

**Jodoin, Starla**

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**From:** pearl hewett [REDACTED]  
**Sent:** Tuesday, November 18, 2014 8:40 AM  
**To:** zSMP  
**Cc:** Karl Spees; marv chastain; Lois Perry; Sue Forde; Brian and Brooke; [REDACTED] Harry bell; [REDACTED] Amy Cruver; lynn; Delane Hewett; joni howard [REDACTED] Keith Olson; Rick Forschler -; Frank M Penwell; Wylie clark; Mike Newman; Linda Young; Dick Pilling; Miller, Sheila Roark; Steve Gray; Bill Peach; McEntire, Jim; Chapman, Mike; Van De Wege, Rep. Kevin [REDACTED] Hargrove, Jim; chuck cushman; Jim Boyer; [REDACTED] Sandy Collins; Ross Krumpe [REDACTED]  
**Subject:** SMP comment on Aquaculture

**Clallam County SMP Update  
Public comment on Aquaculture  
Pearl Rains Hewett**

**SMP? DNR Aquaculture?**

**Why waste Clallam County SMP Update time on the mote point of DNR Aquaculture**

**The 2.6 million acres of state-owned aquatic lands (mostly submerged) are a public trust, managed and protected by DNR for the people of Washington. DNR looks after more than 4,000 aquatic leases statewide.**

**LOTS OF REVENUE IS GENERATED .....**

**Need I say more?**

**OK, if you want more...**

**THE COURT'S DECISION IS LIKELY TO BE UNPOPULAR WITH MANY SHORELINE PROPERTY OWNERS.**

**Here is the documentation.**

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Court Ruling Opens Up Aquaculture to Anyone, Regardless of Ownership of Abutting Shorelands

**THE STATE DEPARTMENT OF NATURAL RESOURCES ("DNR") has the authority to lease the beds of all navigable tidal water to any person for aquaculture uses regardless of whether the lease holder owns the abutting shorelands.**

**THE COURT'S DECISION IS LIKELY TO BE UNPOPULAR WITH MANY SHORELINE PROPERTY OWNERS.**

**Accordingly, the Court determined that preference to RCW 79.135.110, which allows DNR to lease bedlands to any person who will use the bedlands for an aquaculture use, was warranted. [\[12\]](#)**

The 2.6 million acres of state-owned aquatic lands (mostly submerged) **are a public trust, managed and protected by DNR for the people of Washington.** DNR looks after more than **4,000 aquatic leases statewide.** **REVENUE IS GENERATED .....**

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July 25, 2007 The Washington State Court of Appeals (Division II) has held that **THE STATE DEPARTMENT OF NATURAL RESOURCES (“DNR”) has the authority to lease the beds of all navigable tidal water to any person for aquaculture uses regardless of whether the lease holder owns the abutting shorelands.** The Court of Appeals decision in *Echo Bay Community Association v. Department of Natural Resources*[\[1\]](#) also defines “aquaculture” to include offshore storage of herring in net pens, even if the herring are not fed. **THE COURT’S DECISION IS LIKELY TO BE UNPOPULAR WITH MANY SHORELINE PROPERTY OWNERS.**

One month later, members of the Echo Bay Community Association, with property adjacent to Echo Bay, filed suit under RCW 79.02.030 challenging the lease’s validity. Plaintiffs argued that: (1) the DNR lacked authority under RCW 79.130.010 to lease the bedlands to individuals other than adjacent shoreland and tideland owners; and (2) the proposed herring pen operations did not constitute “aquaculture.” **THE SUPERIOR COURT RULED IN FAVOR OF THE DNR ON BOTH OF PLAINTIFFS’ CLAIMS, AND PLAINTIFFS APPEALED.**[\[6\]](#)

