

## Army Corps of Engineering Shellfish Culture Permitting Issue

December 12, 2005 update

On December 2, 2005, shellfish industry representatives from around the country, and a legal team assembled by the Pacific Coast Shellfish Growers Association, met at the Pentagon with John Paul Woodley, Assistant Secretary of the Army for Civil Works, and Craig Schmauder, Army Deputy General Counsel, to discuss Army Corps jurisdiction over shellfish culture activities. Industry attendees included Ed Rhodes, Executive Director of the East Coast Shellfish Growers Association; Robin Downey, Executive Director of the Pacific Coast Shellfish Growers Association; John Connelly, President of the National Fisheries Institute (for Mike Voisin, President of the Gulf Oyster Industry Council whose flight was canceled); Bill Dewey, Taylor Shellfish Company and chair of the PCSGA Government Relations Committee; Greg Dale, manager of Coast Seafoods Humboldt Bay operations; and three Virginia growers: AJ Erskine, Lake Cowart and Tommy Kellum. PCSGA's legal team included Billy Plauché, Sylvia Quast and Peter Weiner. Also in attendance were Margaret Black (NFI), David Weiman, a lobbyist working with PCSGA; and staff from the Army General Counsel's office and the Permit and Regulatory Affairs office.

**Background.** The Army Corps of Engineers implements Section 10 of the Rivers and Harbors Act (RHA) and Section 404 of the Clean Water Act (CWA). RHA Section 10 deals with regulating structures and works that interfere with navigation. CWA Section 404 deals with regulating the discharge of dredged and fill material into waters of the United States, including wetlands.

Historically, Corps authorization has not been required for the vast majority of shellfish seeding, cultivating and harvesting activities. Without explanation, the Corps in recent years has begun to assert jurisdiction over a number of shellfish culture activities but has done so inconsistently around the country. This issue has risen to the forefront in recent years in Humboldt Bay, California as the Corps has asserted jurisdiction over Coast Seafoods' historic oyster culture operation, requiring Coast to obtain an individual permit.

As a consequence, Coast has been forced to spend in excess of \$1,000,000 on studies, monitoring, legal and environmental consulting fees and operational changes in attempts to navigate the Corps' multi-year permitting processes and additional consultation requirements brought about as a result of this new federal nexus. One of the primary areas of regulatory focus has been the interactions between Coast's operations and submerged aquatic vegetation (SAV).

Coast's Humboldt experience has been reverberating around the country and causing great concern amongst shellfish growers, particularly on the West Coast. The reason for the concern is that Coast's Humboldt operations are not unique. Shellfish companies around the country, and in particular on the West Coast, use culture methods similar to Coast, which often involves farming in and around SAV. Many of these operations go back more than 100 years. The concurrence of shellfish and SAV is no surprise given the fact that the shellfish themselves create optimal water quality conditions where SAV can thrive. Not by coincidence, many of the estuaries in the country with the healthiest eelgrass beds also have thriving shellfish industries. Many growers have attempted to avoid eelgrass only to find it moves into their beds once the shellfish are established.

**Exposing national inconsistency to get to a solution.** Unable to get relief at the local level (San Francisco District), PCSGA and Coast were forced to elevate the issue to Army Civil Works Headquarters and Assistant Secretary John Paul (J.P.) Woodley. They first met with Woodley approximately two years ago to discuss the Corps' regulatory expansion, the draconian measures being imposed on Coast, and the apparent inconsistencies in the way regulations were being applied from region to region.

**Corps agrees to review authority to regulate shellfish culture activities.** To resolve the problems identified by PCSGA, the Corps committed to review its jurisdictional authority for regulating shellfish culture activities under RHA section 10 and CWA section 404. Following that review, the Corps committed to creating a streamlined permitting system for those activities they determine fall within their regulatory authority. The Corps indicated a willingness to develop programmatic permits, either under Nationwide Permit 4, possibly a new Nationwide Permit specific to shellfish culture, or through Regional General Permits. The goal of such programmatic permits is to efficiently and consistently permit industry activities around the country.

PCSGA and their legal team received permission from the Corps to provide a memorandum on a legal review of Corps jurisdiction for their consideration. That memo was transmitted to the Corps at the end of July. PCSGA and their lawyers have held several conversations on this issue with Deputy General Counsel Schmauder since submitting this review. The meeting on December 2 was a dialogue on these jurisdictional arguments with Mr. Schmauder and Secretary Woodley. Secretary Woodley, an environmental attorney himself, and former head of the Virginia Department of Natural Resources, is familiar with the details of these issues. Until this meeting, PCSGA had understood the final decision on regulatory jurisdiction was a policy decision to be made by Secretary Woodley. During the meeting, Secretary Woodley made it clear he would not make a decision regarding regulation under Section 404 of the CWA without first obtaining EPA concurrence.

