

May 3, 2005

## **Emerging Commercial Fishery Designation – Commercial Shellfishery for Wild Clams, Mussels and Oysters On Non-state Tidelands**

### **Regulatory Background**

Commercial fishing statutes prohibit the harvest and sale of wild shellfish without a commercial fishing license, regardless of whether they are harvested from public or private waters or tidelands (RCW 77.65.010). Unlike the licenses for removal of commercial wild shellfish from state public tidelands (geoduck fishery license, hardshell clam mechanical harvester license, razor clam fishery license; RCW 77.65.220), there is no specific commercial license allowing harvest and sale of wild shellfish taken from private and other non-state owned tidelands. "Wild" shellfish are distinct from "private sector cultured aquatic products," which are defined to include shellfish that are farmed under the supervision of an aquatic farmer or naturally set on aquatic farms which at the time of setting are under management of an aquatic farmer (RCW 15.85.030). Shellfish, which are not under the supervision of an aquatic farmer at the time of natural setting, are not aquaculture products. State v. Hodgson, 60 Wn. App. 12, 802 P.2d 129 (1990).

The sale of wild shellfish harvested from state tidelands or bedlands are reported on shellfish receiving tickets, which are required to be reported to the Department within six working days WAC 220-69-260. By contrast, aquatic farmers report production on a quarterly basis. WAC 220-69-243. Prior to shellfish cultivation, aquatic farmers are required to register their aquatic farms with the Department. RCW 77.115.040; WAC 220-76-010

### **WDFW Issues**

There has been a recent development of harvesting wild shellfish from non-state tidelands and bedlands before the aquatic farmer establishes a shellfish culture operation under an aquatic farm registration permit. Sometimes this wild commercial harvest is reported on quarterly aquatic farm production reports. These reports are not legal documents used for recording wild harvest from non-state lands so they do not provide the accountability necessary to meet state-tribal harvest sharing obligation under United States v. Washington, which provides that treaty tribes are to have access to up to one-half of natural production of shellfish beds. (See generally Case No.: C70-9213, Subproceeding No. 89-3, Stipulation and Order Amending Shellfish Implementation Plan (hereinafter "the Implementation Plan"). The absence of a commercial fishery license for wild shellfish from a non-state owned tideland means that there is no accurate or timely accounting mechanism for the removal of wild shellfish from these tidelands. The lack of catch accounting requirements for these wild shellfish harvests also creates enforcement difficulties, especially for high market value shellfish, e.g., geoduck. Harvest of wild shellfish absent license requirements and absent catch accounting requirements provides an avenue for

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marketing illegally harvested shellfish from other tidelands.

The Department is proposing to use the Emerging Commercial Fishery license as the license to allow harvest and sale of wild shellfish from non-state owned tidelands and bedlands. An emerging commercial fishery includes, "the commercial taking of a classified species in an area from which that species has not been previously commercially taken (RCW 77.65.400 (2)). This definition includes both newly registered aquatic farms and taking of intertidal wild geoduck, which previously had only been taken subtidally (RCW 77.60.070). Use of the Emerging Commercial Fishery license and accompanying trial fishery permit will provide timely accounting of removal, will provide a base for assessment of the enhanced food fish excise tax (see RCW 82.27.020), and provide a accurate accounting for purposes of private grower-tribal allocation.

## **Stages of Development of ECF Rule Proposal**

**Original WDFW Proposal:** The Department proposed that wild shellfish from private tidelands could be harvested under an Emerging Commercial Fishery License (cost \$185 per year) and Trial Fishery Permit (free). Persons intending to harvest wild shellfish would be required to conduct a survey of the wild shellfish, using standard survey methods provided by state-tribal managers, including marking aquatic farm site boundaries. The estimates of standing crop biomass obtained from the survey would provide a basis for verifying that harvest originates from the specific site and as a basis for calculating treaty and non-treaty harvest shares for natural shellfish production. Thirty days prior to the survey the harvester would notify the state and any affected tribes. Sixty days prior to harvest the harvester would provide a copy of the survey to the state and tribes. Two weeks prior to harvest the harvester would notify the state and tribes.. All shellfish coming off the property for the first 24 months after the aquatic farm was registered with the Department, except geoduck, will be reported as wild harvest. All geoducks for the first 60 months will be reported as wild harvest. (These time periods, in this case 24 and 60 months, are the "presumptive wild shellfish reporting period").

