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

October 25, 2006

Mr. Thomas J. Young
Assistant Attorney General
Office of the Attorney General of Washington
Ecology Division
P. O. Box 40117
Olympia, WA 98502-0117

Re: Regulation of Geoduck Culture Under the Shoreline Management Act

Dear Tom:

As we discussed last week, I have prepared this letter on behalf of the Pacific Coast Shellfish Growers Association ("PCSGA") to address the regulation of geoduck clam culture under the Shoreline Management Act ("SMA"). It is our understanding that the Department of Ecology ("Ecology") is currently preparing guidance to local governments discussing this issue. Specifically, we understand that Ecology is considering issuing a guidance document stating that all geoduck culture should be regulated as "development" under the SMA. As explained more fully in this letter, we believe that such a guidance document would run afoul of provisions of the SMA, the Growth Management Act ("GMA") and the Administrative Procedures Act ("APA").

As an initial matter, it bears emphasizing that our client, PCSGA, represents numerous shellfish farmers growing all species of mollusks. While geoduck cultivation takes place on only a small percentage of the total tideland acreage operated by Association members, the question of the applicability of the SMA is of great significance to all shellfish farmers in the State of Washington. It is difficult to distinguish the activities involved in geoduck culture from other forms of shellfish farming, such as oyster farming, clam farming and mussel farming.[1] Thus, Ecology's decision on this issue will not only impact geoduck farmers, but Washington's entire shellfish-growing community.

The potential economic ramifications of this issue are also significant to the State of Washington. Washington is the largest producer of farmed molluscan shellfish in the United States, with sales valued at approximately $97 million annually. Shellfish farms are a vital component of rural coastal communities, providing family-wage jobs in 14 counties.

[1] We have attached hereto a one-page document prepared by the shellfish growers explaining the process of farming geoducks.

Currently, all of the counties in Washington with significant shellfish production address aquaculture in their Shoreline Master Plans. These counties typically determine whether a shellfish farm requires a Substantial Development Permit on a case-by-case basis, depending on the facts relevant to the particular operation under review. As discussed below, this type of local variation is precisely what the Legislature envisioned when it adopted the SMA. Ecology should not issue guidance reducing the discretion of local governments to regulate shellfish farming as each deems appropriate, based on local circumstances.

I. Under the SMA, local governments have discretion to decide, based on local circumstances, whether geoduck farming is "development."

The SMA regulates "developments" on shoreline waters. RCW 90.58.020.[2] As explained in more detail below, determining whether a particular geoduck culture operation meets the definition of "development" is a fact-specific inquiry that involves consideration of local circumstances. As such, local governments should retain discretion to consider these local circumstances and decide whether shellfish aquaculture, including geoduck culture, constitutes "development."

"Development" is defined in the SMA as "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)(d). Under this definition, an activity can be development in one of two ways: (1) if it constitutes one of the listed activities or (2) if it interferes with normal public use. "Substantial development" is development with a total cost of at least $5,000 or any development that materially interferes with the normal public use of the surface of the waters or shorelines. RCW 90.58.030(3)(e).

In construing statutes, the primary objective is to ascertain legislative intent as expressed in the statutory language. *Martin v. Meier*, 111 Wn.2d 471, 479 (1988). Clear language will be given effect. *People's Org. for Wash. Energy Res. v. Utils. & Transp. Comm'n*, 104 Wn.2d 798, 825 (1985). If a term is defined in a statute, that definition is used. Absent a statutory definition, the term must be given its plain and ordinary meaning unless a contrary legislative intent appears. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 479-80 (1987).

A. Geoduck culture is "development" under SMA if local circumstances support a finding of interference with normal public use.

We understand from our client's meeting with Ecology that one of the primary bases for Ecology's decision to issue guidance is the recent Court of Appeals decision in *Washington Shell Fish v. Pierce County*, 132 Wn. App. 239 (2006). Because that decision focused exclusively on the second part of the definition of "development" – interference with normal public use – we begin our analysis there as well.

---

[2] The SMA also regulates "uses" of shoreline waters. *Clam Shacks of Am., Inc. v. Skagit County*, 109 Wn.2d 91, 95-96 (1987). It is our understanding, from our client's meetings with Ecology, that the Department is focused on the regulation of geoduck farming as a "development," not as a "use."

In determining whether a project constitutes an interference with normal public use, courts require both evidence of both normal public use and an interference with that normal public use. *See, e.g., Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 818-20 (1992) ("In order to fall within that part of RCW 90.58.030(3)(e) which defines as a substantial development a 'development which materially interferes with the normal public use of the water or shorelines of the state,' it is plain that normal public use must be established."). *See also Toandos Peninsula Ass'n v. Jefferson County*, 32 Wn. App. 473, 486 (1982) (declining to resolve the issue of whether a private commercial campground project materially interfered with normal public use because "the forum in the proceedings below was not adequate to develop and resolve critical factual issues relating to that use"). In *Cowiche Canyon Conservancy*, the court determined that the placement of locked gates at the ends of a right-of-way did not materially interfere with public use because the "paltry showing" of public use relied upon by the Department of Ecology was "plainly inadequate" to show that the right of way was a route of normal public access to the shoreline. Further, because the public could simply walk around the gates and proceed on the right-of-way, the gates did not constitute substantial development. *Cowiche Canyon Conservancy*, 118 Wn.2d at 820.

