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Reply to: Seattle Office

January 19, 2011

Bridget Moran
Deputy Supervisor
Aquatics and Agency Resources
Office of the Commissioner of Public Lands
P.O. Box 47001
Olympia, WA 98504-7001

Re: Reversion of Bush Tidelands

Dear Ms. Moran:

I represent the Case Inlet Shoreline Association whose members own property and enjoy recreational opportunities around Case Inlet. They are concerned that a geoduck facility in that area proposed by Seattle Shellfish will cause environmental damage. Those environmental issues were first addressed by Mason County and are now before the Shorelines Hearings Board.

In conducting our investigation, we believe we have determined that the sub-tidal aquatic lands proposed for use for this facility have reverted by operation of law to the State of Washington. If so, Seattle Shellfish cannot proceed with its project – at least not without obtaining a lease for use of the aquatic lands from DNR. We believe that if Seattle Shellfish were to proceed with the project in the current property ownership status, Seattle Shellfish would be trespassing on State property. We request that you investigate this matter and take whatever action is necessary to protect the State's interests.

The aquatic lands in question are located in Spencer Cove on the west side of Case Inlet near the northeast corner of Harstine Island. A legal description is attached as Exhibit A.

The aquatic lands are proposed to be used for a geoduck nursery facility. A copy of portions of the application for a shoreline permit is attached, too, as Exhibit B.

The aquatic lands in question were conveyed by the State of Washington pursuant to the Bush Act (ch. 24, Laws of 1895). The Bush Act allowed for the sale of aquatic lands for oyster planting purposes only. The law had a reversionary clause: if the aquatic lands were used for any purpose other than oyster planting (or were put to no use at all), the lands would revert to the State by operation of law or equity. *See In re Anderson*, 95 Wash. 330, 163 P. 676 (1917). Those reversionary rights have not been sold by the State.

In 1919, the Legislature passed what is known as the "Clam Act." That legislation allowed owners of Bush Act lands to use them for raising other shellfish without having the lands revert to the State.

In 1935, the Legislature (finally) repealed the Bush Act. But the legislation included a grandfather clause. Individuals who had purchased aquatic lands under the Bush Act could continue to own the lands, but still subject to reversion if the lands were not used for growing oysters or other specified shellfish.

In 1949, the Legislature repealed the Clam Act. But in doing so, the Legislature did not include a grandfather clause so the continued right to use these lands for cultivating clams and other shellfish other than oysters was left in question.

Much of this legislative history is outlined in Attorney General Opinion 1991 AGO No. 8 (Mar. 11, 1991). In that Attorney General Opinion, the Attorney General addressed the Legislature's action in 1949 to repeal the Clam Act without expressly granting grandfather rights to persons who were growing clams pursuant to the Clam Act. The Commissioner of Public Lands had asked the question whether the State can "revoke or limit the vested right of those persons who were cultivating clams prior to 1949?" *Id.* at 7. The Attorney General answered in the affirmative. "We see no reason why the Legislature could not adopt new legislation to eliminate or phase out whatever vested rights remain to cultivate clams, provided that the conditions under which such rights were phased out or discontinued were reasonable." *Id.* at 8.

Eleven years later, the Legislature responded to this Attorney General's Opinion by enacting ESHB 2819 (codified at RCW 79.135.010). Essentially, insofar as it relates to the issue we raise in this letter, the legislation provides that the right to possess the aquatic lands for purposes of cultivating clams or any shellfish revert to the State "unless the sub-tidal portions of the land had been planted with that species of shellfish prior to December 31, 2001." RCW 79.135.010(3).

For purposes of the pending Seattle Shellfish proposal, the issue thus becomes: Were the aquatic lands that Seattle Shellfish proposes to utilize for cultivating and propagating geoducks "planted with that species [geoducks] prior to December 31, 2001? We believe the weight of the evidence indicates that the answer to this question is "No." As such, we believe the lands have reverted by operation of law to the State.

Proving that these lands were not used for planting geoducks prior to December 31, 2001 is, of course, an effort to prove a negative. Nonetheless, we have collected significant evidence which appear to do just that.

The subject aquatic land (Parcel 221250083081) was owned by Toebe's Clam Farm prior to 2002. In February of 2002, Toebe Clam entered into a real estate contract with Seattle Shellfish to sell the property to Seattle Shellfish. That transaction has not closed. Toebe is still reflected as the owner of record on the County's tax records, though Seattle Shellfish is indicated to be the taxpayer. See Exhibit C.

