



# Opinion

Rob McKenna

Attorney General of Washington

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

- 1. The Department of Fish and Wildlife may not require hydraulic project approval permits under RCW 77.55.021 to regulate planting, growing, or harvesting of farm-raised geoduck clams by private parties.**
- 2. The planting, growing, and harvesting of farm-raised geoduck clams would require a substantial development permit under the Shoreline Management Act if a specific project or practice causes substantial interference with normal public use of the surface waters, but not otherwise.**
- 3. Where a geoduck clam culture project would require a substantial development permit, the local government and the Department of Ecology would have a variety of enforcement options available; in some cases, conditional use permits might also be used to regulate this practice.**

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**January 4, 2007**

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

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Dear Representative Lantz:

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

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

Attorney General of Washington  
Post Office Box 40100  
Olympia, WA 98504-0100  
(360) 753-6200

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## BRIEF ANSWERS

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

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

In answer to the third question, local government and the Department of Ecology may take informal or formal civil enforcement actions against a substantial development that is undertaken without a permit. Alternatively, conditional use permits may be used to manage this type of aquaculture if the approved shoreline master program includes such a requirement.

## BACKGROUND

Your questions concern a new type of shellfish farming that takes place on lower elevations of intertidal lands.<sup>1</sup> The process involves four-inch diameter PVC pipe cut into approximately one-foot lengths. The short PVC tube is inserted in the beach, leaving a few inches above the surface. A shellfish grower places tiny juvenile geoduck clams into the sandy substrate protected by the tube. The tube itself, or the general area, is covered with netting. Together, the tube and netting protect the juvenile geoduck from predators until it grows large enough to bury itself to a safer depth. After the geoduck has grown a sufficient amount to avoid predation (which requires several months), the shellfish grower removes the netting and tubes. The geoduck farming site may occupy many acres of tideland.

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

The harvest incidentally releases silt and sediment which may temporarily be found in the surrounding water. Kent S. Short & Raymond Walton, Ebasco Environmental, *Transport and Fate of Suspended Sediment Plumes Associated with Commercial Geoduck Harvesting* (April 1992) (copy on file). Removing a geoduck from the beach therefore results in a temporary depression where the substrate was loosened and the geoduck removed. *See generally*

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<sup>1</sup> Intertidal here simply refers to tidelands that are periodically covered and uncovered by the daily high and low tides. It is not necessary to distinguish types of tidelands and bedlands to address the questions.

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*Washington Shell Fish, Inc., v. Pierce Cy.*, 132 Wn. App. 239, 131 P.3d 326 (2006) (petition for review denied Jan. 3, 2007) (discussing geoduck aquaculture).<sup>2</sup>

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

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

(1) Except as provided in RCW 77.55.031, 77.55.051, and 77.55.041, in the event that any person or government agency desires to undertake a **hydraulic project**, the person or government agency shall, before commencing work thereon, secure **the approval of the department in the form of a permit** as to the adequacy of the means proposed for the protection of fish life.

RCW 77.55.021(1) (emphasis added). A “hydraulic project” is “the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state.” RCW 77.55.011(7). The work of inserting tubes and netting on the tidelands for geoduck aquaculture would be a hydraulic project because it is “work” that “uses” and “changes” the “bed of any of the salt or freshwaters of the state.” *Id.* An HPA permit would thus be required for geoduck aquaculture unless there is some exception. The exception is in the statutes that address WDFW disease inspection powers for private sector cultured aquatic products.

RCW 77.115.010(2) provides, in part:

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

(Emphasis added.)

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

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

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Farm-raised geoducks are within the definition of private sector cultured aquatic products because they are “native, nonnative, or hybrids of marine or freshwater plants and animals that are propagated, farmed, or cultivated on aquatic farms”. RCW 15.85.020(3). An “aquatic farmer” is a private sector person who “commercially farms and manages the cultivating of private sector cultured aquatic products on the person’s own land or on land in which the person has a present right of possession.” RCW 15.85.020(2). The case of *State v. Hodgson*, 60 Wn. App. 12, 802 P.2d 129 (1990), illustrates that privately planted geoducks can be private sector cultured aquatic products.<sup>3</sup>

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

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

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

Next, we consider that RCW 77.115.010(2) does not mention the HPA permit or terms that address HPA requirements. The HPA statute refers to “construction” or “work” that “uses” or “changes” the bed or flow of state waters. RCW 77.55.021(1). In contrast, RCW 77.115.010(2) does not use any of these terms. Moreover, other statutes in RCW 77.55 provide explicit exemptions to the HPA permit. *See* RCW 77.55.031–.071 (describing activities that might use or change the beds of state waters such as crossing an established ford, removing derelict fishing gear, abatement of certain noxious plants, hazardous waste cleanups, and construction of housing for sexually violent predators). It is arguable that these express

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<sup>3</sup> In *Hodgson*, a criminal defendant contended that geoduck clams he harvested from DNR-managed bedlands were private sector cultured aquatic products. The court took judicial notice that geoduck clams take five years to mature and rejected the defendant’s argument because the harvester’s connection with the public geoduck beds was transitory, and wild geoduck clams were not under the active supervision and management of a private aquatic farmer at the time of planting. *State v. Hodgson*, 60 Wn. App. at 17-18. In contrast to *Hodgson*, your question deals with an aquatic farmer who actively supervises and manages the geoduck clam bed at the time of planting.

