BEFORE THE HEARING EXAMINER
OF PIERCE COUNTY

TAYLOR SHELLFISH FARMS Appellant.	NO. NOTICE OF APPEAL OF ADMINISTRATIVE DETERMINATION

APPELLANT: Taylor Shellfish Farms ("Taylor")
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APPELLANT'S REPRESENTATIVE: Samuel W. Plauché, WSBA #25476
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DECISION APPEALED

On August 8, 2007, the Assistant Director of Pierce County's Department of Planning and Land Services issued "Administrative Determination, SD22-00, Taylor Shellfish (Foss Property)" ("Administrative Determination"). A copy of the Administrative Determination is attached hereto as Exhibit 1. In this Administrative

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Determination, the County concludes that: (a) Taylor was required to obtain a Shoreline Substantial Development Permit ("SSDP") for its activities at the Foss Geoduck Farm; (b) the SSDP that Taylor obtained in 2000 expired pursuant to RCW 90.58.143, WAC 173-27-090, Pierce County Code 20.76.030, and the terms of the SSDP itself; and (c) Taylor must obtain a new SSDP from the Pierce County Hearing Examiner to continue operation of its geoduck farm. That August 8, 2007, Administrative Determination is the subject of this appeal.

FACTUAL BASIS FOR THE APPEAL

1. In 2000, Taylor leased private tidelands along approximately one mile of shoreline of Case Inlet from the North Bay Partnership ("Foss Farm") for the purposes of establishing a commercial geoduck farm. Specifically, Taylor intended to plant, cultivate, and harvest geoduck at the Foss Farm on an ongoing basis.

2. The planting and harvesting cycle at the Foss Farm is similar to operations at other geoduck farms throughout the area and uses methods developed by the Washington State Department of Fish and Wildlife. Taylor employees insert nine-inch-long PVC pipe into the substrate approximately one foot apart. The employees plant four juvenile geoduck by hand into the PVC pipe. The PVC pipe temporarily protects the vulnerable juvenile geoduck from predators. Taylor employees remove the pipes from the sand after approximately 1-2 years when the geoduck have burrowed sufficiently into the sand to avoid predation and drying out at low tide.

3. The geoduck continue to grow for 4-5 years after the PVC pipes are removed. Taylor employees then harvest the geoduck by using a low pressure, high volume water pump to loosen the sand around the geoducks and remove them from their

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burrows. This is the same methods employed by divers to harvest wild geoducks from subtidal beds. This harvest takes place 5-6 years after the initial planting.

4. Taylor plants and harvests the Foss farm on a rotation, farming it in segments. Taylor planted a portion of the farm in 2001, another portion in 2002, another in 2003, and so on. After the harvest of each portion, Taylor replants that segment of the farm such that the farm is in a perpetual cycle of planting, cultivation and harvesting.

5. Taylor's geoduck farming activities at the Foss Farm do not constitute "development" under the Shoreline Management Act ("SMA"). The Washington Attorney General has opined that geoduck farming does not constitute "development" under the SMA unless the farm in question substantially interferes with the public's use of the surface waters. AGO 2007-001, attached hereto as Exhibit 2. Taylor's Foss Farm does not substantially interfere with the public's use of the waters and is therefore not "development" under the SMA

6. Although Taylor's Foss Farm does not constitute "development," Pierce County Code purports to require that all geoduck farms obtain an SSDP. In 2000, in deference to these regulations and prior to initiating its farming activities, Taylor requested a SSDP from Pierce County to construct and operate the Foss Farm. The Pierce County Hearing Examiner granted the permit in December 2000. *See* Shoreline Substantial Development Permit SD 22-00 ("Permit"), attached hereto as Exhibit 3. The Permit authorizes Taylor to "cultivate the intertidal zone of private tidelands for the commercial production of geoduck clams along the east shore of Case Inlet/North Bay." *Id.*

7. The SMA and implementing regulations require construction of projects permitted by SSDPs be completed within five years of permit issuance. *See* RCW

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90.58.143(1); WAC 173-27-090. The Permit includes a similar restriction that is patterned from the statute and regulations. *See* Exhibit 3 at pp.2-3, conditions 4 and 5.

8. Taylor completed development of the Foss Farm within five years of issuance of the permit. Namely, Taylor established the boundaries of the farm, planted the areas appropriate for geoduck culture with geoduck seed, registered the farm with the Department of Fish and Wildlife, and notified potentially affected Tribes that it had established an artificial shellfish bed. Taylor has now initiated a regular rotation of planting geoduck on the established farm.

9. Taylor has been in continuous communication with the County regarding its farming operations at the Foss Farm ever since it applied for and was granted its Permit. Over the past six years, the County repeatedly confirmed that the Permit remains valid as long as Taylor continues farming at the Foss Farm. The County confirmed that the Permit did not expire, and Taylor was permitted to farm the property on an ongoing basis once the farm was established. Taylor has continued to plant geoduck at the Foss Farm on an annual basis in reliance on those assurances.

10. On May 9, 2007, Taylor received a letter from Pierce County indicating, for the first time, that the County interpreted the Permit as establishing timelines for the operation of the farm. A copy of that letter is attached hereto as Exhibit 4.

11. On June 26, 2007, Taylor prepared a letter addressing the duration of the Permit. A copy of that letter is attached hereto as Exhibit 5. In that letter, Taylor pointed out that the permit did not contain an expiration provision and remained in effect. Taylor also noted that, because its operations do not substantially interfere with the public's use of surface waters, its farm is not "development" under the SMA and does not require an SSDP.

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12. On August 8, 2007, David Rosenkranz, Assistant Director of Planning and Land Services, issued the Administrative Determination that is the subject of this appeal. Contrary to the County's prior interpretations with respect to the Permit's impact on ongoing farming activities, the Administrative Determination concludes that the Permit has expired and that ongoing farming operations, including planting and harvesting, constitute "development" under the SMA and therefore require a new permit.

13. The Administrative Determination appears to require that all geoduck farms in Pierce County obtain SSDPs. The County's conclusion in this regard is contrary to AGO 2007-001. The County's interpretation in this regard is also inconsistent with its historic practices: the County is fully aware of other geoduck farms operating in Pierce County without SSDPs.

LEGAL BASIS FOR THE APPEAL

1. The Administrative Determination is clearly erroneous because it is contrary to the law, including, without limitation, the Shoreline Management Act (e.g., RCW 90.58.020, RCW 90.58.030, RCW 90.58.140, RCW 90.58.143, RCW 90.58.200), implementing regulations in the Washington Administrative Code (e.g., WAC 173-27-020, WAC 173-27-030, WAC 173-27-090, WAC 173-27-140, WAC 173-26-241), the County's Shoreline Master Program, case law, guidance documents interpreting these laws and the County's own historic interpretation of these laws on other, similarly-situated farms. The Administrative Determination is based on the erroneous premise that the ongoing planting and harvesting operations at the Farm constitute development. Based on this premise, the County concludes that a shoreline substantial development permit is required to plant and harvest geoduck, that Taylor's substantial development permit expired with respect to planting and harvesting operations, and that a new permit is required to continue planting and harvesting activities. The fundamental premise on

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which the Administrative Determination is based is inconsistent with the law. Instead, the farming and harvesting operations at the Foss Farm do not constitute development because those operations do not substantially interfere with normal public use of the surface waters. Neither do the operations at the Foss Farm constitute dredging, drilling, filling, removal of materials, or placing of obstructions. Accordingly, no SSDP is required to continue the planting and harvesting at the Foss Farm.

2. The Administrative Determination is clearly erroneous because it is not supported by evidence or facts and is internally inconsistent. The Administrative Determination concludes that the ongoing farming and harvesting activities interfere with normal public use of surface waters such that they constitute "development" and are governed by the Shoreline Management Act. However, the Administrative Determination does not investigate or consider *any* facts related to the impact of the farming and harvesting operations on the public's use of surface waters. This is despite the conclusion in the Administrative Determination that the inquiry into whether an activity interferes with normal public use of waters "will depend on the facts, which should be determined by the local government."

3. The Administrative Determination is clearly erroneous because it is contrary to the SMA, its implementing guidelines, Pierce County Code and the permit itself. Even if the Foss Farm is "development" and requires an SSDP, these provisions of the law, and the language of the Permit, required only that Taylor fully establish the Foss Farm within five years of permit issuance. Taylor fulfilled that requirement. The County's interpretation that authorization to continue farming activities at the Foss Farm expired is contrary to the law (including, but not limited to, RCW 90.58.143, WAC 173-27-090, and PCC 20.76.030) and the language of the Permit itself.

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4. The Administrative Determination is arbitrary and capricious and inconsistent with the County's prior interpretations of the Permit and the law. According to the County's previous and repeated interpretations of the Shoreline Management Act, implementing regulations in the WAC, the County's Shoreline Master Program, and the Permit, itself, the farming and harvesting activities at the Foss Farm were not subject to the expiration provisions of the permit, or of the comparable provisions in the Shoreline Management Act (including RCW 90.58.143) and implementing regulations (including WAC 173-27-090). Accordingly, the County previously determined that ongoing farming activities could continue at the Foss Farm without need of a new permit. The more recent Administrative Determination, which is seemingly based on the same information that was before the County at the time it issued its earlier interpretations, is therefore arbitrary and capricious and inconsistent with earlier interpretations.

