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PATRICIA T. LANTZ

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ATTORNEY GENERAL
OF WASHINGTON

September 28, 2006

Attorney General Robert M. McKenna
State of Washington Attorney General's Office
Post Office Box 40100
Olympia, WA 98504-0113

Re: Request for formal Attorney General Opinion

Attorney General McKenna:

I request your formal opinion to the following questions concerning the application of the hydraulic project approval and the substantial development permit to intertidal geoduck aquaculture operations. I am seeking your opinion to understand the existing law and responsibilities that apply to private-sector geoduck aquaculture operations; this information is vital as I consider moving forward with potential legislative action in this arena. Although I understand that a completion date can not be guaranteed, I would appreciate any efforts to produce a final opinion before the 2007 legislative session.

I. 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?

Hydraulic Permit Program

Chapter 77.55 RCW establishes a comprehensive regulatory program governing construction projects in state waters. Under RCW 77.55.011(7), "hydraulic project" means 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." Before commencing work on a hydraulic project, RCW 77.55.021(1) requires any person to "secure the approval of the department [of Fish and Wildlife] in the form of a permit as to the adequacy of the means proposed for the protection of fish life."

For the purposes of your opinion, please assume that the current accepted technology for planting, raising, and harvesting geoducks for private aquaculture requires that saltwater beds be

at least minimally altered and impacted. This technology involves embedding plastic tubes into the intertidal substrate, planting geoduck seedlings inside the tubes, and placing protective netting over the tubes. The seedlings grow for approximately 18 months inside the tube's protective walls, after which the grower removes the tubes. In 3 to 5 years, growers harvest the mature geoducks by temporarily liquefying the substrate with high-pressure water to loosen the clams, allowing for hand removal. If only temporarily, these operations affect intertidal substrates, localized currents, and beach forming processes. I have provided this background information solely to justify the assumption that the basic actions required to plant and harvest geoducks "use" and "change" the natural flow or bed of salt waters of the state and thus fall within the scope of the "hydraulic project" definition. I do not expect you to draw any conclusions as to the impact of these practices on fish life.

Chapter 77.55 RCW also provides exactly five exemptions to the hydraulic permit requirement. RCW 77.55.021(1) includes three exceptions: driving across an established ford (RCW 77.55.031), removing spartina or purple loostrife (RCW 77.55.051), and removing derelict fishing gear (RCW 77.55.041). RCW 77.55.061 expressly exempts certain remediation of hazardous contamination; and RCW exempts activities required for the housing of sexually violent predators. These three sections represent the only explicit hydraulic permit exceptions created by the Legislature. Geoduck aquaculture operations do not fall into any of these exemptions.

Aquaculture Marketing

The Legislature has also enacted provisions governing marketing and disease control in aquaculture operations. RCW 15.85.030 designates the Department of Agriculture as the principal state agency for providing state marketing support services for the private sector aquaculture industry. RCW 15.85.85.060 requires the Department of Agriculture to adopt rules for identification requirements for private sector cultured aquatic products. Under this chapter, the Legislature defined "aquaculture" as the "growing, farming or cultivating of private sector cultured aquatic products in marine or freshwaters." RCW 15.85.020(3) defines "private sector cultured aquatic products" in a way that seems to include cultured geoducks, and RCW 18.85.020(2) defines "aquatic farmer" in a way that would seem to include the individuals involved with the planting, growing, and harvesting of geoducks.

These rules, however, are limited to the transportation, sale, processing, and other possession of the private sector cultured aquatic products. Most importantly, these rules apply only after the product is removed from aquatic lands. RCW 15.85.060 does not authorize the Department of Agriculture to regulate the planting, raising and harvesting of private sector cultured aquatic products. The construction activities which trigger a hydraulics permit occur prior to the removal of the geoducks from aquatic lands; nothing in Chapter 15.85 RCW allows the Department of Agriculture to exempt aquatic farmers from the hydraulic permit requirements of RCW 77.55.021. Therefore, the fact that this statute does not require compliance with the hydraulic project approval process does not seem to create an implied exemption to RCW 77.55.021.

Disease Prevention

In addition to the marketing provisions contained in RCW chapter 15.85, RCW 77.115.010(1) requires the Department of Agriculture to jointly adopt a program with the Department of Fish and Wildlife "to protect the aquaculture industry and wildstock fisheries from a loss of productivity due to aquatic diseases or maladies." RCW 77.115.010(2) directs the Fish and Wildlife Commission to adopt rules implementing the disease protection program. Because the requirements of the hydraulic approval permit extend far beyond disease protection, it seems as though the mere absence of a hydraulic permit requirement in this program is insufficient to trump the permit requirements of RCW 77.55.021.

