requirement in RCW 77.115.010(2)'s list of WDFW's authorities applicable to shellfish farmers. The HPA requirement was in place in 1985 largely to the same extent it exists today, and the Legislature did not include WDFW's HPA authority in the list of authorities WDFW maintained over private sector cultured aquatic products and aquatic farmers. The language of RCW 77.115.010(2), which is more recent than the HPA permit requirements, should be given effect.

b. "The specific trumps the general."

Representative Lantz next references the canon of statutory interpretation known as "the specific trumps the general." Representative Lantz opines that RCW 77.115.010 is a statute more general in nature than the HPA requirement in RCW 77.55.021. While we agree with Representative Lantz that "the specific trumps the general," we disagree with her conclusion that the HPA requirement is the more specific statute. Rather, case law supports a finding that RCW 77.115.010(2), creating a specific exemption for shellfish farmers, controls over the general HPA requirement applicable to all hydraulic projects.

For example, in *Bailey v. Allstate Ins. Co.*, 73 Wn. App. 442, 446 (1994), the court reviewed two apparently conflicting statutes addressing insurance cancellation notification requirements, The Court concluded that the more specific statute addressing cancellation of private passenger auto insurance by the insurer should prevail over a statute addressing insurance cancellation in general. Similarly, in *ETCO, Inc. v. Dept. of Labor and Indus.*, 66 Wn. App. 302, 306 (1991), the court resolved an apparent conflict between two statutory provisions governing judicial review of final decisions of the Board of Industrial Appeals by finding that the more specific statutory provision addressing judicial review of Department orders of assessment prevailed over a general statutory provision regarding judicial appeals of all final Board decisions.

The HPA statute, RCW 77.55.021, contains a general requirement that a permit must be secured prior to beginning work on a hydraulic project much like the general insurance cancellation provision at issue in *Bailey* or the general appeal provisions at issue in *ETCO*. As previously noted, "Hydraulic project" is broadly defined as "the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state." RCW 77.55.011(7). A wide range of activities, occurring in both freshwater and saltwater, can fall under the definition of hydraulic project, including: construction of marinas, bridges, piers, and docks; pile driving; conduit crossing; and mineral prospecting. http://wdfw.wa.gov/hab/hpapage.htm. The HPA requirement, then, is a broad regulatory scheme that applies to many types of construction projects and work activities.

RCW 77.115.010, on the other hand, is part of a regulatory scheme enacted with the intention of defining WDFW regulatory authority over a particular subset of persons: aquatic farmers. The legislative act creating this regulatory scheme specifically relates only to aquatic farming. Laws of 1985, ch. 457. This specific provision is similar to the specific auto insurance cancellation provision the Court enforced in *Bailey* or the specific Board of Industrial Appeals judicial review provisions the Court enforced in *ETCO*.

To summarize, the language of RCW 77.115.010 applicable to aquatic farmers should be given preference over the HPA requirements of RCW 77.55.021 applicable to all persons. Pursuant to well-established canons of statutory construction, preference among two apparently conflicting statutes is given to the later adopted statute and to the more specific statute. The broad HPA requirement was enacted in 1949. The statutory language specifically defining WDFW's authority over aquaculture farming, currently codified at RCW 77.115.010, was enacted thirty-six years later and applies only to WDFW's authority over private sector cultured aquatic products and aquatic farmers. RCW 77.115.010(2), as both the later adopted statute and the more specific statute, should be given preference over the prior-adopted and more general HPA requirement.

C. Representative Lantz's Additional Arguments Are Unpersuasive.

Representative Lantz raises two additional arguments that she claims support reading the limitations in RCW 77.115.010(2) as inapplicable to WDFW's HPA regulatory authority. First, she argues that the limitations in RCW 77.115.010 should only apply to WDFW's authority over disease control, licensing, and registration for aquatic products and farmers. This argument is contrary to the plain language of RCW 77.115.010, however, which states that the listed provisions "constitute the only authorities of the department to regulate private sector cultured aquatic products and aquatic farmers...." Lantz's argument asks the Attorney General to effectively amend the statute to read that the listed provisions "constitute the only authorities of the department to regulate private sector cultured aquatic products and aquatic farmers [in the areas of disease control, licensing, and registration for aquatic products and farmers]." This reading would be in direct contradiction to the language preceding it, which clearly states that the list restricts the authority of WDFW over an entire industry – that of private sector cultured aquatic products and aquatic farmers, including geoduck farmers. Representative Lantz's reading would also be inconsistent with the legislative history of the statute which, as discussed in Section I above, demonstrates a clear legislative intent to reduce WDFW's regulatory authority over aquatic farms.