The Court of Appeals also concluded that, even if a conflict between the two statutes existed, under principles of statutory construction, the more specific statute and more recently enacted statute controls. **In this case, the Court found that RCW 79.135.110 was more specific because it applied only to aquaculture leases on bedlands, and was also the more recently enacted. Accordingly, the Court determined that preference to RCW 79.135.110, which allows DNR to lease bedlands to any person who will use the bedlands for an aquaculture use, was warranted.**[\[12\]](#)

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*DNR as the proprietary land manager of State Owned Aquatic. Lands: ...* **DNR has two Land Managers dedicated to aquaculture leasing.**

#### **DNR: Steward of state-owned aquatic lands**

The 2.6 million acres of state-owned aquatic lands (mostly submerged) are a public trust, managed and protected by DNR for the people of Washington. DNR manages these lands to protect fish and wildlife and to facilitate commerce, navigation, and public access. Revenue is generated from the sale of renewable resources, such as wild geoduck, as well as from leasing submerged lands for mooring buoys, marinas, docks, and other uses. This revenue is used to manage and protect the health and productivity of aquatic resources and to fund local projects that restore aquatic ecosystems and create public access to the waters of the state.

DNR looks after more than **4,000 aquatic leases statewide.** Lessees of state-owned aquatic lands include marinas, restaurants, piers, docks, ports, and state parks that offer opportunities for businesses, transportation, and public access. Money earned from aquatic leases goes back into supporting healthy

aquatic habitat and restoration, public access to the waters of the state, and managing the lands for current and future generations.

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## Court Ruling Opens Up Aquaculture to Anyone, Regardless of Ownership of Abutting Shorelands

July 25, 2007

The Washington State Court of Appeals (Division II) has held that the state Department of Natural Resources (“DNR”) has the authority to lease the beds of all navigable tidal water to any person for aquaculture uses regardless of whether the lease holder owns the abutting shorelands. The Court of Appeals decision in *Echo Bay Community Association v. Department of Natural Resources*<sup>[1]</sup> also defines “aquaculture” to include offshore storage of herring in net pens, even if the herring are not fed. The Court’s decision is likely to be unpopular with many shoreline property owners.

### Background

DNR currently leases public aquatic lands for aquaculture purposes, including salmon and herring net pen, and oyster and mussel rafts or longline operations.<sup>[2]</sup> In 2004, DNR had five leases covering 4.3 acres for herring production.<sup>[3]</sup> According to a 2004 DNR report, the agency had five leases covering 137 acres at nine sites in Puget Sound for salmon net pen operations. That same year, DNR had eleven floating mussel raft leases covering 31 acres, and six floating oyster raft leases covering 51 acres.<sup>[4]</sup>

*Echo Bay Community Association* involved DNR’s leasing of bedlands located off Fox Island in Pierce County, Washington to F/V Puget LLC (“F/V Puget”) for herring pen operations. The company’s plan of operations involved catching and storing herring in net pens for a period of two weeks without food. The company then planned to preserve and package the fish at an onshore location prior to sale as bait fish. The offshore herring storage process makes the fish more amendable to subsequent freezing and preservation.<sup>[5]</sup>

In August 2005, Pierce County granted a shoreline substantial development permit to F/V Puget, subject to several conditions. As part of the permitting process, Pierce County determined that the herring net pens constituted an aquaculture use under Pierce County Code. In September 2005, the DNR leased the Echo Bay bedlands to F/V Puget. One month later, members of the Echo Bay Community Association, with property adjacent to Echo Bay, filed suit under RCW 79.02.030 challenging the lease’s validity. Plaintiffs argued that: (1) the DNR lacked authority under RCW 79.130.010 to lease the bedlands to individuals other than adjacent shoreland and tideland owners; and (2) the proposed herring pen operations did not constitute “aquaculture.” The superior court ruled in favor of the DNR on both of plaintiffs’ claims, and plaintiffs appealed.<sup>[6]</sup>

### Governing Law

This case involves the interplay between two statutory provisions related to the disposition of public aquatic lands. RCW 79.130.010 provides that DNR “may lease [bedlands] to the abutting tidelands or shorelands owner or lessee.” In contrast, RCW 79.135.110(1) provides that all bedlands “shall be subject to lease for the purposes of planting and cultivating oyster beds, or for the purpose of cultivating clams or other edible

shellfish, or for other aquaculture use. ..." RCW 79.135.110(2) further provides that "[n]othing in this section shall prevent any person from leasing more than one parcel, as offered by the department."