RCW 77.115.010(2) also states that the rules adopted to implement the disease protection program, along with the regulations contained in an enumerated series of statutory citations, represent the only authorities of the Department of Fish and Wildlife to regulate private sector cultured aquatic products and aquatic farmers. This section seems to indicate that the Department of Fish and Wildlife has no other authority to regulate this activity. This premise is reinforced by RCW 77.12.047(3), which expressly excludes private sector cultured aquatic products from certain, specified powers of the Fish and Wildlife Commission. The question is whether the limitations imposed under RCW 77.115.010(2) and RCW 77.12.047(3) are sufficient to establish an implied exemption to the permit requirements of RCW 77.55.021.

Addressing the latter section first, the limitation of the Fish and Wildlife Commission's authority over private sector cultured aquatic products in RCW 77.12.047(3) applies to many of the Commission's basic powers to regulate fish, wildlife and shellfish seasons; classify species of fish, wildlife and shellfish species, and govern the possession of fish, wildlife, and shellfish species. However, regulation of construction projects in state waters and the permit requirements of RCW 77.55.021 are not included in the enumerated powers of the Commission restricted by RCW 77.12.047(3). Further, RCW 77.04.055(5) expressly authorizes the Commission to adopt rules to "implement the state's fish and wildlife laws"; presumably this section includes all state fish and wildlife laws, including the hydraulic permits authorized by RCW 77.55.021. Therefore, the language in RCW 77.12.047(3) specifically excluding private sector cultured aquatic products from a portion of the Commission's scope of authority, falls far short of creating an implied exemption from the hydraulic permit requirement for geoduck aquaculture operations.

Next, if the limitations in RCW 77.115.010 comprise the total extent of the Department of Fish and Wildlife's authority, then RCW 77.04.055 and RCW 77.55.021 may be rendered less effective. Such a reading implies that by failing to explicitly exempt aquaculture operations from Chapter 77.55 RCW, the Legislature has created a conflict of authority within the state statutes. Chapter 77.55 RCW provides a specific and limited list of exemptions from the hydraulic project approval requirement, and neither aquaculture, nor even agriculture, has been provided by the Legislature with an express exemption. However, RCW 77.115.010 seems to suggest that hydraulic project approval, by the mere fact that it is not mentioned, is one of the regulatory authorities that must be surrendered by the Department of Fish and Wildlife regarding aquatic farmers.

This reading raises two questions. First, RCW 77.115.010, in its basic essence, creates a program specifically to control the spread of disease from aquaculture operations. Within its text, this statute proclaims that the program's intent is to protect the aquaculture industry from a loss of productivity brought on by the spread of disease. Indeed, the entire legislative act that gave rise to the current statute focuses narrowly on the promotion of the aquaculture industry and the control of diseases arising from and impacting the industry (Chapter 457, Laws of 1985). This statute does not pertain to any state agency activities designed to address the issues of substrate disturbance, natural fish habitat changes, bed disruption, and other factors that would be evaluated under the hydraulics project approval process. It seems illogical to infer legislative intent to exempt private sector cultured aquatic products from the hydraulic approval requirements in a legislative act specifically addressing the control of aquaculture diseases and marketing of aquaculture products. Rather, the limitations contained in RCW 77.115.010 should be considered as an affirmative list of the authorities which the Department of Fish and Wildlife retains regarding disease control, licensing, and registration for aquatic products and farmers.

The rulemaking procedure outlined in RCW 77.115.010(2) provides further evidence that the Legislature never intended for this statute to serve as an exemption from the project approval process. This section requires aquaculture regulations adopted by the Fish and Wildlife Commission to obtain the approval of the director of the Department of Agriculture prior to adoption. This cross-agency approval is consistent with a rulemaking process that considers subject matter where both agencies share a level of expertise. Chapter 457, Laws of 1985 assumes expertise in aquaculture diseases is shared by the Department of Fish and Wildlife and the Department of Agriculture. However, nowhere in this statute has the Legislature assumed that a shared expertise exists over hydraulic construction projects. Conversely, state law is very clear that the regulation of in-water construction projects is within the Department of Fish and Wildlife's jurisdiction. The Department of Agriculture's involvement in the rulemaking processes of RCW 77.115.010 evidences the Legislature's intent to limit this statute to disease control only, and does not extend to regulatory mechanisms of the Department of Fish and Wildlife that consider the impacts of in-water construction on the non-disease impacts to native fish life.