The Court of Appeals recently applied this same, fact-specific inquiry to determine whether a Pierce County geoduck culture operation constituted "development" under the SMA. *See Washington Shell Fish, Inc. v. Pierce County*, 132 Wn. App. 239, 250-52 (2006). Relying on a Pierce County Code provision that mirrored the SMA definition of "development," the *Washington Shell Fish* court focused on whether the project interfered with the normal public use of surface waters. *Id.* at 250. The Court undertook a factual inquiry and concluded that "the testimony and exhibits provided substantial evidence to support the hearing examiner's finding that Washington Shell Fish's geoduck activities interfered with the normal public use of the surface water. . . ." *Id.* at 251-52. The Court noted specific evidence demonstrating that rope left in the water and other geoduck farming equipment interfered with windsurfing and other normal public uses of the waters in the project. *Id.* at 251. Testimony included a recreational windsurfer's testimony that an estimated 100 to 150 people windsurf at various times on or near the property Washington Shell Fish leased from Pierce County. *Id.* at 247 n.7. Based on this evidence of actual interference with an established public use, the Court determined that the operation at issue in *Washington Shell Fish* constituted "development."

Washington Shell Fish does not stand for the proposition that all geoduck farms constitute "development" under the SMA. Quite the opposite, *Washington Shell Fish* supports the principle established in *Cowiche Canyon Conservancy* and *Toandos Peninsula Ass'n* that determining whether an activity constitutes "development" is fact-specific. Such a fact-specific determination is appropriately left to local government to decide, based on particular local circumstances.

In fact, it is likely that only a few geoduck farming operations would have an impact on the normal public use of the surface waters overlying shorelines. All geoduck farming in the state currently takes place on private tidelands, and most of the farming-related activities occur

at low tide, when those tidelands are not overlain by surface waters.[3] Because these tidelands are privately owned, the "normal public use" of these areas is typically fairly limited.[4] Indeed, many of the tidelands used for shellfish culture (including geoduck culture) were transferred by the State under the Bush and Callow Acts for the express purpose of growing shellfish. Ch. 79.94 RCW.

Ecology should recognize that local governments are best able to consider local circumstances and determine whether, and under what circumstances, geoduck farming, or shellfish farming in general, could constitute "development."

B. The first portion of the definition of "development" encompasses activities that are inapplicable to geoduck culture.

As noted in the preceding section, the *Washington Shell Fish* court focused exclusively on the second part of the SMA definition of "development" – interference with normal public use. The Court's decision not to address other aspects of the SMA definition of "development" was likely based on the fact, as discussed below, that geoduck farming does not involve any of the activities listed as "development" in the first part of the SMA definition.

In the first part of the SMA, the definition of "development" lists the following activities as development: construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; and the placing of obstructions are considered "development." RCW 90.58.030(3)(d). No Washington court or Shorelines Hearings Board decision has ever considered the issue of whether geoduck culture constitutes development under the first part of the SMA definition.

The rules of statutory construction require that the terms listed in RCW 90.58.030(3)(d) be given their plain meaning. In reviewing the listed terms, it is apparent, as discussed below, that they are inapplicable to geoduck aquaculture. Unless otherwise indicated, definitions below come from Webster's II New College Dictionary (2001).

- Construction or exterior alteration of structures: A "structure" is defined 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 ..." WAC 173-27-030(15). Geoduck culture does not involve buildings or other work built or composed of parts joined together in a definite manner. As such, it does not involve construction or alteration of structures.

---

3 The operation at issue in *Washington Shell Fish*, by contrast, occurred in part on areas owned by Pierce County that were adjacent to a County park.

4 It bears noting that one of the goals of the SMA is to protect private property rights, such as the private ownership of tidelands. RCW 90.58.020. *See also* WAC 173-26-186(5) ("Planning policies should be pursued through the regulation of development of private property only to an extent that is consistent with all relevant constitutional and other legal limitations (where applicable, statutory limitations such as those contained in Ch. 82.02 RCW and RCW 43.21C.060) on the regulation of private property.")

- Dredging: Dredging involves the removal of material from a water body. For example, the Shorelines Hearings Board has accepted the Island County Shoreline Master Program's definition of dredging – "the removal of earth, sand, gravel, silt or debris from the bottom of a ... bay or other water body." *Save Port Susan Committee v. Dep't of Ecology*, SHB 83-3 (Jan. 30, 1984). While geoduck culture may temporarily relocate bottom materials, it does not involve the removal of bottom materials from the water. As such, it does not constitute dredging. *See also Clam Shacks*, 109 Wn.2d at 95 (accepting without deciding Skagit County's decision that the use of a high-pressure hose to liquefy sediments for clam harvest was not "dredging" under the SMA). [5]

- Drilling: To drill is to "make a hole in with a drill." Geoduck culture does not involve drilling or the use of a drill.

- Dumping: To dump is to "throw down or release in a large mass" or "empty (material) out of a container or vehicle." Geoduck culture does not entail dumping of material in large mass or from containers or vehicles.