5. The County is time-barred from issuing an Administrative Determination that is inconsistent with the Permit and prior interpretations of the Permit and the law. The Permit and the County's prior interpretations constitute land use decisions that should have been appealed administratively and/or to the Courts pursuant to RCW 36.70C. As is any party, the County is time-barred from challenging those earlier determinations beyond the timeframe for filing appeals.

6. Taylor has continued to plant the Farm through its rotation, in reliance on the County's prior interpretations. The Foss Farm is currently planted with geoduck that must be harvested or it will be lost. The doctrine of equitable estoppel precludes the County from issuing an Administrative Determination that is inconsistent with its prior interpretations and would preclude the Taylor from harvesting the geoduck it has planted.

RELIEF SOUGHT

Appellant requests the following relief:

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1. An order and judgment reversing the challenged Administrative Determination because it is clearly erroneous, contrary to law, arbitrary and capricious and not supported by evidence.

2. An order and judgment remanding the matter back to Pierce County's Department of Planning and Land Services for action consistent with the Order;

3. Any other relief as the Hearing Examiner may find just and equitable.

Respectfully submitted this 22nd day of August, 2007.

GORDONDERR LLP

By: _____
Samuel W. Plauché, WSBA #25476
Tadas Kisielius, WSBA #28734
Attorneys for Appellant, Taylor Shellfish Farms

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EXHIBIT 1

Pierce County
Department of Planning and Land Services

CHUCK KLEEBERG
Director

2401 South 35th Street
Tacoma, Washington 98409-7460
(253) 798-7210 • FAX (253) 798-7425

RECEIVED
AUG 10 2007
GordonDerr LLP

August 8, 2007

CERTIFIED MAIL
7005 3110 0001 9661 4204

Taylor Shellfish, Inc.
Attn: Diane Cooper
SE 130 Lynch Road
Shelton, WA 98584

RE: Administrative Determination, SD22-00
Taylor Shellfish (Foss Property)

Dear Ms. Cooper:

As you know an issue has arisen regarding your Shoreline Substantial Development Permit (SSDP) to cultivate the intertidal zone of private tidelands for the commercial production of geoduck clams along the east side of Case Inlet/North Bay, commonly known as the Foss Property, SD22-00. This permit was approved by the Hearing Examiner on December 28, 2000. No appeals were filed.

The present issue involves whether the permit has expired. Planning and Land Services has reviewed this matter and concludes that the permit was issued for five years, and that a one-year extension was granted, thereby extending the life of the permit to six years. Accordingly, the permit has expired and further work at the site will require application for and approval of a new shoreline substantial development permit (SSDP).

Our position is based upon Revised Code of Washington (RCW) 90.58.143, Washington Administrative Code (WAC) 173-27-090, Pierce County Code (PCC) 20.76.030, the Hearing Examiner's December 28, 2000, decision, 2007 Attorney General's Opinion (AGO) No. 1, and the Court of Appeals decision in ***Washington Shell Fish, Inc. v. Pierce County***, 132 Wn. App. 239 (2006), as set forth below. In addition, we have reviewed the letter from Samuel W. Plauche at Gordon Derr, LLP, dated June 26, 2007.

I. RCW 90.58.143.

RCW 90.58.143(1) sets forth time requirements for SSDPs and other shoreline permits. Subsection 1 provides that these time requirements apply to all shoreline permits and that upon a finding of good cause; local governments may adopt different time limits from those set forth in this statute:

> (1) The time requirements of this section shall apply to all substantial development permits and to any development authorized pursuant to a variance or conditional use permit authorized under this chapter. Upon a finding of good cause, based on the requirements and circumstances of the project proposed and consistent with the policy and provisions of the master program and this chapter, local government may adopt different time limits from those set forth in subsections (2) and (3) of this section as a part of action on a substantial development permit.

Subsection 2 of RCW 90.58.143 requires that construction activity or, where no construction activities are involved, the use or activity shall be commenced within two years of the effective date of a SSDP. A one-year extension of the commencement date may be approved.

Subsection 3 provides that authorization for construction activities shall terminate five years after the effective date of the SSDP, with a possible one year extension:

> (3) Authorization to conduct construction activities shall terminate five years after the effective date of a substantial development permit. However, local government may authorize a single extension for a period not to exceed one year based on reasonable factors, if a request for extension has been filed before the expiration date and notice of the proposed extension is given to parties of record and to the department. [Emphasis added.]

Subsection 4 addresses the effective date of SSDPs in light of appeals, etc. Of note is that part of this section which provides that the time periods for commencing the construction or activity, and the five year period in subsection (3) do not run where other governmental permits/approvals are required:

> (4) The effective date of a substantial development permit shall be the date of filing as provided in RCW 90.58.140(6). The permit time periods in Subsections (2) and (3) of this section do not include the time during which a use or activity was not actually pursued, due to the pendency of administrative appeals or legal actions, or due to the need to obtain any other government permits and approvals for the development that authorize the development to proceed, including all reasonably related administrative or legal actions on any such permits or approvals.

II. WAC 173-27-090.

WAC 173-27-090 parallels RCW 90.58.143. WAC 173-27-090 Subsections 1-4 appear to be identical to Subsections 1-4 in RCW 90.58.143, except that WAC 173-27-090(3) refers to conducting "development" activities, as opposed to "construction" activities.

III. PCC 20.76.030.

PCC 20.76.030.G sets forth time limitations for SSDPs as well as other shoreline permits (shoreline conditional use permits, shoreline variances, etc.). Subsection G.2 requires that "construction or substantial progress toward construction of a project shall be commenced or, where no construction is involved, the use or activity shall be commenced within two years of the effective date of a permit." This subsection goes on to allow the Hearing Examiner to authorize a single one-year extension.

Like WAC 173-27-090(3) subsection G.3 states that "[a]uthorization to conduct development activities shall terminate five years after the effective date of a permit. The Examiner may authorize a single, one-year extension as set forth in Subsection 2, above." Other subsections in G address the date of filing, the effect of appeals and litigation, revisions, etc.

IV. 2007 AGO No. 1.

In January of this year the Attorney General issued an opinion (2007 AGO No. 1) regarding the need for SSDPs for geoduck planting, growing and harvesting activities. Although the opinion did not address the time limitation for SSDPs, the opinion is helpful in that it discusses the activity itself.

In this opinion the Attorney General questioned whether geoduck farming is, in and of itself, a "development" under the SMA.[1] The Attorney General concludes that geoduck tube aquaculture does not necessarily fall within the definition of "development."

> Therefore, although hypothetically a project may interfere with use of surface waters, we conclude that the SMA addresses permitting of actual "projects" and involves a concrete examination of whether the project interferes with normal public use of surface waters. The Washington Shell Fish case illustrates this approach by examining the facts of a particular project. Accordingly, we conclude that whether a particular geoduck farm interferes with normal public use of Taylor Shellfish, Inc. surface waters will depend on the facts, which should be determined by local government when deciding if a permit is required. See RCW 90.58.140(1).[2]

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[1] RCW 90.58.030(3)(d) defines "development" to mean: a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level[.]

[2] The Attorney General also states that geoduck tubes do not fall within the ordinary meaning of the word "structures" referred to in the definition of "development." If tubes are not "structures," then placing them does not appear to amount to "construction."

V. Washington Shell Fish, Inc. v. Pierce County, Court of Appeals Decision.[3]

As noted in the AGO, the Court of Appeals recently interpreted Pierce County's shoreline regulations with respect to geoduck activities in ***Washington Shell Fish, Inc. (WSF) v. Pierce County***, 132 Wn. App. 239 (2006). A brief recap of that decision may be helpful. In this case, Washington Shell Fish (WSF) leased County Park property (tidelands) at the Purdy Spit as well as other nearby privately owned tidelands. After receiving numerous complaints about WSF's harvesting and aquaculture activities, PALS issued Cease and Desist (C&D) orders applicable to all 11 leased properties, requiring WSF to stop its geoduck operations because they did not have SSDPs. WSF appealed the C&D orders and the Hearing Examiner upheld the C&D orders. WSF filed a judicial appeal (LUPA) and the Pierce County Superior Court upheld the Examiner's decision. WSF appealed to the Court of Appeals.

WSF argued before the Court of Appeals that it was not required to obtain a SSDP before engaging in geoduck planting and harvesting on leased shorelines because such activities are not "development." The Court of Appeals disagreed:

> In these ways, WSF's activities prevented the general public from using certain areas of the water: (1) WSF's geoduck planting and harvesting equipment posed a safety risk to the public; and (2) WSF's activities and fixed objects occupied shoreline water, thereby excluding others. The testimony and exhibits provided substantial evidence to support the hearing examiner's finding that WSF's geoduck activities interfered with the normal public use of the surface water. Therefore, under PCC 20.76.030, WSF engaged in "development" when it harvested and planted geoducks on the leased properties.
>
> WSF also argues that it merely disrupted, but did not remove, sand when it used water jets to harvest geoducks. But the hearing examiner did not expressly address WSF's sand removal; rather, he based his decision on WSF's interference with the public's use of the surface water. Interfering with public use of the surface water is a sufficient ground, standing alone, to support the hearing examiner's findings and the cease and desist orders as they relate to geoduck planting and harvesting. Thus, we do not address whether disrupting sand provides a separate basis for requiring a substantial development permit under Pierce County's shoreline regulations.
>
> The Court of Appeals further found that the activities involving the harvesting and planting of geoducks constituted "substantial" development:

[3] A petition for review of this case is pending before the Washington Supreme Court.

