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David A. Bricklin
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1001 Fourth Avenue, Suite 3303
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Dear Mr. Bricklin:

I am writing in response to your appeal of the Department of Ecology's denial of the petition asking the Department to amend the aquaculture standards in the shoreline master program guidelines rule (WAC 173-26-241(3)(b)). The appeal, brought on behalf of the Coalition to Protect Puget Sound and Case Inlet Shoreline Association, asks that I direct Ecology to initiate rulemaking to require all geoduck aquaculture operations, both existing and new, to obtain a "substantial development permit" under the Shoreline Management Act (SMA).

I have carefully considered the issues raised in your appeal, and deny the appeal for the reasons outlined below.

1. The appeal notes that the agency's rule requires shoreline conditional use permits for new or expanded geoduck operations. However, the appeal says existing geoduck farms, and conversions of other existing aquaculture farms (*e.g.*, clams, salmon) to geoduck aquaculture, have the same environmental impacts as new farms. For this reason, the appeal says a local substantial development permit should be required for all existing geoduck commercial operations, and for any conversions.

Regarding proper evaluation of impacts from geoduck farms, I believe the agency's decision to require local and state review of new or expanded farms, and to defer to local governments on the impacts of any conversions or on the impacts of existing operations, is a well-reasoned and balanced approach. This approach recognizes the shared regulatory roles of state agencies and local governments, and is also consistent with the recommendations of the legislatively-created Shellfish Aquaculture Regulatory Committee.

2. The appeal notes that the SMA definition of "development" includes the construction of a "structure." The appeal says the orderly and dense placement of plastic tubes for a geoduck farm is a structure that constitutes a development under the SMA. Further, the appeal states that Ecology's rule is largely based on a "misguided opinion from the Attorney General."

With regard to shoreline substantial development permits for geoduck aquaculture, WAC 173-26-241(3)(b)(iii) states: "As determined by Attorney General Opinion 2007 No. 1, the planting, growing, and harvesting of farm-raised geoduck clams requires a substantial development permit if a specific project or practice causes substantial interference with normal public use of the surface waters, but not otherwise." AGO 2007 No. 1 responded to a legislator's request for a formal opinion on the issue of whether the planting, growing, and harvesting of farm-raised geoduck clams would require a substantial development permit under the SMA. The opinion told the Legislature that a substantial development permit would be required if a specific project or practice causes substantial interference with normal public use of the surface waters, but not otherwise. Subsequent to the issuance of this opinion, the Legislature enacted Second Substitute House Bill 2220. This bill directed the Department of Ecology to develop, by rule, guidelines for the appropriate siting and operation of geoduck aquaculture operations that are to be included in any master program. The guidelines were required to be developed in consultation with the newly created Shellfish Aquaculture Regulatory Committee. Passage of SSHB 2220 is strong evidence of the Legislature's acceptance of the conclusion reached in AGO 2007 No. 1. In a parallel context, the Washington Supreme Court has noted that greater weight attaches to an Attorney General Opinion when the Legislature has acquiesced in the interpretation of statutory law:

> Additionally, the Attorney General issued an opinion agreeing that the Department's interpretation of this issue was correct. AGO 1 (1976). Although not controlling, Attorney General opinions are given "considerable weight". *Everett Concrete Prods., Inc. v. Department of Labor & Indus.*, 109 Wn.2d 819, 828, 748 P.2d 1112 (1988). Moreover, the Attorney General opinion constitutes notice to the Legislature of the Department's interpretation of the law, and the Legislature has not acted since 1976 to overturn the Department's interpretation. Greater weight attaches to an agency interpretation when the Legislature acquiesces in that interpretation. *See Newschwander v. Board of Trustees,* 94 Wn.2d 701, 711, 620 P.2d 88 (1980).

Bowles v. Washington Dept. of Retirement Systems, 121 Wn.2d 52, 63-64, 847 P.2d 440, 446 (1993). Here, the issuance of the Attorney General opinion was closely followed by legislation that specifically addressed geoduck aquaculture but did not alter the statute interpreted in the opinion. This leads to the presumption the Legislature is satisfied with the interpretation. In these circumstances, legislative amendment or a final controlling court decision are the appropriate methods of changing the construction of the statute, not a new administrative agency interpretation.

3. The appeal argues that the SMA rule appeal provisions do not preclude a petition under the Administrative Procedures Act.

The SMA provides a discrete process for appealing Ecology rules, one that promotes finality in land use decisions. Under RCW 90.58.180(4), a petitioner must appeal SMA rules to the Shoreline Hearings Board within 30 days of adoption or approval. The SMA does require the agency to follow APA procedures, including the petition process, except where they are inconsistent with the SMA. As a general matter, the APA petition process does not seem inconsistent with the SMA rule appeal requirements. However, where an appeal questions the statutory validity of an SMA rule subject to RCW 90.58.180(4), the policy of that statute must be considered to avoid undercutting its appeal requirements.

4. On the issue of whether an amendment to the aquaculture standards would preclude other needed amendments to the rule during the same annual cycle, I agree that the agency could reasonably "batch" the aquaculture amendment with any other needed, near-term rule changes. However, for the reasons stated above, I decline to direct the Department to include amendment to the aquaculture standards in this annual cycle.

5. The appeal asserts that agency priorities and funding are not appropriate reasons for denial of this petition.

Prioritization of agency efforts is necessary given limited funding, particularly in our current state budget situation. Although I am denying this appeal on other grounds, I believe Ecology reasonably concluded that amending the shellfish aquaculture rule in response to the petition would adversely impact other priority work.

For the reasons outlined above, I am denying your appeal.

Thank you for your interest in protecting and restoring the shorelines of Puget Sound.

Sincerely,

Christine O. Gregoire
Governor