The term "aquaculture" is not defined in RCW 79.135.100. However, DNR regulations define "aquaculture" to mean "the culture and/or farming of food fish, shellfish, and other aquatic plants and animals in fresh water, brackish water or salt water areas. Aquaculture practices may include but are not limited to ... processing of aquatic plants or animals."[\[7\]](#)

## DNR May Lease Bedlands to Any Person for Aquaculture Uses

Analyzing the interplay between RCW 79.130.010 and RCW 79.135.110, the Court of Appeals concluded that the two statutory provisions covered different lands and allowed for different types of leases. According to the Court, nothing in RCW 79.130.010 precluded DNR from leasing bedlands to non-abutting property owners. It was, instead, a positive grant of authority to allow DNR to lease bedlands to abutting landowners, including tidal, river and lake aquatic lands.[\[8\]](#)

In contrast, the Court of Appeals held that RCW 79.135.110 gave DNR broad authority to lease bedlands *for aquaculture uses*, without limitation on the recipient of such leases.[\[9\]](#) The Court found support for its interpretation in RCW 79.135.120, which provides for lease applications, and also refers to "any person."[\[10\]](#) Accordingly, and granting deference to DNR's interpretation of statutes that it administers, the Court concluded these seemingly conflicting statutes constituted independent grants of authority, and that DNR could lease lands under either statute.[\[11\]](#)

The Court of Appeals also concluded that, even if a conflict between the two statutes existed, under principles of statutory construction, the more specific statute and more recently enacted statute controls. In this case, the Court found that RCW 79.135.110 was more specific because it applied only to aquaculture leases on bedlands, and was also the more recently enacted. Accordingly, the Court determined that preference to RCW 79.135.110, which allows DNR to lease bedlands to any person who will use the bedlands for an aquaculture use, was warranted.[\[12\]](#)

The Court rejected plaintiffs' arguments that the legislature intended abutting property owners to control the uses of neighboring bedlands. According to the Court, such an interpretation would render the terms "any person" in RCW 79.135.110(2) and RCW 79.135.120, meaningless. Moreover, such an interpretation would have rendered the DNR's competitive bidding structure for obtaining a lease nonsensical because only one person would be entitled to obtain that lease. Accordingly, the Court rejected plaintiffs' argument that RCW 79.135.110 imposes a limit on DNR's authority to lease bedlands to non-abutting property owners, and held that "any person" may lease bedlands for aquaculture uses.[\[13\]](#)

## Herring Pen Operations Constitute "Aquaculture"

The Court of Appeals applied the same principles of statutory construction in its analysis of Plaintiffs' argument that F/V Puget's herring pen operations do not constitute "aquaculture." The Court reviewed DNR regulations that provide that the term "aquaculture" encompasses the "processing of aquatic plants or animals."[\[14\]](#) Next, relying on Webster's Third New International Dictionary, the Court of Appeals found three alternative definitions for term "process": (1) "to subject to a particular method, system, or technique of preparation, handling, or other treatment designed to effect a particular result;" (2) "to prepare for market, manufacture, or other commercial use by subjecting to some process;" or (3) "to make useable by special treatment." Under any of these definitions the Court concluded F/V Puget's proposed herring operations

would constitute “aquaculture.” Accordingly, and after again granting deference to DNR’s interpretation of a statute, the Court concluded that DNR’s interpretation of the statute was reasonable and that F/W Puget’s herring pen operations are “aquaculture” for purposes of RCW 79.135.110(1).<sup>[15]</sup>

## Conclusion

Conflicts between waterfront property owners and commercial aquaculture developers have recently heated up with the anticipated leasing by DNR of up to 250 acres of state-owned land for geoduck cultivation in Puget Sound waters.<sup>[16]</sup> *Echo Bay Community Ass’n* clarified DNR’s authority to lease state-owned bedlands to *any person* for aquaculture uses, and broadly defines aquaculture to include herring holding pens.<sup>[17]</sup> The case will likely be of interest to a multitude of interests including shoreline property owners, recreational shoreline users, environmental groups, developers and regulators, affected by offshore uses in Puget Sound.