> WSF admitted engaging in both planting cultivated geoducks and harvesting wild geoducks on the leased lands (except for the Tellefson and Ohlson properties). Neither activity is exempt from substantial development permit requirements under PCC 20.24.030: Harvesting activities are subject to PCC 20.24.030(A), and planting activities are subject to PCC 20.24.030(B) through (D). Because WSF's geoduck activities constituted substantial developments, WSF had to apply for and to obtain the required permits before planting or harvesting geoducks.

Washington Shell Fish, Inc. v. Pierce County, 132 Wn. App. at 250 - 253.

VI. Taylor Shellfish's Position.

In the case at hand, a SSDP was issued on December 28, 2000. More than six years have passed since the permit was issued. In his June 26, 2007, letter, Samuel W. Plauche, Taylor Shellfish's attorney, argues that Condition 5 of the Examiner's decision requires that the approved project be completed within five years, with an option for a one-year extension; and that they have met condition 5 by building/creating/installing the Foss geoduck farm within five years. Mr. Plauche further argues that they do not need a SSDP for continued geoduck farming under the criteria set forth in the AGO discussed above.

Taylor Shellfish describes the process by which it constructed the geoduck farm as establishing the boundaries of the Foss farm, registering it with the WDFW, and planting the entire farmable area with geoduck seed. Although not specifically mentioned, the actual construction appears to refer to the installation of PVC tubes and netting. While Taylor Shellfish considers such activities to be "construction" of structures as required by RCW 90.58.143(3), the Attorney General Opinion referenced above appears to be to the contrary. ("Geoduck tubes do not fall within the meaning of the word 'structures' referred to in the definition of development.)

Regardless of whether the installation of geoduck tubes constitutes "structures" and/or "construction", WAC 173-27-090(3) and PCC 20.76.030.G(3) limit "development" activities to a five year period. Since the Washington Shell Fish case determined geoduck aquaculture falls within the definition of "development," the SSDP approved for this geoduck farm is limited to a five-year period.

Taylor Shellfish also argues that even if a SSDP was required to establish the operation, they do not need a SSDP for continued operation based upon the criteria set forth in the Attorney General Opinion.

The Planning and Land Services Department disagrees with Taylor Shellfish's interpretation of the ***Washington Shell Fish*** Court of Appeals decision. The decision was not limited to public lands. The Court of Appeals specifically upheld the requirement for SSDPs on public and private tidelands based upon the wording in Pierce County's shoreline regulations. In the present case, the activities of Taylor Shellfish are similar to the activities of Washington Shell Fish. It is this activity that necessitates the SSDP, both in 2000 and now.

In conclusion, under applicable provisions of the PCC shoreline regulations, Taylor Shellfish was properly required to obtain a SSDP in 2000 for its activities at the Foss property. The permit that Taylor obtained in 2000 expired pursuant to the applicable RCW, WAC, PCC provisions and Hearing Examiner decision. To continue operation of its geoduck farm at this location, Taylor must obtain a new SSDP from the Hearing Examiner.

In accordance with PCC 1.22, Appeals of Administrative Decisions to the Examiner, any person aggrieved or affected by any decision of an administrative official may file a notice of appeal. A notice of appeal, together with the appropriate appeal fee, shall be filed within 14 days of the date of an Administrative Official's decision, at the Public Services Building, 2401 So. 35th Street, Tacoma, Washington.

Sincerely,

David Rosenkranz
Assistant Director

JG/TB/cla
ADMIN/PLANNERS/BYERS/Taylor Shellfish AD 2.doc

c: Samuel W. Plauche, Attorney at Law, Gordon Derr, 2025 - 1st Avenue, Suite 500, Seattle, WA 98121-3140
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Ty Booth, Senior Planner
Trish Byers, Associate Planner
Mark Luppino, Code Enforcement Officer

EXHIBIT 2

Westlaw.

Wash. AGO 2007 NO. 1, 2007 WL 81009
(Wash.A.G.)

Office of the Attorney General
State of Washington
*1 AGO 2007 No. 1

January 4, 2007

DEPARTMENT OF FISH AND WILDLIFE - SHORELINE MANAGEMENT ACT - DEPARTMENT OF ECOLOGY - Extent to which hydraulic project approval permits or shoreline substantial development permits are required for the planting, growing, and harvesting of farm-raised geoduck clams.

1. The Department of Fish and Wildlife may not require hydraulic project approval permits under RCW 77.55.021 to regulate planting, growing, or harvesting of farm-raised geoduck clams by private parties.

2. The planting, growing, and harvesting of farm-raised geoduck clams would require a substantial development permit under the Shoreline Management Act if a specific project or practice causes substantial interference with normal public use of the surface waters, but not otherwise.

3. Where a geoduck clam culture project would require a substantial development permit, the local government and the Department of Ecology would have a variety of enforcement options available; in some cases, conditional use permits might also be used to regulate this practice.

Honorable Patricia Lantz
State Representative
26th District
P. O. Box 40600
Olympia, WA 98504-0600

Dear Representative Lantz:

By letter previously acknowledged, you have requested an opinion on the following questions, which we have paraphrased slightly for clarity:

1. May the Department of Fish and Wildlife require hydraulic project approval permits under RCW 77.55.021 to regulate planting, growing, and harvesting of farm-raised geoduck clams by private parties?
2. Should local governments require shoreline substantial development permits under RCW 90.58.140 for planting, growing, and harvesting farm-raised geoduck clams by private parties?
3. If substantial development permits can be required for geoduck farming operations, how can local government and the Department of Ecology address existing operations?

*[original page 2]*BRIEF ANSWERS

We answer the first question in the negative. RCW 77.115.010(2) limits application of Washington Department of Fish and Wildlife (WDFW) regulatory powers with respect to private sector cultured aquatic products. The limitation prevents WDFW from requiring a hydraulic project approval permit to regulate the planting, growing, and harvesting of geoducks grown by private aquaculturalists.

Regarding the second question, we conclude that farm-raised geoducks may require a substantial development permit under circumstances where the particular geoduck planting project causes substantial interference with normal public use of the surface waters. Projects that do not meet this description would not require a substantial development permit.

In answer to the third question, local government and the Department of Ecology may take informal or formal civil enforcement actions against a

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substantial development that is undertaken without a permit. Alternatively, conditional use permits may be used to manage this type of aquaculture if the approved shoreline master program includes such a requirement.

BACKGROUND

*2 Your questions concern a new type of shellfish farming that takes place on lower elevations of intertidal lands. [FN1] The process involves four-inch diameter PVC pipe cut into approximately one-foot lengths. The short PVC tube is inserted in the beach, leaving a few inches above the surface. A shellfish grower places tiny juvenile geoduck clams into the sandy substrate protected by the tube. The tube itself, or the general area, is covered with netting. Together, the tube and netting protect the juvenile geoduck from predators until it grows large enough to bury itself to a safer depth. After the geoduck has grown a sufficient amount to avoid predation (which requires several months), the shellfish grower removes the netting and tubes. The geoduck farming site may occupy many acres of tideland.

Approximately five years after planting, geoducks reach their marketable (and impressive) size as one of the world's largest burrowing clams. At that point, the shellfish grower harvests the clams which have "burrowed" two or three feet below the surface. A water jet loosens the substrate around the clam's shell and siphon (also called the "neck"), allowing the harvester to remove the geoduck from the muck.

The harvest incidentally releases silt and sediment which may temporarily be found in the surrounding water. Kent S. Short & Raymond Walton, Ebasco Environmental, *Transport and Fate of Suspended Sediment Plumes Associated with Commercial Geoduck Harvesting* (April 1992) (copy on file). Removing a geoduck from the beach therefore results in a temporary depression where the substrate was loosened and the geoduck removed. *See generally [original page 3] Washington Shell Fish, Inc., v. Pierce Cy.*, 132 Wn. App. 239, 131 P.3d 326 (2006) (petition for review denied Jan. 3, 2007) (discussing geoduck aquaculture). [FN2]

1. May the Department of Fish and Wildlife require hydraulic project approval permits under RCW 77.55.021 to regulate planting, growing, and harvesting of farm-raised geoduck clams by private parties?

Your first question concerns the requirement for a hydraulic project approval (HPA) issued by the WDFW under the authority of RCW 77.55.021. That statute provides, in part:

> (1) 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) (emphasis added). A "hydraulic project" is "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). The work of inserting tubes and netting on the tidelands for geoduck aquaculture would be a hydraulic project because it is "work" that "uses" and "changes" the " bed of any of the salt or freshwaters of the state." *Id* . An HPA permit would thus be required for geoduck aquaculture unless there is some exception. The exception is in the statutes that address WDFW disease inspection powers for private sector cultured aquatic products.

*3 RCW 77.115.010(2) provides, in part:

> The authorities granted the department by [the rules implementing a program of disease inspection and control for aquatic farmers]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.

(Emphasis added.)

