

Meeting Summary

Shellfish Aquaculture Regulatory Committee

November 26, 2007

11:00 a.m. - 4:45 p.m.

Ecology Headquarters, ROA-36

Lacey, Washington

Committee members and staff present: Nick Jambor, Diane Cooper, Ward Willits, Jeff Dickison, Eric Hurlburt, Lisa Veneroso, Dick Wallace, Krystal Kyer, Cyrilla Cook, Sarah Dzinbal, Laura Hendricks, Bryan Harrison, Dave Risvold, Tom Clingman (Ecology Staff), Jeanne Koenings (Ecology Staff)

Other interested parties: Morris Barker (WSFW alt.), Blain Reeves (DNR alt.), Bruce Wishart (PFPS alt.), Adrienne Stewart, David Fyfe, Tony Forsman, Jessie DeLoach, Perry Lund, Kim VanZwalenburg, Brad Murphy, Jeff Stewart, Kathryn Townsend

Presenters: Casey Ehorn (Corps), Loree Randall (Ecology)

Facilitator: Sally Toteff, Department of Ecology

Note taker: Candice Holcombe, Department of Ecology

Introductions

Meeting Goals and Approval of Proposed Agenda

(Sally Toteff, Facilitator)

- **Meeting Goals:**
 - Improve understanding of shellfish aquaculture permits under federal regulations and the Shoreline Management Act (SMA).
 - Identify key regulatory gaps in federal, SMA, and other aquaculture permits.
 - Continue exploring recommendations for integrating shellfish aquaculture regulations (Task 1).
 - Discuss interim progress report to Legislature (due December 2007).
- **Discussion of proposed agenda:**
 - Questions were raised regarding completing Task 1. There was interest in examining commonalities and discrepancies to approach a consistent regulatory package. Other members expressed concern about legislative intent for the scope of Task 1. It was agreed that these topics were included on the agenda for the meeting.
 - **Consensus: Approve proposed agenda.**

Quick Announcements

- WiFi is available. Jeanne can provide password/log in info.

Committee Business

(Sally Toteff, Facilitator)

- **Approval of 10-15-07 Meeting Notes:**
 - **Consensus: No comments. Approve October meeting notes as final.**
- **Approval of Proposed Ground Rules.**
 - **Consensus: No comments. Approve Ground Rules as final.**

Presentations and Discussion

Review and Reflections from last meeting:

Overview: Where we are now. Tom C. provided an overview of Committee work to date and remaining tasks

- **Task 1:** Integrating and streamlining existing shellfish aquaculture regulations:
This will be discussed in more detail today. There will be presentations on 401 and Shoreline permitting processes.
- **Task 2:** Providing oversight to Sea Grant's geoduck research program:
 - A number of members and staff attended Sea Grant's research symposium.
 - The Request for Proposals has been issued and proposals received.
 - Ecology is assisting in review of proposals.
- **Task 3:** Update of rule that establishes guidelines for SMP updates for intertidal geoduck aquaculture.
 - It is important for us to complete our work within the timeframe specified by the legislature. We have funding only through June 2009 by that time we need to complete the rulemaking process.
 - By mid-2008 we need to file a CR101 (intent to start rulemaking). CR102 is the actual filing of the draft language. There will be public notice and a number of hearings. It will take some time for the rulemaking process.
 - We need to conclude Task 1 in a couple of months so we can move on to the details of Task 3.
 - The main work of the Committee on Task 3 will be recommendations for geoduck aquaculture guidelines. Ecology will then initiate rulemaking process. Once we receive public comments on the draft rule language, we'll need to reconvene the committee to recommend response to public comments.

Discussions on Completing Task 1: Key outcomes

Completing committee work on Task 1 emerged as a major topic of the meeting.

The following key outcomes reflect results of discussions under both the Review/Reflections agenda item and the discussion near the conclusion of the meeting. The key outcomes are numbered for clarity: Numbering does not reflect any Committee ranking or priority.

1. **The core Legislative direction for Task 1 is to “integrate existing regulations.” At this time, there are no major integration actions necessary under Task 1.** Discussion points:
 - The “integration” topic was included in 2007 HB 2220 (which was the melding of two separate bills) due to shellfish industry concerns about the new 401 permit process. The approach that Federal and state agencies would take for this new permit was very unclear at the time of the 2007 Legislative session.
 - Federal and state actions since the 2007 session have clarified the 401 permit process. The industry now sees no need to integrate the 401 process with other existing permit processes.
 - The “integration” task is specifically related to *existing* regulations. We should not mix issues about *new or revised* permits for aquaculture proposals into Task 1.

- Other committee members understood the industry perspective on this topic. However, members have **caveats about considering Task 1 as “complete”**:
 - Some of us at the table aren’t really clear on what the federal permits are going to look like, the details of the attorney general’s opinion, etc. Not everyone is as confident as industry that regulatory processes are adequate.
 - Detailed consideration of permit conditions, including addressing property owner and environmental concerns, will occur during Task 3 on geoduck aquaculture guidelines.
 - We should be able to revise our Task 1 conclusions at a later date if necessary. Detailed examination during Task 3 may reveal integration issues regarding existing regulations.