<sup>[1]</sup> *Echo Bay Community Ass’n v. State, Dept. of Natural Resources*, --- P.3d ----, 2007 WL 1747476 (Wash. App. June 19, 2007).

<sup>[2]</sup> See Washington State Department of Natural Resources Aquaculture Program website, at <http://www.dnr.wa.gov/htdocs/aqr/aquaculture/index.html>.

<sup>[3]</sup> *Id.* at \*1.

<sup>[4]</sup> See Derrick R. Toba, 2004 presentation entitled [“Aquaculture on Washington’s State-Owned Aquatic Lands”](#) (June 30, 2004).

<sup>[5]</sup> *Echo Bay Community Ass’n*, 2007 WL 1747476 at \*1.

<sup>[6]</sup> *Id.* at \*1-2.

<sup>[7]</sup> WAC 332-20-106.

<sup>[8]</sup> *Echo Bay Community Ass’n*, 2007 WL 1747476 at \*3-4.

<sup>[9]</sup> The Court reasoned that if RCW 79.135.110(2) allowed “any person” to lease more than one parcel, then it is logical that, read as a whole, RCW 79.135.110 allows any person to obtain such a lease.

<sup>[10]</sup> RCW 79.135.120 provides that: “[a]ny person desiring to lease tidelands or beds of navigable waters for the purpose of planting and cultivating oyster beds, or for the purpose of cultivating clams or other edible shellfish, shall file with the department, on a proper form, an application in writing. ...” RCW 79.135.120 (emphasis added).

<sup>[11]</sup> *Echo Bay Community Ass’n*, 2007 WL 1747476 at \*3-4.

<sup>[12]</sup> *Id.* at \*4.

<sup>[13]</sup> *Id.*

<sup>[14]</sup> WAC 332-30-106(4).

<sup>[15]</sup> *Echo Bay Community Ass’n*, 2007 WL 1747476 at \*5-7.

[16] See [Washington State Department of Natural Resources Aquaculture Program website](#); see also “Geoduck ‘compromise’ not much of one,” The News Tribune (March 7, 2007); Susan Gordon, “Geoduck farm fight: Round 2,” The News Tribune (May 8, 2007)

[17] Conflicts over offshore geoduck farming is likely to stimulate interest in decisions that address DNR's authority to lease offshore lands for aquaculture uses. It should be noted, however, that the impact of *Echo Bay Community Ass'n* on the geoduck debate may be limited since the Court of Appeals' decision addresses statutes governing DNR's leasing of *bedlands*, while most shellfish aquaculture takes place on *tidelands*.

- See more at: <http://www.martenlaw.com/newsletter/20070725-aquaculture-opened#sthash.gLHRzL5U.dpuf>

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**WA STATE DEPT OF NATURAL RESOURCES IS UNPOPULAR WITH MANY SHORELINE PROPERTY OWNERS.**

**TOO BAD SO SAD DNR RULES**

**DNR MANAGES Lake Sutherland.**

If you own a FLOATING DOCK on Lake Sutherland?

You may want to read this.

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**The agency ( ) began the formal process to obtain custody on September 26, when staff posted notices on the FLOATING DOCKS. DNR followed up with a second notice of custody on October 16.**

**The agency officially takes custody on November 15, unless owners step forward before then to remove the floating objects and anchors.**

**In cases where DNR is aware of ownership of the float, the agency will seek reimbursement for the costs to remove and dispose of the object, anchoring system, and related debris.**