[original page 4]Farm-raised geoducks are within the definition of private sector cultured aquatic products because they are "native, nonnative, or hybrids of marine or freshwater plants and animals that are propagated, farmed, or cultivated on aquatic farms". RCW 15.85.020(3). An "aquatic farmer" is a private sector person who "commercially farms and manages the cultivating of private sector cultured aquatic products on the person's own land

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or on land in which the person has a present right of possession." RCW 15.85.020(2). The case of *State v. Hodgson*, 60 Wn. App. 12, 802 P.2d 129 (1990), illustrates that privately planted geoducks can be private sector cultured aquatic products. [FN3]

RCW 77.115.010(2) allows WDFW to regulate private sector cultured aquatic products only by using the enumerated statutes, which do not include the HPA permit. We reach this conclusion after considering the two canons of statutory construction identified in your letter and by examining the language of the statute and the statutory scheme.

First, we examine whether the HPA statute is a later enacted statute that might apply to geoduck farming regardless of RCW 77.115.010(2). This concept does not apply, however, because the general HPA requirement dates back to the 1940s. *See* Laws of 1943, ch. 40, § 1. The HPA law, indeed, existed when the original version of RCW 77.115.010(2) was adopted in Laws of 1985, ch. 457, § 8. *See former* RCW 75.20.100 (1985 HPA statute). Thus, although a 2005 bill recodified the HPA law, we do not conclude that it is a new legal requirement. We therefore cannot conclude that HPA authority reflects a latter enactment outside the scope of RCW 77.115.010(2).

Second, we examine whether the HPA law is more specific than RCW 77.115.010(2), because a more specific statute is given effect if there is a conflict with a general statute. *See Pannell v. Thompson*, 91 Wn.2d 591, 597, 589 P.2d 1235 (1979). However, the HPA law is substantially broader than RCW 77.115.010(2), applying to all work and construction in salt and fresh waters. In contrast, RCW 77.115.010(2) has a narrow scope. We therefore conclude that RCW 77.115.010(2) is a later enactment and more specific with regard to WDFW authority to regulate private sector cultured aquatic products.

Next, we consider that RCW 77.115.010(2) does not mention the HPA permit or terms that address HPA requirements. The HPA statute refers to " construction" or "work" that "uses" or "changes" the bed or flow of state waters. RCW 77.55.021(1). In contrast, RCW 77.115.010(2) does not use any of these terms. Moreover, other statutes in RCW 77.55 provide explicit exemptions to the HPA permit. *See* RCW 77.55.031-.071 (describing activities that might use or change the beds of state waters such as crossing an established ford, removing derelict fishing gear, abatement of certain noxious plants, hazardous waste cleanups, and construction of housing for sexually violent predators). It is arguable that these express *[original page 5]*exemptions in RCW 77.55 should be interpreted as providing the only exceptions to the HPA permit. *See In re S.B.R.*, 43 Wn. App. 622, 625, 719 P.2d 154 (1986) (express exceptions in a statute exclude all other exceptions).

*4 However, we do "not construe statutes so as to render language meaningless." *State v. Haddock*, 141 Wn.2d 103, 112, 3 P.3d 733 (2000). RCW 77.115.010(2) has no meaning if it does not reflect a legislative intent to limit WDFW authority to regulate private sector cultured aquatic products. We therefore construe RCW 77.115.010(2) as a limit on WDFW regulation of private sector cultured geoducks using the following guidance.

First, RCW 77.115.010(2) acts as an exception and must be read narrowly. *See State v. Turpin*, 94 Wn.2d 820, 825, 620 P.2d 990 (1980) (statutory provisos should be strictly construed with doubts resolved in favor of the general provisions to which the proviso does not strictly apply). We also avoid absurd or unintended consequences. *Frat. Order of Eagles, Tenino Aerie v. Grand Aerie*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002) (The courts "will avoid literal reading of a statute which would result in unlikely, absurd, or strained consequences."). Thus, we do not read RCW 77.115.010(2) disjunctively as a limit on WDFW regulation of any registered aquatic farmer, because that leads to absurd results where, for example, WDFW could not regulate an aquatic farmer who is hunting because the laws regulating hunting are not on the statutory list. We read RCW 77.115.010(2) conjunctively. Thus, it limits regulations when applied to both the private sector cultured aquatic products *and* the aquatic farmer. [FN4]

We also rely on RCW 77.12.047(3) to reach our conclusion. This statute provides that rules adopted by the Fish and Wildlife Commission shall not apply to private sector cultured aquatic products, except for rules adopted under RCW 77.12.047(1)(g) (allowing WDFW to adopt rules " specifying the statistical and biological reports required from fishers, dealers, boathouses, or

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processors of wildlife, fish or shellfish.") Under this statute, WDFW rules governing the time, place, and manner for taking wild fish, shellfish, and wildlife are not applicable to private sector cultured aquatic products. We conclude that if an HPA permit were used to regulate geoduck planting and harvesting, it would sidestep this express limit on the use of WDFW rules, confounding express legislative intent.

Finally, we consider that the HPA permit is enforced primarily using criminal sanctions under RCW 77.15.300. Interpretation of whether an HPA permit is required must therefore consider the rule of lenity. Under the rule of lenity, if two possible constructions of a statute imposing a criminal penalty are permissible, the criminal statute will be construed against the state and in favor of the accused. *See, e.g., State v. Radan*, 143 Wn.2d 323, 330, 21 P.3d 255 (2001). A person planting geoducks without an HPA permit would properly invoke the rule of lenity to argue for the above interpretation of RCW 77.115.010(2) limiting the HPA permit requirement. [FN5]

> ***[original page 6]*** **2. Should local governments require shoreline substantial development permits under RCW 90.58.140 for planting, growing, and harvesting farm-raised geoduck clams by private parties?**

Background - The Shoreline Management Act

*5 The Legislature enacted the Shoreline Management Act (SMA) to protect and to manage the private and public shorelines of Washington State; to further public health, public rights of navigation, land, vegetation, and wildlife; and to plan for and foster reasonable and appropriate shoreline uses. RCW 90.58.020; *Samuel's Furniture, Inc. v. Ecology*, 147 Wn.2d 440, 448, 54 P.3d 1194 (2002). The SMA regulates both "uses" of shorelines as well as "developments" on them. *Clam Shacks of Am., Inc. v. Skagit Cy.*, 109 Wn.2d 91, 95-96, 743 P.2d 265 (1987).

RCW 90.58.140(1) provides that development on the shorelines shall not be undertaken unless consistent with the SMA, with SMA guidelines, and with local government master programs. Subsection (2) prohibits substantial development on the shorelines "without first obtaining a permit from the government entity having administrative jurisdiction under this chapter."

RCW 90.58.030(3)(d) defines "development" to mean:

> a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level[.]

RCW 90.58.030(3)(e) defines "substantial development" as "any development of which the total cost or fair market value exceeds five thousand dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state." We accept your suggestion that we engage in the reasonable assumption that the cost and value of such activity will exceed the five thousand dollar threshold for "substantial" development in RCW 90.58.030(3)(e).

"Under the [SMA]no 'substantial development' exists if there is no 'development' within the meaning of RCW 90.58.030(3)(d), because for there to be a 'substantial ***[original page 7]*** development', there must first be a 'development' " . *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 812, 828 P.2d 549 (1992). Our analysis therefore focuses on whether geoduck farming is a development. [FN6]

Substantial development permits are administered by local government according to shoreline master programs. RCW 90.58.140(3). The process for development of the shoreline master program governing these permits is described in *Weyerhaeuser Co. v. King Cy.*, 91 Wn.2d 721, 729, 592 P.2d 1108 (1979):

> The SMA requires each local government to develop a master program for the use and development of shorelines within its boundaries. RCW 90.58.080. The programs, once approved by the Department of Ecology, operate as controlling use regulations for the various shorelines of the state. RCW 90.58.100.

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Analysis

We start by examining a recent case where the Court of Appeals held that a geoduck tube aquaculture operation required a substantial development permit. *Wash. Shell Fish*, 132 Wn. App. 239. [FN7] The Court analyzed the Pierce County shoreline master program definitions for substantial development, which are identical to SMA definitions. It held that geoduck aquaculture in that case involved "development" because it interfered with normal public use of the waters. *Id.* at 251-52, citing RCW 90.58.030(3)(d) ("any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level").

*6 We have found the Court of Appeals opinion answers your question only in the context of the facts of that case, and it fails to offer an analysis applicable to all geoduck tube aquaculture. To answer your questions, we conclude that geoduck tube aquaculture does not necessarily fall within the definition of development except where it interferes with normal public use of surface waters, as in *Washington Shell Fish*:

> Several witnesses testified that WSF left rope in the water where WSF had planted geoducks, and this rope would become entangled with people or non-geoduck-harvest-related objects. WSF divers harvesting geoducks placed markers on the water's surface that prevented public use of that area. The PVC planting pipes that WSF inserted into the shorelines were up to 12 inches long, ***[original page 8]***with their top portions protruding vertically out of the sand. In addition, according to one witness, WSF used up to four boats at a time to store the geoducks that divers harvested, one of which was a barge large enough to drag a buoy; these WSF boats further constricted the water surface open to public use.

Wash. Shell Fish, 132 Wash. App. at 251. The opinion goes on to describe the particular site where wind surfers were affected by the project. The relevant factors appear to be the public use of the surface waters of the site and the manner in which the geoduck project interfered with public use-floating ropes on the surface, markers on the water's surface creating barriers to public use, and barges and boats that occupy the site to the exclusion of the public.