- Filling: To "fill" means "the addition of soil, sand, rock, gravel, sediment, earth retaining structure, or other material ... on shorelands in a manner that raises the elevation or creates dry land." WAC 173-26-020. Geoduck culture does not involve the filling of shorelands with any material that results in an increase in bottom elevation or the creation of dry land.

- Removal of sand, gravel, or minerals: To "remove" is to "convey from one place to another" or to "take away." Geoduck culture does not involve the removal of sand, gravel, or minerals from the shorelands.

- Bulkheading: A bulkhead is a "wall or embankment constructed in a mine or tunnel to protect against earth slides, fire, water, or gas." Geoduck culture does not require bulkheading.

- Driving of piling: Driving of pilings, defined as a "long sturdy post or column of timber, steel, or concrete, driven into the earth as a foundation or support for a structure," is not an activity engaged in during geoduck culture.

- Placing of obstructions: To obstruct is to "clog or block (a passage) with obstacles." Geoduck culture does not obstruct passages in shoreline areas; culture that takes place on private land does not provide public passage. Furthermore, geoduck culture takes place in intertidal areas, which are exposed

---

[5] The *Clam Shacks* court went on to affirm Skagit County's decision to treat the activities in question as a conditional use. Under the SMA, it is within local governments' discretion to determine whether a given use should be regulated as a conditional use. RCW 90.58.100(5); WAC 173-26-241(2)(b). As noted in footnote 3, above, we understand from our client's meeting with Ecology, that Ecology is considering guidance describing geoduck farming as "development," not as a conditional use. We are therefore not addressing the conditional use issue further in this letter.

> only at low tide and therefore are not areas that typically provide aquatic passage. While there may be some circumstances where geoduck culture could conceivably obstruct passage, local governments are in a far better position to make a fact-based determination, based on local circumstances, as to whether such obstruction might occur.

None of the terms listed in the first part of the SMA definition of "development" apply to current geoduck farming practices. As discussed in the preceding section, the second part of the SMA definition of "development" only applies to geoduck farming in those circumstances where there is a factual finding of an actual interference with normal public use. Because determining whether geoduck farming constitutes "development" is a fact-specific inquiry, Ecology should not issue statewide guidance stating that geoduck farming always constitutes "development." Instead, Ecology should allow local governments to make that determination based on local circumstances.

II. Policy Considerations.

As explained above, the SMA statutory language supports allowing local governments to determine whether geoduck culture, or shellfish culture in general, constitutes "development." In addition to the specific statutory language, there are several policy considerations that also favor allowing local governments discretion on this issue.

A. One of the fundamental policies of the SMA is preserving local discretion.

The SMA makes clear that local governments have the primary role in regulatory decisionmaking under the Act:

> Local government shall have the primary responsibility for initiating the planning required by this chapter and in administering the regulatory program consistent with the policy and provisions of this chapter.

RCW 90.58.050. This principle is carried throughout Ecology's Shoreline Master Program Guidelines. *See, e.g.*, WAC 173-26-171 ("The guidelines allow local governments substantial discretion to adopt master programs reflecting local circumstances and other local regulatory and non-regulatory programs related to the policy goals of shoreline management . . . ."); WAC 173-26-186(9) ("To the extent consistent with the policy and use preference of 90.58.020, this chapter, and these principles, local governments have reasonable discretion to balance the various policy goals of this chapter, in light of other relevant local, state and federal regulatory and non-regulatory programs. . . .").

Ecology's shoreline guidelines go on to emphasize that local decisionmaking, based on local conditions, is particularly appropriate with regard to aquaculture activities:

> Local governments should consider local ecological conditions and provide limits and conditions to assure appropriate compatible types of aquaculture for the local conditions as necessary to assure no net loss of ecological functions.

WAC 173-26-241(3)(B).

Thus, the Act and Ecology's guidelines make clear that local governments should decide how to regulate aquaculture, including geoduck farming, based on local circumstances. That is precisely what is happening at present. It would be inconsistent with this fundamental principle of local discretion for Ecology to issue guidance asserting that all geoduck farming constitutes "development" under the SMA.

B. Commercial shellfish beds, including geoduck farms, should be protected as "critical habitat" under SMA, not regulated as "development."

In its Shoreline Master Program guidelines, Ecology makes clear that "commercial shellfish beds" are critical saltwater habitat under the SMA. WAC 173-26-221(2)(C)(iii)(A).[6] As such, commercial shellfish beds "require a higher level of protection due to the important ecological functions they provide." *Id.* Far from requiring such areas be regulated as "development," Ecology goes on to require that local master programs protect these areas, including protection from incompatible uses and nuisance complaints. WAC 173-26-221(2)(C)(iii)(B).

Ecology's recognition of the important ecological function of commercial shellfish beds is well supported. As the U.S. Court of Appeals noted in reviewing the Clean Water Act permit requirements for a Puget Sound mussel cultivation operation:

> But it must also be recognized that the mussels act as filters and are considered by many to enhance water quality by filtering excess nutrients or other matter in the water that can be destructive to marine environments.

Ass'n to Protect Hammersley, Eld and Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007, 1010 (9th Cir. 2002). *See also id.* at 1016 ("Moreover, there may be countervailing environmental benefits to encouraging shellfish farming in Puget Sound.").