- 2. **HB 2220 includes the broad intent that the committee examine opportunities to streamline agency permit processes. The agencies will examine this and report back to the committee in early 2008.**
 - The examination of process improvement will include the following:
 - 1) Map the various regulatory processes;
 - 2) Identify places to integrate/streamline (in terms of procedural steps);
 - 3) Determine what kinds of databases are available to share this information so we at least have a common understanding of what data exists.
 - While HB 2220 stipulates rulemaking for geoduck aquaculture only, administrative process improvements recommended by the committee might require update of agency rules. If this is the case, it is OK for the committee to make recommendations that might require an agency to update their rules.

- 3. **“In the course of our deliberations” ideas and recommendations may also be identified outside of any HB 2220 tasks.** Some suggestions that emerge from committee work may fall outside of either Task 1 or Task 3. It will still be important to identify these for others to consider.
 - This committee is not a panacea for all problems with shellfish aquaculture regulation.
 - If we need more legislation, we need to work with our legislators on that.
 - Potential topics in this category include “other advice” such as state guidance for permitting, cumulative impacts assessments regarding aquaculture, etc

Discussion of brainstorm session document:

Staff distributed comments received from People for Puget Sound and DNR on brainstorm session section III: “Possible Solutions”. PPS saw this as an opportunity for members to clarify their respective interests. They offered suggestions to make this a better, more comprehensive document. DNR identified priority topics, which they understood to be part of the request from staff.

Key outcomes of the discussion:

- This was a wide-ranging discussion that identified an impressive spectrum of issues.
- A number of the suggestions and issues are associated with Task 3 (rather than Task 1).

- Several members noted during the brainstorm process that the ideas being presented were much broader than the committee’s charge and more than what we can accomplish.
- If specific items from the session are to be used in the committee’s further work, we’ll need to refine those brainstorm ideas.
- The most useful way to look at the brainstorm is as a reference that gets issues on the table, so we can look back and see what gets addressed and what doesn’t as we move forward.
- There may be brainstorm ideas that are not relevant to any of the HB 2220 tasks. If ultimately desired by the committee, these could be clarified and included in the committee report as “in the course of deliberations” items (see previous agenda item.)

Technical Presentations and Discussions:

Federal Aquaculture Permits

(Nationwide Permit 48; Individual Permits for Section 404 and 401 of Clean Water Act; Coastal Zone Management Consistency Determination)

(Casey Ehorn of US Army Corps of Engineers; and Loree Randall of Ecology)

Corps and Ecology staff attempted to clarify the Federal and state review process related to 404/401 permits. They used PowerPoint slides as the basis of their presentations. Extensive question and answer session followed the presentations. Casey noted that there will be a workshop on December 5th at Ecology Headquarters on all NW permits

Discussion/ Q & A: Responses are from Casey Ehorn unless identified as LR (Loree Randall.)

Q: What are the criteria that distinguish “new” from “existing” aquaculture?

A: : “Existing” is defined as “in the water” and having a permit issued by some government (local, state, etc.).

Q: For individual permits, is there duplication in the permit processes, or is each step unique?

A (CE): Each agency can choose whether or not to “piggy-back” on the work already done by the Corps (where applicable).

A (LR): For individual 404 certifications, Ecology and the Corps have agreed on a joint public notice. We try to consolidate the timing as much as possible. The Office of Regulatory Assistance (ORA) webpage has schematics for 401 and Corps permits.

Q: : What about the 10,600 acres of geoduck aquaculture that the NWP 48 data show vs. the 150 acres geoduck aquaculture reported by the industry? Who’s going to reconcile these numbers?

A (LR): The table referred to by Laura is an internal working document that Ecology staff generated to summarize all the reports received. We were trying to decipher which were geoduck vs. clams, which were planted vs. planned, etc. Our interpretation of this table may have been changed in the course of our continual research. When discrepancies became

apparent, Ecology staff began calling geoduck operators to clarify the information on existing and planned geoduck operations.

Diane Cooper clarified that growers were asked by the Corps to report all species being cultured in project areas. They have reported to Ecology separately on the exact number of geoduck acres. Some growers weren't sure of their acreage, which resulted in some distortion. The total acreage in geoduck aquaculture is around 150 acres.

Q: How will the NWP 48 terms and conditions of approval be identified?

A: One principle source will be the biological evaluations/opinions that the Federal services will be providing. These reports are expected on December 1. The consultation on ESA should take 3-6 months.

Q: Regarding turbidity, is there a set number turbidity is based on?

A: (LR): Water quality standards for turbidity are based on a background number. Criteria for "non-degraded waterways" is 5 NTU over background .WAC 173.201a.210

Q: What is considered "dredge" or "fill"? Is a clam fork turning over material during harvest considered "fill"?