Second, Representative Lantz argues that the Department of Agriculture's role in rulemaking under RCW 77.115.010(2) somehow demonstrates that the Legislature did not intend to limit WDFW's HPA authority. As discussed in Section I above, the statutory language limiting WDFW's regulatory authority and the joint Department of Agriculture/WDFW rulemaking procedures are two separate aspects of the 1985 Act relating to aquaculture. Department of Agriculture's role in rulemaking does not bear on the meaning of the sentence in RCW 77.115.010(2) limiting WDFW's regulatory authority over aquatic farmers. And, again, as noted above, several of the statutes included in 77.115.010(2) as applicable to shellfish farmers have nothing to do with the Department of Agriculture. This demonstrates a legislative understanding that the effect of RCW 77.115.010(2) is to limit all of WDFW's regulatory

authority in various areas, including its authority in areas that have nothing to do with the Department of Agriculture.

The legislature has chosen, in RCW 77.115.010(2), to limit WDFW's regulatory provisions as they apply to aquatic farmers. The plain language of that statute indicates that WDFW's authority to require HPAs is not applicable to aquatic farmers, including geoduck farmers. Even if RCW 77.115.010(2) is found to conflict with RCW 77.55.021 (requiring HPAs), the only way to read these provisions harmoniously is to find that RCW 77.115.010(2) exempts aquatic farmers from WDFW's HPA requirements. Such a reading is also consistent with canons of statutory authority that favor more specific, later-enacted statutory provisions.

III. As a branch office of the state's agricultural industry, aquatic farmers are exempt from the Shoreline Substantial Development Permit requirements.

Under RCW 90.58.030(3)(e)(iv)[3] practices normal or necessary for farming are exempted from the definition of substantial development, even if those practices would normally constitute substantial development. In the Aquaculture Marketing Act, the legislature made clear that "aquaculture should be considered a branch of the agricultural industry for the state for purposes of any laws that apply to or provide for the advancement, benefit, or protection of the agriculture industry within the state." RCW 15.85.010. The SMA's agricultural exemption (RCW 90.58.030(3)(e)(iv)) is a law that provides for the advancement, benefit and protection of the agricultural industry. Therefore, as Representative Lantz points out, acts that are normal or necessary for aquaculture are exempted from the definition of substantial development, even if those activities would otherwise satisfy the definition of substantial development.[4]

In her AGO request, Representative Lantz asks the Attorney General to make certain assumptions about the use of "current accepted technology for planting, raising, and harvesting geoducks for private aquaculture," including the embedding of plastic tubes into the intertidal substrate and planting protective netting over the tubes. Because geoduck farming is a form of agriculture, any "current accepted technology" used in geoduck farming necessarily falls under the SMA's exclusion of "construction and practices normal or necessary for farming" from the definition of Substantial Development. Thus, geoduck farming, as described by Representative Lantz, does not require a Shoreline Substantial Development Permit. *See Ritchie v. Markley*, 23 Wn. App. 569 (1979) (holding that local governments are prohibited from requiring a Substantial

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[3] RCW 90.58.030(3)(e)(iv) exempts: "Construction and practices normal or necessary for farming, irrigation, and ranching activities, including agricultural service roads and utilities on shorelands, and the construction and maintenance of irrigation structures including but not limited to head gates, pumping facilities, and irrigation channels. A feedlot of any size, all processing plants, other activities of a commercial nature, alteration of the contour of the shorelands by leveling or filling other than that which results from normal cultivation, shall not be considered normal or necessary farming or ranching activities. A feedlot shall be an enclosure or facility used or capable of being used for feeding livestock hay, grain, silage, or other livestock feed, but shall not include land for growing crops or vegetation for livestock feeding and/or grazing, nor shall it include normal livestock wintering operations."

[4] The Legislature defines "aquaculture" for purposes of this statute as "the process of growing, farming, or cultivating private sector cultured aquatic products in marine or freshwaters and includes management by an aquatic farmer." RCW 15.85.020(1). The Legislature's use of the word "farming" in the definition of aquaculture further demonstrates that aquaculture is a type of "farming."

Development Permit for activities that are within the scope of the SMA agricultural exemption in RCW 90.58.030(3)(e)(iv)), *overruled on other grounds by Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801 (1992).

IV. Even if geoduck farming is not within the scope of the SMA's agricultural exemption, the question whether geoduck farming is "development" should be left to local governments to decide, based on local circumstances.

If, in spite of the language of RCW 15.85.010, the Attorney General finds that geoduck culture is not within the scope of the SMA's agricultural exemption, the question whether geoduck culture constitutes "development" under the SMA is inherently fact-specific. As such, that question should be left to local governments to decide, based on local circumstances. PCSGA's arguments and authorities on this point were discussed in some detail in the attached October 25, 2006, letter from Samuel W. Plauché, Buck & Gordon LLP, to Tom Young, Assistant Attorney General. We have attached that letter, and, rather than restate those arguments, we will incorporate them by this reference.