Federal agencies that have considered regulatory controls on shellfish farming also recognize the environmental benefits shellfish provide. As the Corps recently noted in proposing a Nationwide Permit to cover existing shellfish cultivation operations:

> Because shellfish require healthy ecosystems for their growth and productivity, in addition to providing the aquatic ecosystem services of improved water quality and increased food production, we believe that there is generally a net overall increase in aquatic resource functions in estuaries or bays where shellfish are produced.

71 Fed. Reg. 56,258, 56,275 (September 26, 2006).

Similarly, in 2002, the U.S. Environmental Protection Agency decided not to promulgate effluent guidelines for molluscan shellfish farms, affirming its decision to exclude shellfish farms

---

[6] The fact that geoduck beds are farmed by planting, cultivating and then harvesting the geoducks does not distinguish them from other commercial shellfish beds. Virtually all of the shellfish beds in Washington are actively farmed by planting shellfish seed, protecting and cultivating the seed, and then harvesting mature shellfish.

from coverage under its Clean Water Act aquaculture regulations. In explaining that decision, EPA noted:

> For large-scale production of molluscs for food, operators typically use bottom culture, bottom anchored racks, or floating (but tethered to the bottom) rafts in open waters. Because such operations do not typically add materials to waters of the United States, and because EPA has not found any generally-applicable pollutant control technologies to reduce any discharge, the Agency is not proposing effluent limitations guidelines and standards for discharges from open water mollusc culture. EPA notes that molluscs are filter feeders and, in some cases, are recommended not only as a food source, but also a pollution control technology in and of themselves. Molluscs remove pollutants from ambient waters via filtration.

57 Fed. Reg. 57,872, 57,885 (September 12, 2002). *See also* 68 Fed. Reg. 75,068, 75,078 (December 29, 2003); 69 Fed. Reg. 51,892, 51,906 (August 23, 2004).

The well-recognized beneficial environmental effects of shellfish culture support the existing approach to SMA regulation of shellfish farming: allow local governments to review local circumstances and decide whether or not geoduck farming, and shellfish farming in general, meet the definition of "development" under SMA. For Ecology to issue guidance indicating that all geoduck culture (and potentially shellfish culture in general) is regulated as "development" under the SMA would be contrary to the goal of protecting commercial shellfish beds as critical habitat. As the Ninth Circuit noted in reviewing the applicability of Clean Water Act to shellfish culture:

> It would be anomalous to conclude that the living shellfish sought to be *protected* under the Act are, at the same time, "pollutants," the discharge of which may be *proscribed* under the Act. Such a holding would contravene clear congressional intent, give unintended effect to the ambiguous language of the Act and undermine the integrity of its prohibitions.

Taylor, 299 F. 3d at 1016 (emphasis by court). The same could be said for an Ecology determination that geoduck farming should, in every instance, be regulated as "development" under the SMA.

C. A state-wide determination that geoduck aquaculture is "development" under the SMA would be contrary to the resource protection provisions of the GMA.

The Washington State legislature has determined that shellfish aquaculture is a form of agriculture, entitled to all of the protections afforded other agricultural enterprises:

> The legislature finds that aquaculture should be considered a branch of the agricultural industry of the state for purposes of any laws that apply to or provide for the advancement, benefit, or protection of the agricultural industry within the state.

RCW 15.85.010. *See also* RCW 15.85.020 (including molluscan shellfish cultivation within definition of "aquaculture").

The legislature has also made clear, in the GMA, that local governments must take steps to protect agricultural enterprises. *See, e.g., Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn. 2d 38 (1998) ("In seeking to address the problem of growth management in our state, the Legislature paid particular attention to agricultural lands.") As noted by commentators Richard L. Settle & Charles G. Gavigan in *The Growth Management Revolution in Washington: Past, Present, and Future*:

> Natural resource lands are protected not for the sake of their ecological role but to ensure the viability of the resource-based industries that depend on them. Allowing conversion of resource lands to other uses or allowing incompatible uses nearby impairs the viability of the resource industry.

16 U. Puget Sound L. Rev. 867, 907 (1993).

The Court of Appeals recently made clear, in the context of a resource-based use (mining) in a shoreline area, that the SMA is not to be given priority over a County's GMA adoptions; rather, the two are to be construed in harmony. *Preserve Our Island v. Shoreline Hearings Bd.*, 133 Wn. App. 503, 522- 525 (2006). It is within the discretion of local governments to determine how best to harmonize their GMA planning documents, including their resource protection policies, with their Shoreline Master Programs. RCW 36.70A.480. Indeed, Ecology has emphasized this local discretion in its Shoreline Guidelines: "It is the responsibility of local government to assure consistency between the master program and other elements of the [GMA] comprehensive plan and development regulations." WAC 173-26-191(e).

Counties may choose, as a means of implementing the resource protection goals of GMA, to take a variety of steps to protect a vibrant shellfish industry. Those steps could include protecting shellfish beds from conflicting commercial, residential or recreational uses.[7] And a county may decide, in harmonizing the goals of the SMA with the provisions of their GMA comprehensive plans, that shellfish culture, including geoduck culture, is not generally a "development" because if shellfish beds are properly protected against conflicting uses, shellfish culture will not interfere with normal public use of a shoreline area (which, as noted in Section II above, is the only potentially applicable definition of "development" under the SMA).