Although *Washington Shell Fish* shows how geoduck tube aquaculture can interfere with use of surface waters, nothing in the description of geoduck aquaculture necessitates such interference. The PVC pipes protrude only inches and have no more interference with use of the surface waters than bags of oysters, clam nets, or a small rock on the shoreline. The markers, floats, barges, and entanglements affecting the surface in *Washington Shell Fish* may not exist at every geoduck farm. The neighboring public park appears to trigger the interference with public use of the surface waters.

Therefore, although hypothetically a project may interfere with use of surface waters, we conclude that the SMA addresses permitting of actual " projects" and involves a concrete examination of whether the project interferes with normal public use of surface waters. The *Washington Shell Fish* case illustrates this approach by examining the facts of a particular project. Accordingly, we conclude that whether a particular geoduck farm interferes with normal public use of surface waters will depend on the facts, which should be determined by local government when deciding if a permit is required. *See* RCW 90.58.140(1).

We next examine the other statutory definitions of development. The *Washington Shell Fish* opinion does not address the argument that geoduck tube aquaculture is development because the harvest disrupts the substrate around the geoduck. *Wash. Shell Fish*, 132 Wash. App. at 252 n.12. We conclude that disruption of the substrate around a geoduck, considered in isolation, cannot be legally distinguished from general clam digging or raking. Any clam harvest disrupts the substrate around the buried clam. We find no indication that the SMA has ever treated clam harvesting, alone, as development. Moreover, it would lead to a burdensome and apparently unintended consequence where substantial development permits would be required for all significant clam beds, both commercial and recreational.

*7 Next, we consider whether geoduck tube aquaculture involves dredging. In 1977, the Washington Supreme Court affirmed the Shoreline Hearings Board and held that clam harvesting using a dredge was a type of substantial development.

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English Bay Enters., Ltd. v. Island Cy., 89 Wn.2d 16, 568 P.2d 783 (1977). The court rejected the harvester's argument that the statutory definition of "development" did not explicitly include clam harvesting.

> [T]he Board found, and we find here, that it is not the goal of the appellant's activity which governsbut rather it is the method employed. The appellant's operation involves the removal of earth from the bottom of the bay. In the plain and ordinary sense of the term, this procedure is "dredging." The Board found *[original page 9]*that this activity constitutes dredging; the interpretation of the Board is to be given great weight. Hama Hama Co. v. Shorelines Hearings Bd., 85 Wash.2d 441, 536 P.2d 157 (1975).

Id. at 20 (emphasis added).

The dredging in *English Bay* is significantly different. A hydraulic dredge machine removed the top twelve inches of beach, leaving a trench while dislodging clams. *Id.* at 18. The *English Bay* case thus involved a dredging machine, which is necessary to dictionary definitions of dredging, but absent in geoduck farming. *See* Merriam-Webster OnLine Dictionary, Dredging, "1 a: to dig, gather, or pull out with or as if with a dredge -- often used with *up*b: to deepen (as a waterway) with a dredging machine". The water jet used to loosen the substrate around an individual geoduck is not a dredging machine, even if water jets might be used for dredging channels in other places. Here, the water jet simply loosens a geoduck.

Constructing Structures

Geoduck tubes do not fall within the ordinary meaning of the word "structures" referred to in the definition of development. WAC 173-27-030(15) defines structure as "a permanent or temporary edifice or building, or any piece of work artificially built or composed of parts joined together in some definite manner." This does not suggest that a structure could comprise of PVC tubes on a beach. The tubes are not "edifices or buildings" taken separately, they do not form an "edifice or building" taken together, nor are the tubes "parts joined together in a definite manner." Our conclusion is reinforced by *Cowiche Canyon Conservancy*, above, where the Court rejected an argument that removal of railroad trestles was a development, because it modified a structure. The Court there held that removal resulted in no structures, applying the common meaning of the term.

Drilling, Filling, And Removal Of Materials

The term "drilling" is commonly defined in terms of creating a hole. *See* Merriam-Webster OnLine Dictionary, Drill, "2 a(1) : to bore or drive a hole in (2) : to make by piercing action <*drill* a hole>" . While tubes could be creatively described as being "drilled into" the substrate, no hole is created. The tube is a temporary barrier protecting the juvenile clam.

*8 Similarly, while sand, silt, and gravel is disturbed, geoduck aquaculture does not involve filling of tidelands. In contrast, *Dep't of Fisheries v. Mason Cy.*, SHB No. 88-26, 1989 WL 106061 (Wash. Shore. Hrgs. Bd. Aug. 15, 1989), the Shoreline Hearings Board considered a proposal to apply several inches of gravel over large areas of tidelands to create an artificial bed for clam production. That filling required a substantial development permit.

Finally, if sediment is disrupted during harvest, only a minimal amount of sediment is actually removed with the clam. This minimal amount of materials removed does not comport with a reasonable interpretation of the statutory language concerning "removal of materials." *See Black's Law Dictionary* 464 (8th ed. 2004), "*de minimis non curat lex*" (the law does not concern itselfwith trifles).

*[original page 10]*Placing Obstructions

The statutory definition refers to "placing obstructions" as "development." Assuming that this refers to blocking or clogging passage on the water, we conclude that it is conceivable that a project might involve tubes, nets, or other materials that obstruct passage. Arguably, the tubes could obstruct a walker, but that would be relevant only if placed on tidelands used by the public. This term should be applied based on the particular project, as in *Washington Shell Fish*. Local government, as the primary administrator of the substantial development permit system, would determine

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whether a particular project involves placing obstructions. *See* RCW 90.58.140(3); *Samuel's Furniture*, 147 Wn.2d at 455. [FN8]

The Farming Practices Exception

Several comment letters have raised the farming practices exception from the substantial development permit in RCW 90.58.030(3)(e)(iv). This subsection 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.

Every term in the exception describes upland farming; no term reflects aquaculture. *See also* WAC 173-27-040(2)(e) (adopting statute into regulation without any clarification or interpretation of aquaculture practices).Moreover, the Department of Ecology guidelines on shoreline uses distinguish between aquaculture and agriculture. *See* WAC 173-26-241(3)(a), (b). We found no history to suggest that RCW 90.58.030(3)(e)(iv) was adopted to address aquaculture activities or that it has been applied to aquaculture. [FN9] Accordingly, we conclude that this exception does not apply to geoduck tube aquaculture.

To summarize, we conclude that geoduck aquaculture requires a substantial development permit if conducted as described by *Washington Shell Fish*. We do not conclude that geoduck ***[original page 11]***aquaculture inherently involves interference with normal public use of the surface waters in all locations. We also conclude that it does not involve dredging, construction, or other types of development described by RCW 90.58.030(3)(d). Therefore, the substantial development permit requirement is not necessarily required for intertidal geoduck farming.

*9 As described in the next section, our conclusion does not imply that the SMA lacks authority for local government to manage geoduck aquaculture use of the shoreline. The SMA authorizes conditional use permits to manage shoreline uses.

3. If substantial development permits can be required for geoduck farming operations, how can local government and the Department of Ecology address existing operations?

If there is a geoduck farm that meets the definition of substantial development, then both state and local government have a variety of options. First, government may simply pursue informal measures, like asking the geoduck farmer to obtain a permit. Second, RCW 90.58.210 authorizes Ecology and local government to issue penalties, orders requiring permits, and orders requiring corrective action. [FN10]

We also note that government may consider using " conditional use permits" to regulate geoduck aquaculture. The *Clam Shacks* case, cited above, illustrates this SMA regulatory power. In that case, a shellfish harvester using a "hydraulic rake" claimed that if his harvests did not involve substantial development, then no SMA permit could be required to regulate it as a use of the shoreline. The Washington Supreme Court unanimously rejected the argument. The SMA includes express directions and powers to regulate and manage "uses" of the shoreline. Local government may, therefore, require a conditional use permit to manage that hydraulic rake clam harvest. The opinion contains the following discussion:

> Clam Shacks argues that the language of the statute and its application of the permit process only to substantial developments limits the SMA to developments as defined. Thus, Clam Shacks concludes there can be no use control, regardless of the master program, unless the activity involved constitutes a development. We disagree. Such construction would frustrate the declared policy of the SMA.

Clam Shacks v. Skagit Cy., 109 Wn.2d at 95.

It is likely that shoreline master programs have not considered using conditional use permits to regulate geoduck aquaculture and, therefore, that option is not immediately applicable in all jurisdictions. However, all local master programs are being reviewed and updated during the upcoming decade. *See* RCW 90.58.080. Ecology's guidelines for updating master programs ***[original page 12]*** provide that aquaculture of this type is a favored use of the shoreline environment that should be accommodated by shoreline master programs. WAC

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173-26-241(3)(b). [FN11] Therefore, this option is prospectively available as a means for managing existing and future operations.

We trust that the foregoing analysis will be helpful to you.

Sincerely,
Rob Mckenna
Attorney General

Jay Douglas Geck
Deputy Solicitor General

[FN1]. Intertidal here simply refers to tidelands that are periodically covered and uncovered by the daily high and low tides. It is not necessary to distinguish types of tidelands and bedlands to address the questions.