**Grower Objections - General disagreement with:**

- (a) WDFW regulatory authority over private tidelands
- (b) Cost and need of a survey: The survey is expensive and under the Implementation Plan, growers are only required to provide tribal access to "natural beds," defined as natural shellfish beds able to support a commercial livelihood on a sustainable basis. Where the shellfish density level is below the level of a natural bed, there is no tribal entitlement, and, presumably, no survey requirement. The growers and the tribes have not agreed on the density level comprising a natural bed, and this issue may be resolved in an revised Implementation Plan.
- (c) The presumptive wild shellfish reporting period: The period is too long, as oysters and

hardshell clams are harvestable at 12 months, while commercial geoduck can be grown to harvestable size in 36 months.

**Department Response** - The Department agreed:

- (a) To eliminate the survey: The harvest management concerns for non-state owned tidelands and bedlands center on the actual removal of wild shellfish, not what exists on the site. The Department will rely on the actual harvest, as documented on shellfish receiving tickets, and drop the survey requirement.
- (b) To a reduction in the presumptive wild shellfish reporting period: The Department agreed that harvest of market-ready cultured clams and oysters was occurring at 12 months, and, while most commercial geoducks are not harvested earlier than 60 months, some are harvested as early as 36 months. Accordingly, the Department proposed to reduce the presumptive reporting period to 12 and 36 months. (c) In a change in marking aquatic farm site boundaries: The Department decided to allow aquatic farm property marking by any standard method.

**Further Grower Objections** - During a meeting between Department staff and the growers, the following issues were raised:

- (a) Need for grandfathering: The growers stated that Department had not done an adequate job of informing growers of the need to register each separate farm site. Many growers were under the impression that once the aquatic farm registration number was obtained (example: No. 123-01), it applied to all farm activities conducted under the supervision of the aquatic farmer. Some farmers have been farming without knowing they had to register each additional site (example 123-02 for the second site, 123-03 for the third site, etc.). A provision is needed to allow these persons to report cultured product from these additional sites that have been in operation under the supervision of the registered aquatic farmer, and not as wild product simply because they failed to register the additional sites.
- (b) The presumptive reporting period: Some oysters can be grown in as little as six months. There is a developing Chinese geoduck market for immature geoducks ("popper" geoduck) that are harvested at 12 months old, approximately 5 geoducks per pound. The growers revised their initial proposal of the presumptive wild shellfish reporting period to 6 months for oysters and mussels and 12 months for all other shellfish. At the conclusion of this meeting the Department agreed to look at the proposed grandfathering provision. Staff also thought there was merit in the grower proposed 6 and 12 months revision of the presumptive wild time period.

**Tribal Objections**

- (a) To dropping the notification requirements: Tribal representatives stated that, despite the Implementation Plan currently requiring notification of enhancement activities (Section 6.3 notification), the tribes are, in fact, rarely getting notice from growers.
- (b) To shortening the presumptive wild shellfish reporting period: The tribes objected to 6 and 12 months as the presumptive wild shellfish reporting period because it would be too easy for a person to lease tidelands, delay harvest for up to 12 months and then cull the wild shellfish and report them as cultured product.