Under the SMA, the GMA and Ecology's guidelines, these choices should be left to the sound discretion of local governments. Ecology guidance providing that geoduck aquaculture is "development" under the SMA would impermissibly hamstring local governments' ability to balance GMA's resource protection provisions with the policies of the SMA.

---

[7] Protecting shellfish beds from conflicting uses would also implement SMA provisions protecting water dependent uses, like shellfish farming. *See, e.g.*, WAC 173-26-211(3)(b) ("Land use policies should protect preferred shoreline uses from being impacted by incompatible uses. The intent is to prevent water-oriented uses, especially water dependent uses, from being restricted on shoreline areas because of impacts to nearby non-water-oriented uses.").

III. Even if geoduck farming is deemed "development" under the SMA, it is not "substantial development" and therefore should not require a substantial development permit.

The SMA requires that activities meeting the definition of "Substantial Development" not take place without first obtaining a permit from the government entity with jurisdiction under the SMA. RCW 90.58.140(2). The SMA definition of "Substantial Development" provides:

> The following shall not be considered substantial developments for purposes of this chapter:
>
> * * *
>
> Construction and practices normal or necessary for farming, irrigation, and ranching activities. . . .

RCW 90.58.030(3)(e)(iv).

As noted in the preceding section, the legislature has determined that aquaculture, including shellfish aquaculture, is a form of agriculture. The Aquaculture Marketing Act, provides:

> The legislature finds that aquaculture should be considered a branch of the agricultural industry of the state for purposes of any laws that apply to or provide for the advancement, benefit, or protection of the agricultural industry within the state.

RCW 15.85.010. The term "aquaculture," as used in Aquaculture Marketing Act, includes shellfish cultivation. RCW 15.85.030.

The exclusion of agriculture from the definition of Substantial Development is a law that provides for the "protection of the agricultural industry within the state." Pursuant to the express provisions of the Aquaculture Marketing Act, that exclusion applies to aquaculture (including shellfish cultivation). Thus, even if Ecology or another entity with regulatory jurisdiction determines that geoduck farming is "development" under the SMA, it is not "Substantial Development" requiring a permit under the Act.

IV. Under the SMA and the Administrative Procedure Act, Ecology cannot issue shoreline guidance to counties without public notice, an opportunity for comment, and a public hearing.

In adopting the SMA, the Legislature made clear that Ecology's actions under the statute, including adoption of guidance documents, should be subject to a rigorous public involvement process. *See, e.g.*, RCW 90.58.060, .120-.130. The interim guidance document that Ecology is considering issuing changes or, at the very least, supplements Ecology's shoreline guidelines. As such, this guidance document constitutes an amendment to Ecology's shoreline guidelines. Both the SMA and the APA contain extensive notice, comment and

public hearing requirements that apply to amendments of Ecology's guidelines. Any statewide guidance document produced by Ecology to address geoduck culture must satisfy these procedural requirements.

Under SMA, Ecology's role is to act primarily in a supportive and review capacity. RCW 90.58.050. To this end, Ecology issues "Guidelines" that serve as standards to implement the policies of the SMA and that provide criteria to local governments and to Ecology in developing master programs. RCW 90.58.030(3)(a). All guidelines adopted, amended, or rescinded by the department must follow APA requirements and be made available for public inspection. RCW 90.58.120. Prior to adopting or amending guidelines the Department is required to provide an opportunity for public review and comment as follows:

> (a) The department shall mail copies of the proposal to all cities, counties, and federally recognized Indian tribes, and to any other person who has requested a copy, and shall publish the proposed guidelines in the Washington state register. Comments shall be submitted in writing to the department within sixty days from the date the proposal has been published in the register.
>
> (b) The department shall hold at least four public hearings on the proposal in different locations throughout the state to provide a reasonable opportunity for residents in all parts of the state to present statements and views on the proposed guidelines. Notice of the hearings shall be published at least once in each of the three weeks immediately preceding the hearing in one or more newspapers of general circulation in each county of the state. If an amendment to the guidelines addresses an issue limited to one geographic area, the number and location of hearings may be adjusted consistent with the intent of this subsection to assure all parties a reasonable opportunity to comment on the proposed amendment. The department shall accept written comments on the proposal during the sixty-day public comment period and for seven days after the final public hearing.
>
> (c) At the conclusion of the public comment period, the department shall review the comments received and modify the proposal consistent with the provisions of this chapter. The proposal shall then be published for adoption pursuant to the provisions of chapter 34.05 RCW.

RCW 90.58.060(2). The SMA also limits Ecology to a single guideline amendment per year. RCW 90.58.060(3).

The SMA's emphasis on public process is further implemented through RCW 90.58.130, which states that:

> To insure that all persons and entities having an interest in the guidelines and master programs developed under this chapter are provided with a full opportunity for involvement in both their development and implementation, the department and local governments shall:
>
> (1) Make reasonable efforts to inform the people of the state about the shoreline

> management program of this chapter and in the performance of the responsibilities provided in this chapter, shall not only invite but actively encourage participation by all persons and private groups and entities showing an interest in shoreline management program. . . .