The outcome of the Corps jurisdictional review and resulting permit requirements will likely have some degree of impact on all shellfish growers in the country. This is a critical time for the nation's shellfish industry. Having organizations such as PCSGA, ECSGA and the GOIC to effectively represent the industry and to speak with a united voice is critical.

**Consultation requirements present an added burden.** Because the Corps permit is a federal permit, it requires consultation with the National Marine Fisheries Service (NMFS) and U. S. Fish and Wildlife Service (USFW). Consultation is required under the Endangered Species Act (if operations may affect threatened or endangered species) and the Magnuson-Stevens Fisheries Conservation and Management Act (if the operations may affect Essential Fish Habitat). In the case of Coast Seafoods in Humboldt Bay, these consultations have proven to be the biggest challenge in the entire permit debacle. The consultation requirement opened the door for some very biased local NMFS biologists to impose unreasonable mitigation measures on Coast's operation. As with the Corps, this required Coast and PCSGA to go to the national level to seek relief. The outcome is as yet uncertain. Coast remains cautiously optimistic it will obtain a permit it can live with. PCSGA remains concerned about the precedent that could be set by NOAA biologist's dismissal of the science documenting the positive ecological benefits provided by shellfish in favor of outdated studies on localized negative impacts.

Another serious flaw with the Coast consultation is that NMFS primary focus has been on the effects on eelgrass instead of the overall effects of shellfish culture on fish habitat. NMFS refuses to acknowledge that shellfish crops and culture equipment can serve as Essential Fish Habitat despite multiple studies that document this.

On a positive note, as a result of engaging NOAA headquarters on the Coast consultations, NOAA, too, has initiated an internal review to improve evaluation of aquaculture proposals and permitting. NOAA has also promised to work with the Corps to do programmatic consultations on the programmatic permits that result from the Corps jurisdictional review.

**What shellfish culture activities does the Corps have authority to regulate?** The legal arguments regarding Corps jurisdiction over historic shellfish farming activities are complex. The detailed arguments are provided in the PCSGA memorandum attached and a brief synopsis is provided below. In summary, PCSGA argues that the Clean Water Act includes express statutory language, backed up by recent court decisions, that clarify the cultivation of shellfish is not regulated under the Act. With regard to the Rivers and Harbors Act, new or expanded off-bottom culture operations may require RHA permits; however, PCSGA argues historic shellfish farms do not. Finally, with regard to any method of shellfish farming over which the Corps asserts regulatory jurisdiction, PCSGA argues that any farm in existence as of 1991 is "grandfathered," and is not required to obtain any further permits as those farms were (and remain) permitted under Nationwide Permit 4.

**Can shellfish be regulated as pollutants under the Clean Water Act?** This is the most significant and fundamental argument pertaining to the Corps' authority. If the industry prevails with this argument, the Corps' ability to regulate traditional bottom culture (single layer – spat on shell or cultchless seed), whether in SAV or not, goes away. Prevailing on this CWA argument is also important from the standpoint of citizens' lawsuits, which are provided for under the CWA, but not the RHA.

PCSGA has argued that, for an activity to be regulated under the CWA, you must satisfy four key elements. You must have a: 1)DISCHARGE of a 2)POLLUTANT from a 3)POINT SOURCE into 4)NAVIGABLE WATERS. Shellfish, PCSGA argues, are not pollutants and therefore can't be regulated by the CWA. Ironically, the only case law existing in regards to this issue is the result of a shoreline homeowners' organization that sued Taylor Shellfish in Washington State to require them to get a National Pollution Discharge Elimination Permit under Section 402 of the CWA for a mussel farm. Taylor prevailed in this litigation through appeals to the Ninth Circuit Court, where the three judge panel ruled that no NPDES was required. The Ninth Circuit concluded mussels and their biological products (feces, pseudofeces and shells) are not pollutants. The Court further noted that: "Congress plainly and explicitly listed the 'protection and propagation of . . . shellfish' as one of the goals of reduced pollution and cleaner water. It would be anomalous to conclude that living shellfish sought to be protected under the Act are, at the same time, 'pollutants,' the discharge of which may be proscribed by the Act."

At the December 2 meeting, Deputy General Counsel Schmauder gave some indication that he understood the logic of this argument, at least as it applies to bottom culture. However, any optimism should be cautious at best: Deputy General Counsel Schmauder has gone back and forth on this issue several times over the past few months.