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exemptions in RCW 77.55 should be interpreted as providing the only exceptions to the HPA permit. *See In re S.B.R.*, 43 Wn. App. 622, 625, 719 P.2d 154 (1986) (express exceptions in a statute exclude all other exceptions).

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

First, RCW 77.115.010(2) acts as an exception and must be read narrowly. *See State v. Turpin*, 94 Wn.2d 820, 825, 620 P.2d 990 (1980) (statutory provisos should be strictly construed with doubts resolved in favor of the general provisions to which the proviso does not strictly apply). We also avoid absurd or unintended consequences. *Frat. Order of Eagles, Tenino Aerie v. Grand Aerie*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002) (The courts “will avoid literal reading of a statute which would result in unlikely, absurd, or strained consequences.”). Thus, we do not read RCW 77.115.010(2) disjunctively as a limit on WDFW regulation of any registered aquatic farmer, because that leads to absurd results where, for example, WDFW could not regulate an aquatic farmer who is hunting because the laws regulating hunting are not on the statutory list. We read RCW 77.115.010(2) conjunctively. Thus, it limits regulations when applied to both the private sector cultured aquatic products *and* the aquatic farmer.<sup>4</sup>

We also rely on RCW 77.12.047(3) to reach our conclusion. This statute provides that rules adopted by the Fish and Wildlife Commission shall not apply to private sector cultured aquatic products, except for rules adopted under RCW 77.12.047(1)(g) (allowing WDFW to adopt rules “specifying the statistical and biological reports required from fishers, dealers, boathouses, or processors of wildlife, fish or shellfish.”) Under this statute, WDFW rules governing the time, place, and manner for taking wild fish, shellfish, and wildlife are not applicable to private sector cultured aquatic products. We conclude that if an HPA permit were used to regulate geoduck planting and harvesting, it would sidestep this express limit on the use of WDFW rules, confounding express legislative intent.

Finally, we consider that the HPA permit is enforced primarily using criminal sanctions under RCW 77.15.300. Interpretation of whether an HPA permit is required must therefore consider the rule of lenity. Under the rule of lenity, if two possible constructions of a statute imposing a criminal penalty are permissible, the criminal statute will be construed against the state and in favor of the accused. *See, e.g., State v. Radan*, 143 Wn.2d 323, 330, 21 P.3d 255 (2001). A person planting geoducks without an HPA permit would properly invoke the rule of lenity to argue for the above interpretation of RCW 77.115.010(2) limiting the HPA permit requirement.<sup>5</sup>

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<sup>4</sup> Thus, a person who constructs a boat ramp, dock, or other construction work at an aquatic farm would require an HPA permit, because the permit regulates construction; it does not regulate aquaculture products.

<sup>5</sup> Whether lenity applies here depends on whether application of HPA laws to a geoduck planter would be criminal. An ordinance is penal or criminal in nature when “a violation of its provisions can be punished by imprisonment and/or a fine.” *State v. Von Thiele*, 47 Wn. App. 558, 562, 736 P.2d 297 (1987). An ordinance is remedial, rather than criminal, “when it provides for the remission of penalties and affords a remedy for the

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

**Background – The Shoreline Management Act**

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

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

RCW 90.58.030(3)(d) defines “development” to mean:

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

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

“Under the [SMA] no ‘substantial development’ exists if there is no ‘development’ within the meaning of RCW 90.58.030(3)(d), because for there to be a ‘substantial

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enforcement of rights and *redress of injuries*.” *Von Thiele*, 47 Wn. App. at 562. Civil and criminal penalties may coexist without “converting the civil penalty scheme into a criminal or penal proceeding.” *Von Thiele*, 47 Wn. App. at 561.

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

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development', there must first be a 'development' ". *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 812, 828 P.2d 549 (1992). Our analysis therefore focuses on whether geoduck farming is a development.<sup>6</sup>

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

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

## Analysis

We start by examining a recent case where the Court of Appeals held that a geoduck tube aquaculture operation required a substantial development permit. *Wash. Shell Fish*, 132 Wn. App. 239.<sup>7</sup> The Court analyzed the Pierce County shoreline master program definitions for substantial development, which are identical to SMA definitions. It held that geoduck aquaculture in that case involved "development" because it interfered with normal public use of the waters. *Id.* at 251-52, citing RCW 90.58.030(3)(d) ("any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level").

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

Several witnesses testified that WSF left rope in the water where WSF had planted geoducks, and this rope would become entangled with people or non-geoduck-harvest-related objects. WSF divers harvesting geoducks placed markers on the water's surface that prevented public use of that area. The PVC planting pipes that WSF inserted into the shorelines were up to 12 inches long,

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<sup>6</sup> In addition to substantial development permits, the SMA contemplates conditional use permits and variance permits. These latter types of permits are issued by local government but require the approval of the Department of Ecology to be valid. RCW 90.58.140(10); *Samuel's Furniture*, 147 Wn.2d at 455, n.13. We discuss the option of using conditional use permitting in response to the third question.

<sup>7</sup> The *Washington Shell Fish* case arose after the county leased 47 acres of county park tidelands for a nominal fee and the lessee proceeded to remove approximately 2.7 million dollars worth of geoducks. *Wash. Shell Fish*, 132 Wash. App. at 253. The county then raised the issue of a substantial development permit and also challenged the validity of its lease. See *Pierce Cy. v. Wash. Shell Fish, Inc.*, No. 31380-4-II, 2005 WL 536097 (Wash. Ct. App. Mar. 8, 2005) (unpublished).