There is one issue in the attached letter that warrants further elaboration. The attached letter was prepared in response to the Department of Ecology's ("ECY") decision, which has since been postponed, to issue guidance addressing whether geoduck culture is "development" under SMA. It was our understanding that the impetus behind ECY's guidance was the recent decision in *Washington Shell Fish, Inc. v. Pierce County*, 132 Wn. App. 239 (2006), where the Court held, based on the particular facts of that case, that the geoduck farm at issue interfered with the normal public use of waters and was therefore "development." It was our understanding that ECY proposed issuing guidance stating that geoduck farming always interferes with the normal public use of waters and, as such, are always "development." Thus, the emphasis in the attached letter is on the question of whether geoduck farming always interferes with the normal public use of waters.

It now appears that ECY is focused on a different aspect of the definition of "development." Specifically, we understand that ECY may now contend that the PVC pipes used in geoduck culture are "structures" under the SMA and, therefore, constitute "development" under RCW 90.58.030(3)(d). This issue is addressed below, as it was not discussed in detail in the attached letter.

RCW 90.58.030(3)(d) includes "the construction or exterior alteration of structures" as "development." While "structure" is not defined in the Act, Ecology's regulations define "structures" as follows:

> A permanent or temporary edifice or building, or any piece of work artificially built or composed of parts joined together in a definite manner.

WAC 173-27-030(15). A close review of these terms demonstrates that "structure" in the SMA was intended to cover items like buildings and docks, which are constructed out of individual constituent parts to create a new object. The definition does not cover the PVC pipes used in geoduck farming, which are not joined together to form a structure.

The SMA includes as development the "construction or exterior alteration" of structures. In considering the PVC pipe used in geoduck farming, "exterior alteration" of structures is not particularly relevant – the focus is on "construction" of structures. Webster's II New Riverside University Dictionary defines "construct" as "to put together by assembling parts: BUILD." Thus, "construction" focuses on joining constituent parts together to form a single structure, not the disconnected placement of PVC pipes in intertidal areas, as is done in geoduck culture.

The WAC definition of structure next refers to an "edifice or building." Webster's II New Riverside University Dictionary defines "edifice" as "a building, especially one of imposing size or appearance." "Building" is defined as "a structure that is built." "Build" is defined as "to form by combining materials or parts." Again, these definitions refer to the joining together of parts to create something new. Placing individual PVC pipe into the intertidal area as part of a geoduck farming operation does not meet that definition.

ECY's definition of structure then goes on to include "a piece of work artificially built." As stated above, Webster's II New Riverside University Dictionary defines "build" as "to form by combining materials and parts." *See also* Webster's Ninth New Collegiate Dictionary (defining "build" as "to form by ordering and uniting materials by gradual means into a composite whole"). The key in determining whether something is "built" is the joining materials together to form a whole.

And, finally, the WAC definition of "structure" includes a piece of work "composed of parts joined together in some definite manner." WAC 173-27-030(15). This clearly does not include the placement of individual pipes without joining them together in a definite manner.

Thus, the statutory coverage of structures that are "constructed," as well as ECY's definition of "structure," demonstrate that the structures regulated as "development" under the SMA are structures where constituent parts are assembled or joined together in some ordered manner to create a new item – a "composite whole." The PVC pipes used in geoduck farming are not joined together in any way – they are placed independently into intertidal areas (and then individually removed after 1-2 years). As such, geoduck farming does not involve "the construction or exterior alteration of structures."

For these reasons, as well as those discussed in the attached letter, even if geoduck farming is not within the scope of the SMA agricultural exemption, it is not necessarily "development" under the SMA. That decision should be left for local governments to decide, based on local circumstances.

V. Conclusion.

Based on the foregoing, we believe the appropriate answers to Representative Lantz's questions are as follows:

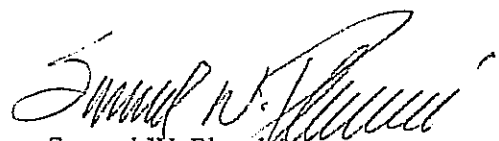
1. *Under RCW 77.55.021, should the Department of Fish and Wildlife require private parties engaged in the practice of planting, growing and harvesting farm raised geoduck claims as part of an aquaculture operation to obtain a hydraulic project approval permit?*

   No. Geoduck farmers are "aquatic farmers" under Ch. 15.85 RCW, and RCW 77.115.010(2) prohibits WDFW from requiring HPAs from aquatic farmers.

2. *Under RCW 90.58.140, should local governments require private parties engaged in the practice of planting, growing, and harvesting farm raised geoduck clams as part of an aquaculture operation to obtain a substantial development permit, and if so, how should local governments and the Department of Ecology manage existing operations?*

   No. Geoduck farms do not necessarily require substantial development permits for two reasons. First, geoduck farming, as a branch of agriculture, is exempt from the definition of substantial development. Second, even if not exempt, the question whether a geoduck farm is "development" depends on whether the farm interferes with the normal public use of waters; that is an inherently fact-specific inquiry best left to local governments to decide, based on local circumstances.

Very truly yours,



Samuel W. Plauché

Amanda M. Carr

SWP/AMC:TAD
Attachment
cc: Robin Downey (w/att.)