

**PALS's Proposed Findings
Taylor Shellfish AA16-07**

- Taylor applied for and obtained a shoreline substantial development permit from the Pierce County Hearing Examiner 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, on December 28, 2000 (Case No. SD22-00).
- Conditions of approval Nos. 4 and 5 in the Hearing Examiner's decision addressed time periods for the permit:
 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, and 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 pendency 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.
- No appeals were filed, and the Department of Ecology approved the permit on February 12, 2001.
- In early 2007 area residents filed a complaint with PALS, arguing that the permit had expired and that the approved activity was creating a variety of adverse impacts.

- In response, on May 1, 2007, the County sent an email to Taylor inquiring when the activity started operations and stating, in part, that the activity may be operating outside the allowable timelines (established per Conditions 4 and 5 of the Examiner's approval) and may need to cease operations and/or obtain new approval.
- On July 9, 2007, neighboring property owners and citizens groups, represented by attorney David Bricklin, filed a request for revocation of the permit (PALS application #607347).
- On August 8, 2007, PALS issued an administrative determination that Taylor's 2000 shoreline substantial development permit had expired and that a new permit was required to continue the activity.
- Taylor timely appealed the Administrative Determination pursuant to PCC 1.22.080 - .090 on August 22, 2007.
- The revocation request was subsequently withdrawn, and hearings were held before the Examiner on Taylor's appeal of the August 8, 2007 Administrative Determination on November 1st and 2nd, and December 13th and 14th, 2007.
- Pursuant to PCC 1.22.090(G), the decision of the Administrative Official shall be entitled to substantial weight, and the Appellant, Taylor, has the burden of proving that the decision of the Administrative Official was clearly erroneous.
- Pursuant to PCC 1.22.090(H), the Examiner may reverse or affirm, wholly or in part, or may modify the Administrative Official's order, requirement, decision or determination. If the Hearing Examiner reverses the Administrative Official's decision, the entire action shall be remanded to the Administrative Official for an action consistent with the Hearing Examiner's decision.
- In the appeal before the Examiner, Taylor argued that the 2000 shoreline substantial development permit had not expired as it met conditions 4 and 5 by establishing a geoduck farm within the required timelines, and that once established, the farm is allowed to continue to operate in perpetuity.
- Taylor also argued that the establishment and operation of the farm does not constitute "development", and therefore a shoreline substantial development permit was unnecessary.
- PALS argued that pursuant to state statutes, administrative codes, the Examiner's decision and case law, Taylor's permit expired five years after it was granted, with an additional one year extension, thereby extending the expiration date to February 12, 2007, six years after it was approved by DOE.

- RCW 90.58.143(1) sets forth time requirements for shoreline substantial development permits 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 activities or, where no construction activities are involved, the use or activity shall be commenced within two years of the effective date of a shoreline substantial development permit. A one-year extension may be approved.
- Subsection 3 provides that authorization for construction shall terminate five years after the effective date of the shoreline substantial development permit, 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.

- Subsection 4 addresses the effective date of shoreline substantial development permits in light of appeals, etc. Of note, subsection 4 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.

- 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.
- PCC 20.76.030(G) sets forth time limitations for shoreline substantial development permits 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 Examiner to authorize a single one-year extension.
- Like WAC 173-27-090(3), PCC 20.76.030(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.
- In January 2007 the Attorney General issued an opinion (2007 AGO No. 1) regarding the need for shoreline substantial development permits for geoduck planting, growing and harvesting activities. The opinion did not address the time limitation for shoreline substantial development permits; however the opinion 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 surface waters will depend on the facts, which

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[.]

should be determined by local government when deciding if a permit is required. See RCW 90.58.140(1).²

- As noted in the AGO, the Court of Appeals interpreted Pierce County’s shoreline regulations with respect to geoduck activities in *Washington Shell Fish, Inc. v. Pierce County*, 132 Wn. App. 239 (2006). In this case Washington Shell Fish (WSF) leased County Parks 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 orders applicable to all 11 leased properties, requiring WSF to stop its geoduck operations because they did not have shoreline substantial development permits. WSF appealed the C&D orders and the Hearing Examiner upheld the C&D orders. WSF filed a judicial appeal (LUPA) and the 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 shoreline substantial development permit 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.

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.”

- The Court of Appeals further found that the activities involving the harvesting and planting of geoducks constituted “substantial” development:

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.

- 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. Thus, under the PCC, the shoreline substantial development permit approved for this geoduck farm is limited to a five-year period.
- Contrary to Taylor’s argument, *the Washington Shell Fish* Court of Appeals decision was not limited to public lands. The Court of Appeals specifically upheld the requirement for shoreline substantial development permits 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 shoreline substantial development permit, both in 2000 and now.
- Under applicable provisions of the PCC shoreline regulations, Taylor Shellfish was properly required to obtain a shoreline substantial development permit in 2000 for its activities at the Foss property.
- The permit Taylor obtained in 2000 expired pursuant to the applicable RCW, WAC, PCC, and Hearing Examiner decision.
- To continue operation of its geoduck farm at this location will require a new shoreline substantial development permit from the Hearing Examiner.