

# WASHINGTON SEA GRANT SHELLFISH & THE ENVIRONMENT RESEARCH SYMPOSIUM

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## *Shellfish Case Law Update*

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The Opinions Expressed Herein do not Represent the Official Position of the Attorney General's Office

- ◎ *Coalition to Protect Puget Sound Habitat v Thurston County, Taylor Shellfish, Arcadia Point Seafood, and NetVenture, SHB No. 13-006c (Lockhart); October 11, 2013*
- ◎ *Coalition to Protect Puget Sound Habitat and Garrison v. Pierce County, Detienne, and Chelsea Farms, SHB No. 13-016c, 13-016, 13-018, 13-019, January 22, 2014*
- ◎ *Appeal of MDNS on Haley/Taylor/Seattle Shellfish SDP Application Nos. 777798, 748284, 748285, 760819, Pierce County Hearing Examiner Report and Decision, dated October 21, 2014*

***Coalition to Protect Puget Sound Habitat  
v Thurston County, Taylor Shellfish, Arcadia Point  
Seafood, and NetVenture, SHB No. 13-006c  
(Lockhart); October 11, 2013***

- **Consolidated Appeal of 4 SDPs for intertidal geoduck**

**Multiple Issues raised including :**

- Impacts to forage fish
- Sedimentation/Siltation concerns
- Competition for food source
- Impacts to salmon
- Impacts to public recreation and navigation
- Marine debris including microplastics; and
- Cumulative impacts



- Three farms in general surf smelt spawning area
- Applicants biological survey indicated no spatial overlap between farm activities and spawning habitat- 4 vertical and 50 horizontal feet of separation
- One farm near sand lance spawning habitat, but farm activities will occur below
- No eel grass, no herring spawn at any of the farms, herring spawn surveys still required, and activities will be disallowed if spawn present

- No direct displacement of spawning habitat, but what about sedimentation of habitat from nearby activities?
- No site specific analysis done by Appellants forage fish expert, and no personal observation of geoduck activities.
- Applicant expert conducted two site visits, and concluded based on site specific analysis of grain size and modeling, that sediment unlikely to accumulate in forage fish spawning areas.
- Board found farming activities unlikely to impact forage fish habitat.



# Cumulative Impacts Analysis

- CIA requirement for CUP or variance, but discretionary for SDP. 6 factors to consider:
  - Shoreline of Statewide Significance (SSWS)
  - Potential harm to habitat, loss of community use, or a significant degradation of views and aesthetic values
  - Is project a “first of its kind” in the area
  - Additional applications for similar activities in the area
  - Does the local SMP require a CIA
  - Is the type of use being proposed a preferred use



## Close call, but no CIA required here:

- ⦿ Not SSWS
- ⦿ No significant long term impacts and recreational impacts only minor
- ⦿ Not first of its kind in area
- ⦿ But 3 of these projects in same area
- ⦿ But SMP has strong policy statement
- ⦿ Aquaculture is water dependent use

## Other factors noted:

- ⦿ Corps 2012 reissuance of NWP 48 with supporting analysis that impacts are temporary
- ⦿ Preliminary Sea Grant research supports the same conclusion
- ⦿ Permit provision that allows the county to reopen the permits after 7 years and consider cumulative impacts



# ***Coalition to Protect Puget Sound Habitat and Garrison v. Pierce County, Detienne, and Chelsea Farms, SHB No. 13-016c, 13-016, 13-018, 13-019, January 22, 2014***

- ⦿ SDP issued by Pierce County for 5 acres geoduck farm on Henderson Bay in Carr Inlet
- ⦿ Primarily subtidal farm, except for 0.5 acre- first subtidal farm permitted by Pierce County
- ⦿ Approved by HE with conditions, and appealed to SHB by various parties including the Applicant, neighbors, and the Coalition to Protect Puget Sound Habitat



# Six Day Hearing After which Board Denied the Permits

- Board recognized some similarities of issues between this case and others BUT emphasized that *each permit is decided on its own merits.*

## Key factors in denial here included:

- Presence of native eelgrass
- Presence of high recreational use- windsurfing
- Proximity of known herring spawn
- Location on Shoreline of Statewide Significance