[FN2]. Embedded and immobile shellfish are part of the real property, under Washington law, belonging to the landowner. *State v. Longshore*, 141 Wn.2d 414, 5 P.3d 1256 (2000). The proprietary aspect of shellfish is illustrated by statutes such as RCW 79.135.130, which requires payment of fair market value for existing shellfish on state aquatic lands before leasing to a shellfish farmer. Other state laws allow shellfish to be taken without regard to the state's proprietary interest. For example, shellfish on certain parks and public lands are available for recreational harvest under licenses and rules of the WDFW and other state agencies.

Shellfish may also be subject to a "right of taking fish at all usual and accustomed grounds and stations" created by federal treaties with various Indian Tribes in Washington. Because federal law creates the treaties and preempts contrary state laws, the right of taking shellfish under the treaty can be applied notwithstanding state property law. *See United States v. State of Washington*, 157 F.3d 630, 646-47 (9th Cir. 1998).

[FN3]. In *Hodgson*, a criminal defendant contended that geoduck clams he harvested from DNR-managed bedlands were private sector cultured aquatic products. The court took judicial notice that geoduck clams take five years to mature and rejected the defendant's argument because the harvester's connection with the public geoduck beds was transitory, and wild geoduck clams were not under the active supervision and management of a private aquatic farmer at the time of planting. *State v. Hodgson*, 60 Wn. App. at 17-18. In contrast to *Hodgson*, your question deals with an aquatic farmer who actively supervises and manages the geoduck clam bed at the time of planting.

[FN4]. Thus, a person who constructs a boat ramp, dock, or other construction work at an aquatic farm would require an HPA permit, because the permit regulates construction; it does not regulate aquaculture products.

[FN5]. Whether lenity applies here depends on whether application of HPA laws to a geoduck planter would be criminal. An ordinance is penal or criminal in nature when "a violation of its provisions can be punished by imprisonment and/or a fine." *State v. Von Thiele*, 47 Wn. App. 558, 562, 736 P.2d 297 (1987). An ordinance is remedial, rather than criminal, "when it provides for the remission of penalties and affords a remedy for the enforcement of rights and *redress of injuries*." *Von Thiele*, 47 Wn. App. at 562. Civil and criminal penalties may coexist without "converting the civil penalty scheme into a criminal or penal proceeding." *Von Thiele*, 47 Wn. App. at 561.

We interpret the HPA laws using lenity because of the primacy of the criminal sanctions; the HPA code includes minimal civil remedial powers. For example, the HPA laws include no provisions for civil orders to stop work or to take corrective actions. *See* RCW 90.58.210(3) (Shoreline Management Act authorizes civil penalty, stop work orders, and corrective action orders). While the HPA laws include a narrow civil penalty provision, RCW 77.55.291, the requirement of an HPA is enforced with a criminal sanction under case law. *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 602 P.2d 1172 (1979).

[FN6]. In addition to substantial development permits, the SMA contemplates conditional use permits and variance permits. These latter types of permits are issued by local government but require the approval of the Department of Ecology to be valid. RCW 90.58.140(10); *Samuel's Furniture*, 147 Wn.2d at 455, n.13. We discuss the option of using conditional use permitting in response to the

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third question.

[FN7]. The *Washington Shell Fish* case arose after the county leased 47 acres of county park tidelands for a nominal fee and the lessee proceeded to remove approximately 2.7 million dollars worth of geoducks. *Wash. Shell Fish*, 132 Wash. App. at 253 . The county then raised the issue of a substantial development permit and also challenged the validity of its lease. *See Pierce Cy. v. Wash. Shell Fish, Inc.*, No. 31380-4-II, 2005 WL 536097 (Wash. Ct. App. Mar. 8, 2005) (unpublished).

[FN8]. Washington common law also shows that the private property interest in a shellfish farm allows the farmer to restrain the general public from interfering with the farm. *See Sequim Bay Canning Co. v. Bugge*, 49 Wash. 127, 94 P. 922 (1908) (lessee of state aquatic lands devoted to shellfish operation can bring trespass action against others who enter the lands and take clams). Thus, even if the PVC tubes might hypothetically affect a person crossing a shellfish farm, it is not a cognizable obstruction of the public, because the person is there at the farmer's express or implied permission.

[FN9]. We note that the findings section of the Aquaculture Marketing Act, RCW 15.85.010, describes a general goal that aquaculture "should be considered" a branch of the agricultural industry for purposes of laws that advance and promote the agricultural industry. "When the legislature employs the words 'the legislature finds, ' as it did in RCW 80.36.510, it sets forth policy statements that do not give rise to enforceable rights and duties. *SeeAripa v. Dep't of Soc. & Health Servs.*, 91 Wash.2d 135, 139, 588 P.2d 185 (1978)." *Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 203, 95 P.3d 337 (2004). The Aquaculture Marketing Act, therefore, does not amend RCW 90.58.030(3)(e)(iv) to change the intent to address farming as described by the words in that subsection. We conclude that for marketing purposes, the Legislature intended to include aquaculture with agriculture but did not intend to erase all distinctions for purposes of environmental regulation or other laws not related to marketing.

[FN10]. We interpret your third question as addressing unpermitted projects where no local decision expressly determined that no substantial development permit is required. If local government previously decided that a project is not a substantial development and did so with a final written local decision, then that decision may be final and unappealable because of appeal deadlines in the Land Use Petition Act. *See Samuel's Furniture*, 147 Wn.2d at 463 (local government decision that project was not in the shoreline became a final decision that no SMA permit is required because it was not appealed under the Land Use Petition Act, RCW 36.70C).

[FN11]. Local government regulation of aquaculture in the shoreline must be consistent with the policies of the SMA, which promote appropriate aquaculture uses. *See* AGO 1988 No. 24 (opining that local government regulation of aquaculture in the shoreline must be done consistent with the SMA). As explained in this 1988 Attorney General's Opinion, the Planning Enabling Act, RCW 36.70, and local police powers cannot be used to impose greater restrictions on aquaculture than allowed under the shoreline master program.

Wash. AGO 2007 NO. 1, 2007 WL 81009 (Wash.A.G.)
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EXHIBIT 3

SHORELINE MANAGEMENT ACT OF 1971
PERMIT FOR SHORELINE MANAGEMENT SUBSTANTIAL DEVELOPMENT
CONDITIONAL USE, OR VARIANCE

NOTE: THIS PAGE FOR LOCAL GOVERNMENT USE ONLY

Application No. SD22-00
Administering Agency Pierce County
Date Received 06/29/00
Approved X Denied
Date 01/09/01

Type of Action: (Check if appropriate)
X Substantial Development Permit ____ Shoreline Conditional Use Permit
____ Shoreline Variance Permit

Pursuant to RCW 90.58, a permit is hereby granted to:
Taylor Resources, Inc.
SE 130 Lynch Road
Shelton, WA 98584

to undertake the following development (be specific):
A Shoreline Substantial Development Permit to cultivate the intertidal zone of private tidelands for the commercial production of geoduck clams along the east shore of Case Inlet/North Bay.

upon the following property: (Legal description to the nearest quarter section, township, range): on the east shore of Case Inlet/North Bay, on private tidelands, located immediately north of Joemma Beach State Park

within Case Inlet/North Bay and /or its associated wetlands.
(Name of water area)

The project will be within shorelines of statewide significance (RCW 90.58.030).
(Be/Not Be)

The project will be located within a conservancy and natural shoreline designation.
(Environment)

The following master program provisions are applicable to the development (State the master program sections or page numbers and specifically reference applicable conditional use or variance provisions): Attached.
Development pursuant to this permit shall be undertaken pursuant to the following terms and conditions: Attached.

The following master program provisions are applicable to this development:

THE CONSERVANCY ENVIRONMENT
- Definition and Purpose
- General Regulations and Policies
- Preferred Uses

20.76.020 Permits Required
20.20.010 Use Activity Regulations

Chapter 20.24 Aquacultural Practices
- 20.24.010 Definitions
- 20.24.020 Guidelines for Reviewing Substantial Development Permits
- 20.24.030 Environment Regulations

Development pursuant to this permit shall be undertaken pursuant to the following terms and conditions:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.

2. The applicant has established that the request for a shoreline substantial development permit to allow the commercial production of geoduck clams along the east shore of Case Inlet is consistent with both the Conservancy and Natural Shoreline Environments of the SMP and also satisfies the Aquaculture Practices Element of the SMP.

3. The applicant has also shown that the request satisfies all criteria in the SUR and WAC for the issuance of a substantial development permit. Therefore, said permit should issue subject to the following conditions:

    1. The applicant shall obtain permits required, if necessary, by other agencies with jurisdiction, including, but not limited to, the U.S. Army Corps of Engineers and the Washington State Departments of Ecology, Fish and Wildlife, and Natural Resources.

    2. A Memorandum of Agreement shall be completed and recorded by the applicant with the Pierce County Auditor. No work shall begin on-site until the recording of the agreement.

    3. The applicant shall comply with the Washington State Geoduck Growers Environmental Code of Practice that was submitted with the application.

    4. Construction or substantial progress toward construction of a project for which a permit has been granted pursuant to the Act must be undertaken within two (2) years after the approval of the permit. Substantial progress toward construction shall include, but not be limited to the letting of bids, making of contracts, purchase of materials involved in development, but shall not include development or uses which are inconsistent with the criteria set forth in WAC 173-14-100. Provided, that in determining the running of the two (2) year period hereof, there shall not be included the time during which a development was not actually pursued by

construction and the tendency of litigation reasonably related thereto made it reasonable not to so pursue; provided further, that local government may, at its discretion extend the two (2) year time period for a reasonable time based on factors, including the inability to expeditiously obtain other governmental permits which are required prior to the commencement of construction.