The most recent substantial revision to Ecology's Guidelines underwent several rounds of drafts before being finalized. From the first proposed draft in 1999 to the final version adopted December 17, 2003, the revisions were subjected to extensive public review and comment. Ecology received about 300 comments on the version proposed in 2003 alone and made seventeen changes in response to these comments before releasing the final version. It would be contrary to the SMA's emphasis on public involvement to now modify, or supplement, those guidelines without a fairly extensive public process.

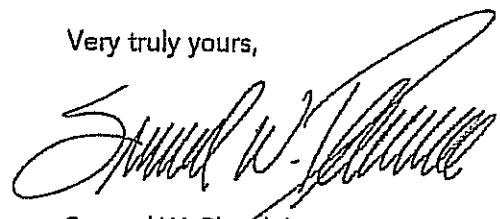
Ecology would violate the above-cited provisions of the SMA by creating an interim guidance document stating geoduck culture constitutes "development" under the SMA without adhering to the SMA's requirements for public participation. An interim guidance document that at best supplements or modifies, and at worst contradicts, properly-adopted Guidelines on shellfish aquaculture, is an amendment to the Guidelines that must be adopted pursuant to procedures required by the SMA and by the APA.

V. Conclusion

Based on the foregoing, it would be contrary to the SMA's statutory language for Ecology to issue guidance stating that geoduck farming meets the definition of "development" under the SMA. Such a guidance document would also be inconsistent with the SMA policies supporting local discretion and protection of commercial shellfish beds as critical habitat, as well as the GMA's resource-protection policies. Indeed, in light of those policies, any guidance issued by Ecology should instead emphasize the need to protect geoduck farming, and all shellfish aquaculture, from conflicting commercial, residential and recreational uses.

Even if Ecology issues guidance stating that geoduck farming is "development" under the SMA, it should also make clear that shellfish culture, like all farming activities, is not "Substantial Development" requiring a permit. Finally, Ecology should refrain from issuing any guidance document without adhering to the required SMA and APA public participation procedures.

Very truly yours,

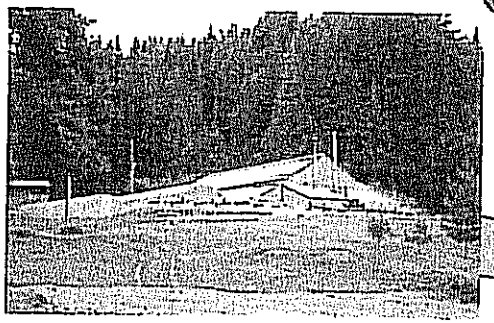


Samuel W. Plauché

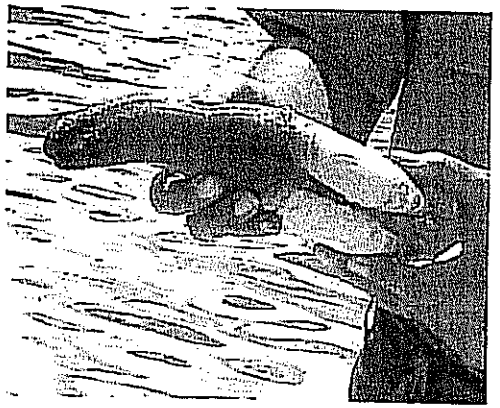
SWP:tad
cc: Robin Downey, PCSGA

Geoduck Culture

www.taylorshellfish.com



Geoduck culture begins at the Taylor Resources hatchery, Dabob Bay, Washington



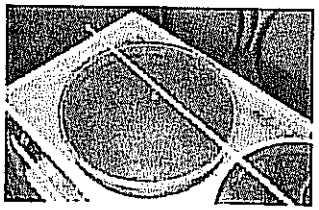
The geoduck grow for approximately 6 years. Harvest is done by hand with a hydraulic wand.

When conditions are set just right, geoduck broodstock begin spawning

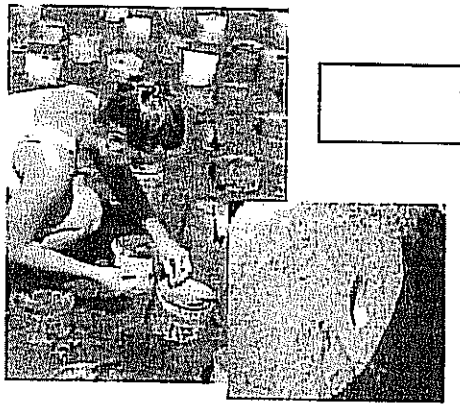
Taylor Shellfish Farms

After 1-2 years, the tubes are pulled and the geoduck continue to grow.

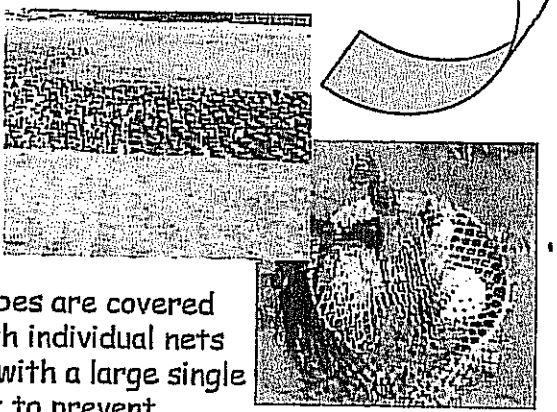
After a brief larval stage, the geoduck are held in nursery tanks and grown to planting size.



