

**Pierce County**

Department of Planning and Land Services

CHUCK KLEEBERG
Director2401 South 35th Street
Tacoma, Washington 98409-7460
(253) 798-7210 • FAX (253) 798-7425

August 8, 2007

CERTIFIED MAIL
7005 3110 0001 9661 4204Taylor Shellfish, Inc.
Attn: Diane Cooper
SR 130 Lynch Road
Shelton, WA 98584RE: 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:

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(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.

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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

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."

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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.

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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.

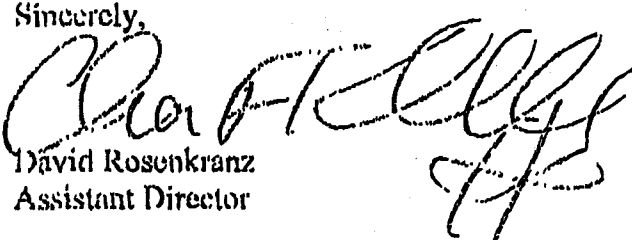
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The Planning and Land Services Department disagrees with Taylor Shellfish's interpretation of the *Washington Shell Fish* Court of Appeals decision. The decision was not limited to public lands. The Court of Appeals specifically upheld the requirement 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 godduck 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

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c: Samuel W. Plauche, Attorney at Law, Gordon Derr, 2025 - 1st Avenue, Suite 500,
Seattle, WA 98121-3140
Tadas Kisielius, Attorney at Law, Gordon Derr, 2025 - 1st Avenue, Suite 500,
Seattle, WA 98121-3140
Perry Lund, Unit Supervisor, Department of Ecology, Southwest Region,
PO Box 47775, Olympia, WA 98504-7775
Jill Guernsey, Deputy Prosecuting Attorney
Vicki Diamond, Supervisor, Current Planning
Kathleen Larrabee, Supervisor, Resource Management
Ty Booth, Senior Planner
Trish Myers, Associate Planner
Mark Luppino, Code Enforcement Officer