5. If a project for which a permit has been granted pursuant to the Act has not been completed within five (5) years after the approval of the permit by local government, the local government that granted the permit shall, at the expiration of the five (5) year period, review the permit, and upon a showing of good cause, do either of the following:

    1. Extend the permit for one (1) year; or
    2. Terminate the permit; provided that nothing herein shall preclude local government from issuing Substantial Development Permits with a fixed termination date of less than five (5) years.

This permit is granted to the Shoreline Management Act of 1971 and nothing in this permit shall excuse the applicant from compliance with any other federal, state, or local statutes, ordinances, or regulations applicable to this project, but not inconsistent with the Shoreline Management Act (Chapter 90.58 RCW).

This permit may be rescinded pursuant to RCW 90.58.140(7) in the event the permittee fails to comply with the terms of conditions hereof.

CONSTRUCTION PURSUANT TO THIS PERMIT WILL NOT BEGIN OR IS NOT AUTHORIZED UNTIL THIRTY (30) DAYS FROM THE DATE OF FILING ORDER OF THE LOCAL GOVERNMENT WITH THE REGIONAL OFFICE OF THE DEPARTMENT OF ECOLOGY AND THE ATTORNEY GENERAL, OR UNTIL ALL REVIEW PROCEEDINGS INITIATED WITHIN THIRTY DAYS FROM THE DATE OF SUCH FILING HAVE TERMINATED.

01/09/01 _____

Date Signature of Authorized Local Government Official

THIS SECTION FOR DEPARTMENT OF ECOLOGY USE ONLY IN REGARD TO A SUBSTANTIAL DEVELOPMENT PERMIT WITH A CONDITIONAL USE OR VARIANCE.

Date received by Department of Ecology _____

Approved _____ Denied _____

This substantial development permit with conditional use/variance is approved by the Department of Ecology pursuant to Chapter 90.58 RCW. Development shall be undertaken pursuant to the following additional terms and conditions:

_____

_____

_____

_____ _____

Date Signature of Authorized Department of Ecology Official

EXHIBIT 4

Pierce County
Department of Planning and Land Services
CHUCK KLEEBERG
Director

2401 South 35th Street
Tacoma, Washington 98409-7460
(253) 798-7210 • FAX (253) 798-7425

May 9, 2007

Taylor Resources, Inc.
Attn: Diane Cooper
SE 130 Lynch Road
Shelton, WA 98584

RE: SD22-00 (Foss)

Dear Ms. Cooper

In a decision dated December 28, 2000, and effective January 9, 2001, the Pierce County Hearing Examiner approved the above-referenced case for a geoduck aquaculture farm. Please reference Conditions 4 and 5 of that decision. Timelines were established as to how many years the farm may operate.

Based on such, when did the farm start operations and is it still in operation? Please provide evidence. Based on the answers, the farm may be operating within the allowable timelines. If so it is appropriate for this department to conduct a site inspection. It is also possible that the farm may be operating outside the allowable timelines and may need to cease operations and/or obtain necessary shoreline permits with associated environmental review.

Kindly provide a response to me by May 24, 2007. Should you have any questions please contact me at (253) 798-7425, fax (253) 798-7425, or email ty.booth@co.pierce.wa.us.

Sincerely,

Ty Booth by CA
Ty Booth
Senior Planner

c: Vicki Diamond, Current Planning Supervisor
Kathleen Larrabee, Resource Management Supervisor
Adonais Clark, Senior Planner
Patricia Byers, Associate Planner

EXHIBIT 5

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

June 26, 2007

Mr. Ty Booth
Senior Planner
Pierce County Planning & Land Services
2401 So. 35th Street
Tacoma, WA 98409

RE: Shoreline Substantial Development Permit SD 2-00, Taylor Shellfish Farms

Dear Mr. Booth:

We represent Taylor Shellfish Farms ("Taylor") with regard to the above-referenced permit. We have prepared this letter in response to your inquiry to Diane Cooper regarding the current status of Taylor's geoduck farm on its Foss lease property ("the Foss farm."). This letter also addresses several of the allegations in David Bricklin's June 15, 2007 letter to Vicki Diamond concerning SD 22-00.

I. Conditions 4 and 5 of SD 22-00.

You have inquired as to when Taylor commenced operations on its Foss farm. Taylor began constructing its geoduck farm on the Foss lease property in the summer of 2001, shortly after SD 22-00 was granted. That commencement of construction occurred within the time period established by Condition 4 of SD 22-00, which requires that "[c]onstruction or substantial progress toward construction of a project for which a permit has been granted pursuant to the Act must be undertaken within two (2) years after the approval of the permit."

You have also inquired as to whether Taylor continues to operate its Foss farm. Taylor is indeed continuing to operate its Foss farm, although Taylor has now completed construction of its farm. Specifically, the boundaries of the Foss farm have been established, the farm has been registered with the Washington Department of Fish and Wildlife, and, over the past six years, Taylor has planted the entire farmable area with geoduck seed. The completion of the construction of the farm occurred within the time period established in Condition 5 of SD 22-00, which requires that project construction be completed within five years of permit issuance.

Based on the foregoing, the Foss farm is operating within the timeframes established in SD 22-00. You indicated in your correspondence with Ms. Cooper that it is an appropriate time for the Department to conduct a site visit. We invite you and other representatives of the Department to the Foss farm for a site visit at your convenience. Please contact Ms. Cooper directly to arrange logistics.

II. Response to Mr. Bricklin's claim that the Foss permit expired.[1]

In his June 15, 2007, letter, Mr. Bricklin argues that the Shoreline Substantial Development Permit for the Foss farm has expired. Mr. Bricklin appears to interpret the language of Condition 5 of SD 22-00 not as requiring that the Foss farm be fully established within five years of permit issuance but as an absolute limitation on the length of the permit, *i.e.* that SD 22-00 expires in five years regardless of the status of the Farm. That interpretation is incorrect for several reasons.

A. Under the permit language and applicable Shoreline Management Act provisions, SD 22-00 has not expired.

Condition 5 in SD 22-00, the condition at issue here, provides as follows:

> If a project for which a permit has been granted pursuant to the Act has not been completed within five (5) years after the approval of the permit by local government, the local government that granted the permit shall, at the expiration of the five (5) year period, review the permit, and upon a showing of good cause, do either of the following:
>
> 1. Extend the permit for one (1) year; or
> 2. Terminate the permit, provided that nothing herein shall preclude local government from issuing Substantial Development Permits with a fixed termination date of less than five years.

This condition requires that the project for which SD 22-00 was granted – installation of a geoduck farm on the Foss lease -- be completed within five years. As noted above, Taylor has fulfilled that condition.

Condition 5 of SD 22-00 was not created whole cloth by the Hearing Examiner; that condition is grounded in the provisions Shoreline Management Act itself. Reference to relevant portions of the Act is therefore helpful in interpreting Condition 5. The statutory antecedent for Condition 5 of SD 22-00 is found in RCW 90.58.143(3), which provides:

> Authorization to conduct construction activities shall terminate five years after the effective date of a substantial development permit. However, local government may authorize a single extension for a period not to exceed one year based on reasonable factors . . . .

In reviewing whether Taylor has completed "construction activities" at its Foss farm, it is useful to review the definition of "construct." Construct means "build" or "to create." *Webster's II New Riverside University Dictionary.* Taylor built, or created, its Foss farm when it established

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[1] While not relevant to the issue at hand, Taylor must respond to Mr. Bricklin's claim that the Foss farm is increasing erosion in the area. Mr. Bricklin offers no support for this allegation, and we do not believe any exists. In fact, any erosion that is occurring on Mr. Bricklin's clients' property is likely attributable to the significant clearing operations that Mr. Bricklin's clients recently engaged in, presumably to enlarge their view.

the corners of the farm area, planted the farm area with geoduck and registered the farm with the Washington Department of Fish and Wildlife ("WDFW"). Indeed, at the outset of its operations, Taylor notified relevant Native American Tribes that it intended to "create" a shellfish farm on the Foss property. *See* Attachment 1, January 24, 2001 letter from William Taylor to David Winfrey ("Please consider this letter our notification to you on the creation of artificial shellfish beds.") Under WDFW's regulations, the Foss farm is now an aquatic farm. WAC 220-76-015 ("An aquatic farm is any facility or tract of land used for private, commercial culture of aquatic products.") Thus, Taylor's current cultivation activities on the Foss farm constitute operating an existing, established farm, and those activities are not prohibited by Condition 5 of SD 22-00.

B. The Foss farm is not the type of ongoing mining or dredging activity that requires a five year permit limitation.

We fully recognize that some ongoing activities that are regulated as "development" under the Shoreline Management Act are generally subject to time limitations in substantial development permits. For example, substantial development permits for mines typically include a five-year limitation. Substantial development permits for dredging activities are also often subject to time limits. This is because mining and dredging are themselves included in the statute's definition of "development." *See* RCW 90.58.030(3)(d). Thus, if mining or dredging activities continue after five years, the mine or dredging area continues to expand and construction is not "complete." The Foss farm, by contrast, is now an established farm and, while farming operations continue, the size of the farm area will not expand.