- Inadequate Eelgrass buffers in permit- original proposal was 2 foot vertical buffer, which in this area equates to a 40-50 foot horizontal buffer. Based on the SEIS for the state of Washington Subtidal Geoduck Aquaculture Fishery, which is what is used to regulate harvest on state-owned tidelands
- Applicants then negotiated a 10 horizontal feet on shoreside for intertidal and 25 horizontal feet on seaward side for subtidal
- With this buffer, evidence indicated some sedimentation of landward edge of eelgrass in the intertidal area, yet no permit condition to address this; permit allowed random reduction of 25 foot buffer to 10 feet
- Result- buffer conditions inadequate, over-rely on adaptive management, yet nothing in permit to describe any required actions if buffers shown to be inadequate

- ⦿ Applicant argued buffers in SEIS represented worst case scenario comparison with buffers in other permits
- ⦿ Board found Applicant's witness regarding protectiveness of eelgrass buffers lacked independent expertise, and relied on 3 unpublished studies:
  - *DNR internal technical memo regarding identification of eelgrass beds and how far they disperse and recede*
  - *Assessment of spillover effects from existing Samish Bay farm*
  - *Canadian study of Impacts of subtidal harvest on nearby eelgrass*
- ⦿ For various reasons, Board found these studies did not sufficiently support the offered opinion that the smaller buffers would be protective
- ⦿ Board did not impose an alternative, based on lack of evidence on what an appropriate buffer would be for a project of this size, density, and location in a high energy subtidal environment

# Cumulative Impacts Analysis Required Based on 6 Factors Discussed in *Lockhart* Case:

- Location in SSWS
- Larger project 5+ acres in area of extensive eelgrass and herring spawn; potential impacts to habitat and community recreational use-i.e. windsurfing
- New activity – first of its kind in an area with minimal aquaculture activity
- Additional projects proposed or approved in area already
- CIA not required in SMP
- Water dependent use

- ◎ SMP prioritizes sites well-suited for aquaculture, but this one doesn't meet the criteria
- ◎ Given site specific factors, lack of appropriate balance of statewide interests
- ◎ “The recognition of aquaculture as a preferred use that is of statewide interest is premised on its proper design and management preventing damage to the environment.”
- ◎ Case is on appeal to Thurston County Superior Court



# **Haley - Appeal of MDNS on Haley/Taylor/Seattle Shellfish SDP Application Nos. 777798, 748284, 748285, 760819, Pierce County Hearing Examiner Report and Decision, dated October 21, 2014**

- ◎ SDP for 11 acres of intertidal geoduck on 3 parcels; no eelgrass present
- ◎ County issued MDNS with 11 conditions necessary to address county's finding of probable significant adverse impact with respect to marine debris
- ◎ 11 conditions to address marine debris are: tube marking; mandatory BMPs; \$1 per tube bond requirement; patrol tidelands within ½ mile; provide contact information and prompt response to complaints





Similar issues as raised in other permit appeals:

- ◎ Environmental impacts regarding sediment, near shore habitat, fish, disease and genetics, water quality, wildlife, public access, and marine debris
- ◎ While experts on both sides were credible, the applicant's experts had more specific field experience



- ⦿ Trigger for Cumulative Impacts Analysis different under SEPA and the Shoreline Management Act for SDPs
- ⦿ SEPA trigger is whether other projects are reasonably foreseeable  
*See Quinault Indian Nation et al v. City of Hoquiam, et al SHB No. 13-012c, (Nov. 12, 2013)*
- ⦿ Neither SEPA nor SMA triggers for CIA met here

## End Results:

- MDNS upheld with additional conditions to address marine debris- Status report every 2 years; maintain a log of citizen complaints and provide to county as requested

## **SDP issued with conditions that address environmental impacts and use conflicts :**

- Environmental Impacts: Aquatic vegetation survey; 25 foot eelgrass buffer; 3 foot minimum vertical separation between farming activities and forage fish habitat; requirement to survey herring spawn and if present no activity until eggs are hatched and no longer present; training in herring spawn ID
- Use conflicts: neutral gear color; no use of loudspeaker; land owners within 300 feet of applicants upland ownership must be informed of harvests 5 days in advance

# Summary

- ⦿ Where facts and evidence remain the same, the Board may rely on its findings in other cases; *BUT each case is decided on its own merits and will be based on the specific facts and testimony presented*
- ⦿ The science is important!
- ⦿ The more the scientific studies can mirror common practices and site conditions, the more weight they will be given by the tribunal



**QUESTIONS?**

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