Prior to the December 2 meeting it appeared the Corps was leaning towards regulating spat on shell as a fill but not cultchless seed. Bill Dewey and Greg Dale brought various seed and shellfish samples to the meeting to demonstrate the difference between spat on shell, and cultchless seed, on which spat attaches to a microscopic shell fragment during metamorphosis. As of December 2, the Army had not yet determined whether the placement of shell used to catch spat, the placement of spat on shell, or the placement of cultchless seed into waterways, constitute "fill" under Section 404 of the CWA.

**If covered under the CWA, shellfish culture should be covered by farming exemption?** Congress created limited exemptions under the CWA for normal farming activities such as "plowing, seeding, cultivating and harvesting for the production of food." PCSGA argues that if shellfish cultivation is not exempt altogether from the CWA, then existing farms should qualify under the farming exemptions within the Act.

**If covered under the CWA, then many shellfish cultivation activities are grandfathered.**

PCSGA argues that if shellfish cultivation is regulated under the CWA many of the older established farming operations are grandfathered. Current Corps regulations state that “activities completed under the authorization of an NWP which was in effect at the time the activity was completed continue to be authorized by that NWP.” Those shellfish farms that were in existence prior to 1991 were covered by the previous version of NWP 4, which did not exclude shellfish seeding in submerged aquatic vegetation; that authorization remains in place today.

**Issue clouded recently by *Crassotrea ariakensis* introduction to Chesapeake.** In the middle of this jurisdictional review by Corps headquarters, on October 24, a letter from Colonel Yvonne Prettyman-Beck, Commander of the Corps Norfolk District, was sent to the Governor of Virginia, asserting jurisdiction under Section 10 of the RHA and Section 404 of the CWA for discharge of ariakensis spat on shell. In light of the ongoing jurisdictional review, PCSGA called this to the attention of Secretary Woodley and Deputy General Counsel Schmauder. A subsequent letter dated November 4 was sent by the Norfolk district, rescinding the directive in the October 24 letter. PCSGA was reassured by Woodley that no jurisdictional decision would be made before the industry meeting was held with him on December 2. Then, On December 1, PCSGA was made aware of yet a third letter from the Norfolk Army Corps district to Virginia’s Governor, dated November 18, indicating that, upon further review, *which included Army headquarters*, it had been determined that discharge of ariakensis spat on shell *is* regulated under Section 10 of the RHA *and* Section 404 of the CWA.

This letter was extremely troubling; indeed, it appeared that the very issue we were meeting in D.C. on December 2 to discuss had already been decided. Secretary Woodley began the meeting on December 2 by saying that the assertion of jurisdiction by the Norfolk District, and Corps headquarters concurrence, was based on issues related to the introduction of a non-native species, and that the general legal issue as to whether spat on shell was regulated remained undecided. This is an issue that needs further clarification. To our knowledge, the CWA contains no provisions for regulating non-native species as pollutants, but we did not get into this at the meeting. Apparently EPA has weighed in on this issue with a letter to the Norfolk District agreeing with its assertion of CWA jurisdiction.

While the national industry may not be in full accord on the issue of introducing ariakensis into the Chesapeake Bay, it is probably unwise to support the use of the CWA as the legal mechanism to prevent that introduction. In our arguments over Corps jurisdiction, having shellfish culture activities not regulated under the CWA is fundamental. It could send a mixed message to say CWA jurisdiction applies to ariakensis but not other species of shellfish.

**Next steps.** As the Corps works to finalize its jurisdictional review, Deputy General Counsel Schmauder has indicated he’d like to discuss this issue in more detail with PCSGA’s legal counsel, likely in Seattle some time in December. The growers hope to also get him out on the night-time low tides to show him their culture methods during that visit. Shellfish growers will be convening in DC from all coasts early in the new year for their annual walk on the hill. The hope is that the Corps position will be finalized by then and a joint meeting can be scheduled with EPA to present the CWA jurisdictional arguments in a meeting similar to the one held on December 2 with Secretary Woodley.

In the event that the administrative process with the Corps results in an unacceptable outcome, particularly regarding regulating traditional bottom culture under the CWA, the industry is exploring legislative and legal remedies as well.

### *Bill Dewey*

Following the December 2<sup>nd</sup> meeting with Secretary Woodley at the Pentagon, Ed Rhodes requested a summary of where we’re at on the Army Corps issue for circulation to growers. I’ve attempted to put that together here (with editing from Robin and Billy) with enough background that it will make sense to people who aren’t all that familiar with the issue.