Indeed, the Washington Attorney General recently opined that geoduck farming is dissimilar from mining, dredging and other ongoing activities that are typically subject to a five-year limitation in shoreline permits. *See Washington Attorney General Opinion 1007 No. 1 at 8-10.* It would be contrary to the Attorney General's Opinion for the County to now determine that the Foss farm is subject to a five-year permit limitation because it involves "dredging" or "mining" activities that may be subject to such a time limit.

The Attorney General found that geoduck farming is only regulated "development" under the Shoreline Management Act when the project itself (*i.e.* the farm), based on the equipment used and the public use of the area, interferes with the normal public use of surface waters. *Id.* at 8. The Act does not place a five-year time limit on projects that are "development" because they interfere with the public use of surface waters; indeed, the Act expressly recognizes that such projects may be permanent. RCW 90.58.030(3)(d) (defining as development "any project *of a permanent* or temporary nature which interferes with the normal public use of surface waters. . . ." (Emphasis added.))

An analogy is useful. When local governments grant shoreline substantial development permits for docks (which often interfere with the normal public use of surface waters), the permit itself typically does not expire. That is true even though ongoing activities may be occurring at the dock (boat moorage, swimming, or, in the case of commercial docks, barge loading activities, etc.) Thus, the dock itself, along with the associated activities, is permitted to continue in place so long as construction was completed within the timeframe provided in the Act. Similarly, with respect to the Foss farm, having completed the construction of the Farm within the time period provided in the Act (and the permit), the farm is permitted to

remain in place, and Taylor is permitted to continue the farming activities associated with the farm.

We also recognize that, in some instances, even where a five-year expiration is not required by the Shoreline Management Act, local governments have placed time limitations on certain projects as a means of addressing potential environmental impacts. However, when local governments set such an expiration period, they do so clearly and explicitly *See, e.g., Washington State Ferries v. City of Edmonds and Dept. of Ecology*, SHB No. 03-013, 2003 WL 22476216 (Order Granting Summary Judgment and Dismissal, 2003) (shoreline permit for ferry terminal improvements provides "the use of the subject site for the development approved under this permit shall expire five years from the date the application is finally approved by the City. . . ."); *Puget Sound Mussels, Inc. v. Kitsap County*, SHB 90-59, 1991 WL 55611 (Order Granting Partial Summary Judgment, 1991) (conditioning a salmon net pen permit on a requirement "[t]hat the shoreline substantial development permit shall expire five years from issuance. A new permit shall be required to continue operations.") Condition 5 of SD 22-00 contains no such explicit expiration provision. Rather, as discussed in detail above, the more reasonable interpretation of that condition is that it requires, pursuant to the Shoreline Management Act's statutory language, construction of the farm be completed within five years of permit issuance. Taylor has satisfied that condition.

C. A five-year permit limitation would render geoduck farming impossible.

Geoduck cultivation operations occur on a four-to-six-year crop cycle. That means geoduck clams are harvested from four to six years after they are planted, with the last of the crop being harvested in year six. Because it typically takes six years to fully harvest a geoduck crop, geoduck farmers generally cannot harvest even a single crop cycle within five years of commencing operations.

In addition, geoduck farms typically contain more than a single crop cycle. That is because geoduck farms, particularly farms the size of the Foss farm, cannot be completely planted in a single year. On the Foss farm, approximately 1/6 of the farm area was planted in 2001, another 1/6 planted in 2002, another 1/6 in 2003, and so forth. Then, when the mature geoduck are harvested from a portion of a farm, the harvested area is typically replanted with a new crop. The County was fully aware, and made the Hearing Examiner aware, that Taylor's proposed Foss farm involved the repeated planting and harvesting of geoduck from the farm property. *See* December 28, 2000, Hearing Examiner Decision at 2 (Comments of Ty Booth, County Planning Division staff: "They will plant four baby clams in PVC pipes and five years hence will harvest the clams with water jets and sell them in Asia. They will then repeat the process.")

These geoduck farming practices would be completely impossible if permits for geoduck farms expired in five years. Thus, interpreting Condition 5 of SD 22-00 as a five-year term limit for the Foss permit would render impossible the project that the permit ostensibly allows. Such a result is not only illogical, it would be contrary to state and local shoreline guidelines. The Department of Ecology's shoreline guidelines make clear that aquaculture is an activity of statewide interest and is a preferred use of shoreline areas. WAC 173-26-241(3)(b). Pierce County's shoreline regulations are in accord. Pierce County Code Section 20.24.020(A)(1) ("The use of shoreline areas for aquaculture shall be encouraged for the production of

commodities for human consumption and utilization.") The Shorelines Hearings Board has made clear that any condition that makes it impossible to use shoreline areas for a preferred shoreline use is contrary to the Shoreline Management Act. *See, e.g., Sperry Ocean Dock v. City of Tacoma*, SHB Nos. 89-4 and 89-7, 1990 WL 151757 (Final Findings of Fact, Conclusions of Law and Order, 1990).

The only interpretation of Condition 5 that does not result in SD 22-00 essentially prohibiting geoduck farming is to interpret Condition 5 as requiring that Taylor's Foss farm be fully established no later than five years from permit issuance. That interpretation is consistent with the Shoreline Management Act, it is how Pierce County has interpreted Condition 5 to date, and it is the interpretation the County should continue to embrace.

III. Conclusion.

Since applying for its permit for the Foss farm, Taylor's employees have engaged County staff in numerous discussions relating to the farm. From these discussions, as well as various materials provided by Taylor with its application, it has been clear to all involved that Taylor is continuing to harvest and replant its Foss farm. Staff has confirmed on several occasions over the years that it interprets the permit for the Foss farm to be in place so long as Taylor continues farming that area. Taylor has now invested, quite literally, millions of dollars in geoduck seed based on its understanding that SD 22-00 remains in effect. A change in the County's interpretation of the permit conditions at this late date would cause significant damage to Taylor.

It also bears emphasizing that Taylor does not believe that its Foss farm constitutes "development" under the Shoreline Management Act. Because of the farm's location and the manner in which the activities on the farm are conducted, the farm does not interfere with the public use of surface waters. Taylor nevertheless pursued (and obtained) a substantial development permit from Pierce County for the Foss farm, in deference to Pierce County's Master Program. If Pierce County re-interprets the conditions in SD 22-00 to render ongoing geoduck farming activities impossible, Taylor will be left with no alternative but to contest the applicability of the County's substantial development permit to the Foss farm.

Based on the foregoing, we request that the County reject any suggestion that Taylor's permit has expired.

Very truly yours,

Samuel W. Plauché

SWP:TAD
Attachment
cc: Jill Guernsey
Vicki Diamond
Client

ATTACHMENT 1

January 24, 2001

Mr. David Winfrey
Puyallup Tribe
6824 Pioneer Way East
Puyallup, Washington 98371

Subject: Creation of Artificial Shellfish Beds

Dear Mr. Winfrey:

Please consider this letter our notification to you on the creation of artificial shellfish beds. This notification procedure follows the direction outlined in the Implementation of Shellfish Proviso, CV 9213, Sub-proceeding No. 89-3, Section 6.3.

The location of the beds and species cultivated is as follows:

Description	Species
North Bay Partnership Second Class tidelands Portions of Section 8,9,16 Township 20 North, Range 1 West, W.M., Pierce County	Geoduck

According to our survey and in our opinion, there is not a natural shellfish bed at this site. A copy of the survey information is attached. A copy of the survey information is attached. Please contact Dave Robertson at this office if you would like an on-site visit. According to the Implementation Order, you will notify us within fifteen days of receipt of this letter if you object to our determination.

Sincerely,

William J. Taylor
Taylor Shellfish Farms

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

GordonDerr
ATTORNEYS AT LAW

FACSIMILE TRANSMITTAL

August 22, 2007

To:	Company:	Telephone:	Fax:
Mr. Terrence F. McCarthy	Pierce County Hearing Examiner	(253) 272-2206	(253) 272-6439
Ms. Jill Guernsey	Pierce County Prosecuting Attorney	(253) 798-6732	(253) 798-6713
Mr. David A. Bricklin	Bricklin Newman Dold, LLP	(206) 264-8600	(206) 264-9300
Mr. Ty Booth	Pierce County – PALS - Senior Planner		(253) 798-7425

From: Samuel W. Plauché

Number of Pages: 40
If you did not receive all copies, or if any are not legible, please call Terri at (206) 382-9540

Regarding: Taylor Shellfish Farms - Foss Farm

We are transmitting the following:

Letter dated 08/22/07, with attachments. Hard copies are following in the mail.

Comments:

THIS FACSIMILE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHOM IT IS ADDRESSED AND MAY CONTAIN CONFIDENTIAL, PRIVILEGED INFORMATION. IF THE READER OF THIS COVER PAGE IS NOT THE ADDRESSEE, PLEASE BE ADVISED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS FACSIMILE IS STRICTLY PROHIBITED. IF YOU RECEIVE THIS COMMUNICATION IN ERROR, PLEASE CALL IMMEDIATELY AT (206) 382-9540 AND RETURN THIS FACSIMILE TO GORDONDERR AT THE ABOVE ADDRESS BY MAIL. THANK YOU.