Seattle Shellfish claims that it began planting the bedlands with geoducks in 2001. We do not address whether they did so in 2002, *i.e.*, after they entered into the real estate contract with Toebe in February 2002. Inasmuch as the legislation set a December 31, 2001 deadline for planting geoducks to vest the right to cultivate geoducks thereafter, Seattle Shellfish's activities in 2002 (and thereafter) are of no legal significance. The issue is whether Toebe Clam or anyone operating on its behalf planted the tract with geoducks prior to December 31, 2001, *i.e.*, before the tract was sold to Seattle Shellfish. The following items establish that geoducks were not planted on this site prior to that date.

1. We have reviewed the WDFW Farm Registration forms that have been filed by Toebe for its operations in this area. In none of those forms dated before December 31, 2001 is there any indication that this tract was planted with geoducks. *See* attached Exhibit D.
2. Likewise, the Department of Health Registration Certificates indicate that Toebe's Clam Farm used only the intertidal area and used that only as a relay station for manila clams. The Department of Health records provide no evidence that Toebe Clam Farm used the sub-tidal area at all and certainly not for planting geoducks. *See* Exhibit E.
3. Yet further indication that the sub-tidal lands were not planted with geoducks prior to 2002 is afforded by the absence of a survey as called for by RCW 79.135.200. That statute was enacted as part of the 2002 amendments that gave rise to the language in RCW 79.135.010 that we have been discussing. RCW 79.135.200 requires owners of sub-tidal lands being used for the cultivation of geoducks to survey those lands and to file the survey in accordance with chapter 58.09 RCW (requiring surveys to be recorded with the county auditor). We have researched the records on file with Mason County and have found no recorded survey meeting these requirements, thus indicating no legal planting or harvesting of geoducks has occurred on these sub-tidal lands.
4. Earlier this year, Seattle Shellfish applied for coverage under Nationwide Permit 48 for this geoduck operation. *See* Exhibit F (referencing parcel 2212-50-083081). Nowhere does it mention any sub-tidal (or intertidal for that matter) planting of geoducks prior to March 2007. The map attachment shows only a kiddie pool nursery and rafts (unpermitted, by the way) existing as of March 12, 2007. The attached email from the Corps states they "have never had Geoduck cultivation" which Seattle Shellfish clarifies to mean a change in cultivation method (*i.e.*, they have only been using pools in the intertidal area). On page 5, they clearly state they have only been growing oysters; manila clam; and nurseries (*i.e.*, no sub-tidal planting). This application is seeking to reconfigure the rafts. On page 4, there is nothing mentioned about sub-tidal, nor intertidal, planting of geoduck - only inter-tidal nurseries. Nowhere in any communications with the Corps has sub-tidal geoduck planting been mentioned.
5. Also earlier this year, Seattle Shellfish retained Environ to do a survey of "baseline benthic resources" at the site. That field reconnaissance covers the footprint of the nursery rafts and a larger area "3.8 and 7.7 times beyond the proposed location of the rafts inshore and offshore, respectively..." "SCUBA [*i.e.*, sub-tidal] surveys were

conducted ... to provide a more thorough description and enumeration of the benthic macrofauna and fish community.” Introduction, page 1. The only bi-valves (clams) noted are Tresus capax (horse clams); Panomya ampla (false geoduck); Macoma secta (sand clam); and, Clinorcardium nuttallii (heart cockle) (page 7). Nowhere in this very detailed analysis of the area is there any mention of any geoducks, something which would have been expected had there been any sub-tidal planting. A copy of this April 26, 2010 “Field Reconnaissance” is attached at Exhibit G.

6. In a 2006 grant application, Seattle Shellfish discussed sub-tidal cultivation of geoducks and stated that “farming technology is very limited to date and virtually non-existent in the sub-tidal area.” See Development and Evaluation of Methods for the Sub-tidal Culture of the Geoduck Clam (viewed at www.reeis.usda.gov/web/crisprojectpages/206494.html). A copy is attached as Exhibit H.
7. If Seattle Shellfish planted geoducks on the site in 2001, the seeds would have been ready for harvest four to eight years later. But harvest records filed with WDFW in that timeframe show no harvest from this site.

In sum, we believe the evidence is overwhelming that this sub-tidal tract was not planted with geoducks prior to 2002. As such, the lands have reverted to the State and may not be used for geoduck aquaculture. If your investigation of this issue is consistent with ours, we hope that you will take immediate action to inform Seattle Shellfish, Mason County, and the Shorelines Hearings Board.

In advance, thank you for your careful consideration of these issues.

If you have any questions regarding this matter, please feel free to contact me.

Very truly yours,

BRICKLIN & NEWMAN, LLP



David A. Bricklin

DAB:pse

Enclosures

cc: Case Inlet Shoreline Association