Geoduck seed ready for planting.



The young geoduck are planted in 4-6" diameter PVC tubes.



Tubes are covered with individual nets or with a large single net to prevent predation.

KANJI & KATZEN, PLLC
ATTORNEYS AT LAW
100 SOUTH KING STREET, SUITE 560
SEATTLE, WASHINGTON 98104
(206) 344-8100 · FAX (866) 283-0178
www.kanjikatzen.com

CORY J. ALBRIGHT
RIYAZ A. KANJI
PHILLIP E. KATZEN
JOHN C. SLEDD
ANN E. TWEEDY

ANN ARBOR OFFICE
101 NORTH MAIN STREET
SUITE 555
ANN ARBOR, MI 48104
PHONE: (734) 769-5400
FAX: (734) 769-2701

December 21, 2006

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

Re: Comments on State Representative Patricia Lantz's Request for a Formal Attorney General Opinion Re: Geoduck Aquaculture

Dear Mr. Pharris:

The Jamestown S'Klallam Tribe, the Lower Elwha Klallam Tribe, the Nisqually Tribe, the Port Gamble S'Klallam Tribe, the Skokomish Tribe, and the Lummi Nation (collectively, the "Tribes") submit these comments in response to State Representative Patricia Lantz's September 28, 2006 request for a formal Attorney General Opinion with respect to the following questions:

> Under RCW 77.55.021, should the Department of Fish and Wildlife require private parties engaged in the practice of planting, growing, and harvesting farm raised geoduck clams as part of an aquaculture operation to obtain a hydraulic project approval permit?
>
> Under RCW 90.58.140, should local governments require private parties engaged in the practice of planting, growing, and harvesting farm raised geoduck clams as part of an aquaculture operation to obtain a substantial development permit, and if so, how should local governments and the Department of Ecology manage existing operations?

Under both questions presented by Representative Lantz, the *threshold* question is whether the Department of Fish and Wildlife ("WDFW") and local governments possess *any* authority to regulate geoduck aquaculture activities under the relevant statutes. For the reasons

set forth below, the answer to that threshold question is no, and thus, the Attorney General should answer both subsidiary questions in the negative.[1]

I. The Interests of the Western Washington Treaty Tribes

From time immemorial, the Tribes have relied upon the clams, oysters, geoduck, and other shellfish found in Puget Sound as a primary source of food, employment, and trade commodities. Shellfish were so essential to the Tribes' way of life that when non-Indians began moving to the Puget Sound region in the 19th century, the Tribes reserved rights to their ancient shellfisheries by treaty. The Tribes' rights include a portion of the shellfish naturally-occurring on private tidelands controlled by commercial shellfish growers. *See United States v. Washington*, 157 F.3d 630, 639-40, 646-47, 650-53 (9th Cir. 1998). Today, in addition to harvesting naturally-occurring shellfish, several Tribes engage in aquaculture activities on their reservation tidelands. As you know, the State of Washington has extremely limited authority to regulate the Tribes' treaty shellfishing activities, whether those activities occur on or off-reservation, and the Tribes' on-reservation aquaculture activities. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983) (on-reservation fishing); *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 398 (1968) (off-reservation fishing); Felix Cohen, *Cohen's Handbook of Federal Indian Law*, § 6.03[1][a] (2005 ed.) ("A state ordinarily may not regulate the property or conduct of tribes or tribal-member Indians in Indian country.").

Several Tribes, however, also own off-reservation tidelands on which they practice shellfish aquaculture activities to supplement the subsistence, employment, and economic opportunities available to the Tribe and its members. Moreover, and of great immediate consequence, the Tribes are in the process of considering whether to approve a settlement that would settle 15 years of ongoing litigation between the Tribes, the State, and commercial shellfish growers. Pursuant to the settlement, the Tribes would permanently forego the exercise of their off-reservation treaty shellfishing rights on tidelands long-controlled by non-Indian commercial shellfish growers in exchange for funds that the Tribes would use to purchase off-reservation tidelands on which the Tribes would conduct their own shellfish aquaculture activities. All parties to the settlement – including members of the Pacific Coast Shellfish Growers Association ("PCSGA") – as well as those parties funding the settlement – the Washington State Legislature and the United States Congress – intend that the tidelands purchased by the Tribes with the settlement funds will allow the Tribes to replace the subsistence, employment, and economic opportunities lost by foregoing treaty access to the growers' tidelands.

The imposition of any new regulatory regime on geoduck or other shellfish aquaculture activities (via legislation or via an opinion from the Attorney General regarding the prospective

[1] The Tribes fully endorse the well-reasoned comments submitted by the Pacific Coast Shellfish Growers Association on November 22, 2006.

application of existing statutes not previously applied) would significantly alter the legal foundation upon which the parties' constructed this delicate compromise over the course of many years. If this settlement is approved, the Tribes do not agree that RCW 77.55.021 and RCW 90.58.140 would apply to the Tribes' off-reservation aquaculture activities, even if an Attorney General's Opinion or legislation extends these statutes to other aquaculture operations. However, the Tribes' collective willingness to settle their treaty shellfishing rights on growers' tidelands, which rights they may exercise free of state regulation, would be substantially diminished by the existence of any new regulatory regime that might in any way constrain their ability to conduct off-reservation aquaculture activities, as contemplated by the settlement. Accordingly, the Tribes' interest in your response to the questions posed by Representative Lantz is immediate and paramount.