A: Structures in the water or individual placement of geoduck seeding is not considered a "fill". The gray area has been whether harvesting activity involved placement of dredged or fill materials. Initially we'd gone out on a site visit and thought it didn't really look like a discharge. Then we got questioned and we crunched the numbers. We pulled up studies on harvest methods; looked at the state EIS; did modeling in Excel; and realized that what someone sees with their eyes might not be the full story. Our working position paper will be released after it's been reviewed and approved by Corps headquarters.

Q: Why are you now regulating recreational harvest activities under permit 48 when they were sufficiently covered under permit 4?

A: As the industry is changing and the public is becoming more aware and involved, we moved that; recreational harvesting still covered under Nationwide 4 was shifted to NW48, so now 4 doesn't cover bivalves.

Q: Is the Nationwide 48 good for 5 years? Why 5 years, and what happens then?

A: (LR): Every 5 years Nationwide program is revisited on national, regional, and state level.

Q: Can there be changes in species in an area? If you have geoducks being raised in Thurston County, does that mean that geoduck can be farmed anywhere in Puget Sound?

A: NWP 48 authorizes changes in species as long as the species have previously been cultivated somewhere in the water body. Any time there's a change in species being cultivated in a growing area, it triggers a Pre-Construction Notice (PCN). We would evaluate their PCN and move through the rest of the Nationwide permit process.

Q: What is the definition of a "project area"?

A: Any areas previously authorized by federal, state, or local permit – it could be multiple parcels, or all of Willapa Bay.

A (LR):The Corps and Ecology have differing requirements on this topic. The state is very specific in what we want regarding geoduck aquaculture. We are still trying to figure out how best to move forward to get accurate data.

Q: Was everything you were talking about related to Nationwide 48? You're not saying there's no such thing as new individual permits in Puget Sound are you?

A: New project areas are judged individually.

- Comment from Lisa V.: If there is to be an exemption from the Corps, please do not make that exemption specific to an entity; it should be activity-specific. I'd like to know that the Corps has heard and noted this comment. It is very important to us.
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SMA Aquaculture Requirements

(Tom Clingman, Ecology) Distributed discussion outline.

This information can apply to both tasks. For Task 1, it outlines the tools available under SMA for permitting aquaculture in general. For Task 3, it identifies the tools that may be used for oversight of geoduck aquaculture proposals. Key comments and issues:

- Conditional Use Permits: A key difference between a substantial development permit (SDP) and a conditional use permit (CUP) is that Ecology is not involved in SDPs (these are more routine), while CUPs at local and state level have 5 specified criteria from statute, more public process, more scrutiny. These could be instituted in three different ways:
 - A county has authority to require a CUP for aquaculture activities (all types or some types). These requirements are contained in their Shoreline Master Program (SMP.)
 - Ecology could update our rule guiding SMP updates, to stipulate that all counties must use a CUP for certain types of aquaculture activities. Jurisdictions that have already updated their SMPs would have to pick up the new statute at their mandatory 7-year review. Those who haven't updated yet would have to incorporate it into their upcoming comprehensive update.
 - Could we amend a rule in such a way that it requires *immediate* updates/changes to local SMPs? Staff will get an answer back.
 - The Legislature could amend the Shoreline Management Act to require CUPs for certain aquaculture uses. This would be an unprecedented change. This could also pose a significant logistical challenge for implementation at the local level.
- A key Shoreline permitting issue is whether an activity is "development", which includes "structures", "dredging" and "filling." The Shoreline definition is unique. Unfortunately, we could have different definitions for Corps versus Shoreline permits for these key terms (fill/dredge/structure.) This is admittedly not a "streamlined" approach. However, since NWP 48 is nationwide, some differences in definitions may be inevitable.

- Preexisting uses are a key concern, especially if there are potential changes in permit requirements. Generally, existing activities are allowed to continue. Expansions would typically require some type of review.
 - Local discretion is a core issue. We should note that permit requirements don't preclude something from happening. It just means that it requires a permit. Local governments can add their own regulations to the processes required by the SMA and Ecology rules.
 - This document is helpful for Task 3 but not Task 1.
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Legislative report: This will be an interim status report. Ecology will send it out in about a week, you'll have a week to review.

Meeting scheduling: Candice will find dates for January, February, and March 2008 and send out notices.

Next meeting Topics:

- Follow up on December 2007 report to Legislature
- Corps: Follow up on 401/404 biological report from the Federal services
- Update on status of Task 2 research projects.
- Completing Task 1: Report from agencies on permit process improvement suggestions for committee consideration.
- Initiating Task 3: Initial sources of information for committee consideration will include:
 - DNR's Best Management Practices.
 - Information on how different counties already are handling geoduck siting and operation.
 - Information from WDFW's Nearshore Project.
 - Is there some scientific information so compelling and relevant that we should somehow find a way to look at it now? (Email Tom if anyone has ideas on source information.)
 - Tom will designate someone to coordinate the agency subgroup.

Final comments?

- None.

Public Comments:

- None.
- Note: A woman made impromptu comments to the committee, but requested that they be excluded from the meeting record. She said she would like to submit more polished comments in writing.

Meeting adjourned 4:45 p.m.