Secondly, the Legislature constructed Chapter 77.55 RCW so that a person trying to understand the law regarding construction projects in state waters will first see the basic requirement of a permit approval, followed by an express list of exemptions. The common reader is provided no information in Chapter 77.55 RCW that further exemptions apply elsewhere in the state code. If the limitations on agency authority provided in RCW 77.115.010 are read to include a limitation on the enforcement of the hydraulic approval requirements of Chapter 77.55, then there has been an amendment by reference to the basic permit requirement set forth in RCW 77.55.021. Essentially, such a reading would create separate and disconnected legislative provisions scattered through different portions of Title 77, raising confusion, ambiguity, and uncertainty.

Finally, your opinion may ultimately hinge on the application of a canon of statutory

interpretation. Two canons seem appropriate in answering my question. The first canon is basically known as "the specific trumps the general". That is, legislative enactments on the same subject should be interpreted so as to give meaning and effect to both, even though one statute is general in application and the other is specific. In this case, RCW 77.15.010 seems to make a very general statement that most of the statutes creating authority for the Department of Fish and Wildlife do not apply to private sector cultured aquatic products. Interpreted in this way, RCW 77.15.010 would conflict with the very specific direction contained in RCW 77.55.021 that all construction projects in state waters require hydraulic permits unless specifically exempted by Chapter 77.55 RCW. This reading fails to give affect to both sections of law.

The second statutory construction canon that seems appropriate states that, when in conflict, more recent enactments should prevail. The current RCW 77.55.021 was enacted in 2005 as part of a comprehensive rewrite of Chapter 77.55 RCW. In fact, the express exemptions found in the chapter were also re-affirmed in 2005. These actions post-date any legislative action on RCW 77.15.010 (last changed in 2000). If the Legislature had intended to exempt private sector cultured aquatic products from RCW 77.55.021, it would have reflected that change in the 2005 rewrite.

II. 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?

The Shorelines Management Act, Chapter 90.58 RCW, requires that a local government issue a permit before any substantial development is undertaken (RCW 90.58.140(2)). The term "substantial development" is defined in RCW 90.58.030(3)(e) to mean any development with a total cost or value of \$5,000 or any development that interferes with the public's use of the water.

I understand that even more than the first question, this question raises questions of fact that are important to ascertain prior to answering any questions of law. However, given the brief description of geoduck aquaculture techniques provided above, please operate under the assumption that the plastic tubes placed into the substrate and protruding above the water line at least potentially interferes with navigation and other use of the water. Also, please operate under the assumption that most aquaculture operations would not invest new resources and technology in growing an animal with a final market value that is less than \$5,000.

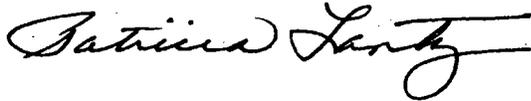
The definition of "substantial development" has a number of exceptions. These exceptions are for activities that would satisfy the definition of substantial development if they were not expressly exempted. One of these exemptions is for "practices normal or necessary for farming" (RCW 90.58.030(3)(e)(iv)). This is important, since the Legislature has declared an intent for aquaculture to be considered a branch of the agriculture industry (RCW 15.85.010). If aquaculture is considered "farming", then acts that are normal necessary or necessary for aquaculture would seem to be exempted from the definition of substantial development.

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Although RCW 90.58.030 describes what is *not* considered necessary for farming, it does not offer a positive definition of what activities *are* to be considered farming. Chapter 90.58 RCW does, in a following section, offer a definition of "agricultural activities" and "agricultural products" (RCW 90.58.065). However, it seems as though the Legislature was careful to keep separate these definitions from the "farming" exception to the definition of substantial development. Not only are different terms used to describe similar concepts, but the definitions of "agricultural activities" and "agricultural products" are preceded with the qualifier that those terms only apply to RCW 90.58.065. Since the "farming" exception to the definition of substantial development appears in RCW 90.58.030, it is unclear if these definitions have any applicability in ascertaining what is normal and necessary for farming.

Thank you for your consideration of this request.

Sincerely,

A handwritten signature in cursive script, appearing to read "Patricia Lantz". The signature is written in black ink and is positioned above the typed name.

State Representative Patricia Lantz