II. Aquaculture Activities Do Not Require a Hydraulic Project Approval Permit

At the outset, it is essential to identify the basic factual predicate upon which Representative Lantz premises her arguments regarding application of the State Hydraulics Code hydraulic project approval ("HPA") permit requirement to geoduck aquaculture activities: "If only temporarily, these operations affect intertidal substrates, localized currents, and beach forming processes. . . . [and thus] 'use' and 'change' the natural flow or bed of salt waters of the state . . . ." This factual predicate applies to *all* shellfish farming practices, including the periodic removal of debris and predators from a shellfish bed and the simple use of a manual clam fork to harvest intertidal clams. The Tribes have employed these practices in Puget Sound for literally thousands of years, and non-Indians have followed suit over the past 150 years.[2]

For over 50 years, the fundamental standard for the application of the HPA permit requirement has remained unchanged. *Compare* Rem. Supp. 1949 § 5780-323 *with* RCW § 77.55.011(7). To the Tribes' knowledge, that requirement (typically directed at discrete construction projects such as constructing marinas, bridges, and docks; pile driving; and mineral prospecting) has never before been applied to shellfish aquaculture activities. Representative Lantz points to no statute, regulation, or case that supports the radical change in course she now proposes. More importantly, in the Aquaculture Marketing Act of 1985 the Legislature narrowly circumscribed the scope of WDFW authority over aquatic farmers and chose to exclude the general HPA permit requirement from that authority:

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

[2] This factual predicate would also likely apply to other seemingly innocuous practices such as building a sandcastle or dragging a kayak across a beach.

RCW § 77.115.010(2) (emphasis added).

The plain language of this statute is unambiguous. Because the HPA permit requirement set forth in RCW § 77.55.021 is not included in the list of statutes comprising WDFW's "only" authorities over aquatic farmers, WDFW lacks authority to impose that permit requirement on aquatic farmers, including geoduck farmers. There simply is no other reasonable way to interpret RCW § 77.115.010(2), and Representative Lantz's attempt to manufacture an ambiguity where none exists must fail. The Legislature, which is presumed to know the state of its laws, is of course free to amend RCW § 77.115.010(2) if it wishes to grant WDFW permitting authority under the State Hydraulics Code with respect to aquatic farmers. However, the Legislature chose not to make any such amendment in 2005 when it undertook comprehensive revisions to that Code. Until it does, any attempt to extend WDFW permitting authority under RCW § 77.55.021 to aquatic farmers would impermissibly render superfluous the unequivocal mandate of RCW § 77.115.010(2). It would be a cruel irony indeed to apply the HPA permit requirement to shellfish aquaculture activities for the first time in 2006 when the Legislature in 1985 carefully excluded that requirement from WDFW's authority over aquatic farmers.

III. The Shoreline Management Act Does Not Regulate Aquaculture Activities

With respect to the Shoreline Management Act ("SMA"), the threshold question again is whether local governments may require aquatic farmers to obtain a substantial development permit prior to engaging in geoduck aquaculture activities. Because the SMA specifically exempts "practices normal or necessary for farming" from the definition of substantial development, it is unnecessary to reach the question as to whether geoduck farming would otherwise satisfy the definition of a substantial development. *See* RCW § 90.58.030(3)(e)(iv). The Legislature provided in the Aquaculture Marketing Act that "aquaculture should be considered a branch of the agricultural industry of the state for purposes of any laws that apply to or provide for the advancement, benefit, or protection of the agriculture industry within the state." RCW § 15.85.010. The Legislature's definition of aquaculture makes explicit that it is "the process of growing, *farming*, or cultivating private sector cultured aquatic products in marine or freshwaters and includes management by an aquatic *farmer*." RCW § 15.85.020(1) (emphasis added). Therefore, notwithstanding Representative Lantz's attempt to obfuscate the obvious, all "normal and necessary" aquatic farming practices (including those practices employed by geoduck farmers), like all "normal and necessary" terrestrial farming practices, are exempt from the substantial development permit requirement of the SMA.

IV. Conclusion

The unambiguous language of the Revised Code of Washington makes plain that all shellfish aquaculture activities, including geoduck farming activities, are exempt from the HPA permit requirement administered by WDFW and from the SMA. The Legislature employed such unmistakable language to advance strong public policies embedded in the vital role that shellfish aquaculture plays in maintaining the economic vitality of Washington's rural communities and

the environmental health of Washington's marine ecosystems. The Tribes' historical and current interest in harvesting and cultivating the shellfish of Puget Sound is fully consistent with these policies. Accordingly, the Attorney General should answer both questions posed by Representative Lantz in the negative.

Respectfully Yours,

Cory J. Albright
Phillip E. Katzen

c: Kelly Toy, Jamestown S'Klallam Tribe
Doug Morrill, Lower Elwha Klallam Tribe
David Troutt, Nisqually Tribe
Tamara Gage, Port Gamble S'Klallam Tribe
David Herrera, Skokomish Tribe
Daniel Raas, Lummi Nation