**Department Response:** After further Department review of both tribal and grower positions and maintaining the intention of the proposed ECF rule, staff decided on the following provisions:

- a) The presumptive wild shellfish reporting period is best defined as 12 months for oysters, mussels, and all clams except geoducks, and 36 months for geoducks. To address the exceptions to the general presumptive wild time period, the Department would include a provision for earlier harvest of cultured product upon showing that the product was truly cultured and not a wild harvest.
- b) Wild product would continue to be reported on fish tickets.
- c) The Department agreed to a grandfathering provision. This would not only allow persons disadvantaged by Department action to report cultured product as farm product, but eliminate the problem associated with purchase of an existing aquatic farm. Under current law the new owner has to reregister the farm in the new owner's name. Without grandfathering, the new registration triggers reporting as wild product.
- d) In order to provide for timely notification to the tribes, the Department would provide the treaty tribes with all copies of applications for Emerging Commercial Fishery licenses (this complements the current practice of providing copies of aquatic farm registrations).

**Further Grower Objections:** The growers did not agree to the presumptive period of 12 and 36.

**Further Tribal Objections:**

- (a) Compliance required: The tribes want a statement added to the rule that all persons harvesting wild shellfish must comply with the Implementation Plan.
- (b) Additional notice required: The tribes want a provision added that gives sixty days notice to the Department and the tribes before commercial harvest of wild shellfish occurs.
- (c) Presumptive wild shellfish reporting period: The tribes propose returning to 24 and 60 months, except harvest could be reported on quarterly reports at 6 and 12 months if the

shellfish are in fact cultured and notice has been given to the tribes.

- (d) Eliminate grandfathering: The tribes objected to inclusion of grandfathering. The tribes state that, since aquatic farm registration is required prior to shellfish cultivation, grandfathering farms that have been in operation prior to registration is not allowed.

**Department Response:**

- (a) Presumptive reporting period: The Department believes 12 and 36 months are the appropriate presumptive wild shellfish reporting periods. Cultured hardshell clams and most oysters are, in fact, being routinely harvested after 12 months, and current cultured geoduck harvesting for market is occurring as early as 36 months. With a provision for earlier harvest reporting of cultured product only by permission from the Department, it provides for an accounting for the actual harvest of the majority of wild shellfish, while furthering the grower's legitimate culture activities.
- (b) Notice requirement: Under current law, a grower is not required to survey until requested to do so by the tribes (Section 6.1 notification). By providing copies to the tribes of both aquatic farm registrations and applications for emerging commercial fishery licenses, the state is cooperating with the implementation plan by giving notice to the tribes that a non-tribal harvester may have a natural bed of wild shellfish. It then becomes the tribe's responsibility to notify the harvester if they want a survey. The Department does not feel it is necessary to either explicitly put into a state rule that compliance with federal law is required, nor to put into a state rule a notice requirement that is not currently in the Implementation Plan (the sixty day Section 6.3 notification applies to grower's notice to tribes of intent to enhance a natural bed or create an artificial bed, it does not apply to notice of intent to harvest wild product). Both Section 6.1 and Section 6.3 notifications, as well as the natural bed definition and survey requirements are still in litigation between the growers and the tribes. When the revised Implementation Plan is agreed to, it will be self executing, as the Implementation Plan has its own enforcement mechanism.
- (c) Grandfathering: The Department believes grandfathering has a legitimate place in the rule. The Department does not agree that registration before shellfish cultivation precludes grandfathering. There are many activities from obtaining beach health certification to installation of geoduck tubes that all predate actual shellfish cultivation. Secondly, privity between growers and the intent to report cultured product as such calls for grandfathering. Lastly, it would be basically unfair to growers who relied on justifiable misunderstanding and failed to register each site to have to report cultured product as wild shellfish. Although there are very few growers in this category, it seems only fair to treat equally all aquatic farmers who are harvesting cultured product.

The Department will ask the Commission to adopt amendments to WAC 220-52-018 as shown in

OTS-6472.1, to WAC 220-52-020 as shown in OTS-6473.1 and adopt new WACS 220-88D-010, 220-88D-020, 220-88D-030; 220-88D-040, and 220-88D-050 as shown in OTS-6397.7.