

# **Commercial Shellfish Harvesting and Cultivating on Private Lands**

## **A Summary of State Regulatory Requirements and Indian Treaty Harvest Rights**

The State and Indian tribes jointly developed this pamphlet to describe state and federal requirements for commercial shellfish activities. The State has requirements to protect public health and to properly manage shellfish populations. Indian tribes have federal rights under various treaties, as confirmed by the federal courts, to harvest wild populations of shellfish. References to a “WAC” are for regulations found within the Washington Administrative Code.

**Q1: What permits/licenses do I need to commercially harvest wild stocks of clams, mussels, or oysters from private lands?**

**A1: You need permits/licenses from both: (1) the Washington Department of Health and (2) the Washington Department of Fish and Wildlife.**

“Wild shellfish” – Wild stocks of shellfish differ from farmed shellfish. Wild stocks are clams, mussels, or oysters that are not farmed – i.e., “cultivated” – and include shellfish that existed on the land before farming began. See WACs 220-88D-040 and 050.

“Commercial harvest” means harvest for sale or barter, or harvest of a quantity of shellfish deemed to be a commercial quantity. See WAC 220-88D-030(4).

“Commercial Quantities” - State regulations define the amount of harvested shellfish that is considered a commercial quantity for purposes of permitting and licensing (any quantity exceeding (a) Forty pounds of mussels; (b) One hundred oysters; (c) Fourteen horse clams; (d) Six geoducks; (e) Fifty pounds of other hard or soft shell clams; or (f) Fifty pounds of scallops).

### **You need, from the Washington Department of Health (DOH):**

- A shellfish operation license.
- A harvest site certificate for each parcel that you want to harvest.
- You must have both ready to display whenever you are in possession of commercial quantities of shellfish or any quantity of shellfish for sale for human consumption.
- See WACs 246-282-010(6) (defining “commercial quantity”), -012 (addressing “certificates of approval”), -014 (addressing “operating provisions”).

### **You need, from the Washington Department of Fish & Wildlife (WDFW):**

- An emerging commercial fishery (ECF) license.

- A trial commercial fishery permit for each parcel that you want to harvest.
- There is a presumption that clams, oysters, or mussels harvested from a new farm within 12 months of registering the farm are wild shellfish (in the case of geoduck, within 36 months). In that case, you must get an emerging commercial fishery (ECF) permit and license.
- See WACs 220-88D-010 to 050

**Q2: What do I need to cultivate shellfish on private lands?**

**A2: You need: (1) a DOH license and certification, and (2) to register your aquatic farm with WDFW.**

**You need from DOH:**

- A shellfish operation license.
- A harvest site certificate for each parcel that you want to harvest.
- You must have both ready to display whenever you are in possession of a commercial quantity of shellfish or any quantity of shellfish for sale for human consumption.
- See WACs 246-282-010(6) (defining “commercial quantity”), -012 (addressing “certificates of approval”), -014 (addressing “operating provisions”).

**You need from WDFW:**

- If you wish to farm shellfish on private lands, you must first register each parcel with WDFW as an aquatic farm. See WAC 220-76-010
- For the first twelve months after an aquatic farm application is filed, all shellfish (other than geoduck) commercially harvested from the site are presumed to be wild shellfish. All geoduck commercially harvested within the first 36 months after the application is filed are presumed to be wild shellfish. During this transition period, before *harvesting* you must meet *both* the wild shellfish and the aquatic farm requirements described in this pamphlet.

**Q3: What must I do to sell the wild or cultivated shellfish that I harvest?**

**A3: You must label the shellfish with a DOH approved tag and report your harvest to WDFW.**

- For wild shellfish, you must report shellfish sales to WDFW on shellfish receiving tickets (“fish tickets”). Your sale must be to a licensed wholesale fish dealer, who then completes and submits the fish ticket. See WAC 220-88D-050
- For farmed / cultivated shellfish, you must report your sales, on a quarterly basis, using an aquaculture production report provided by WDFW.
- For all commercial quantities of shellfish that you possess, AND for or any quantity of shellfish that you possess for sale or for human consumption, you

must attach a DOH approved tag containing all of the required information before removing the shellfish from the harvest site, and you must pack any shellfish for export in approved containers using approved markings. See WACs 246-282-010(6) (defining “commercial quantity”), and 080 (addressing shellfish “identification and records”)

**Q4: How long will it take DOH to process my license/certification application, and how long will it take WDFW to process my permit/license application or aquatic farm registration?**

**A4: DOH will generally process your application within 30 days and will notify affected treaty Indian tribes of your application. WDFW will process your application or registration after you have received your certification from DOH.**

- DOH will generally process your application for a harvest site certificate within approximately 30 days. When DOH receives your application, it will notify affected Indian tribes of your application.
- DOH may reduce the application process time where you show that: (1) the property is exempt from tribal harvest under the federal court’s Consent Decree and Settlement Agreement; or (2) you have already begun working with the tribe to resolve questions regarding its treaty rights on the property.
- WDFW will not process an ECF permit/license for harvesting wild stocks or an aquatic farm registration without a DOH harvest site certificate.
- WDFW will also forward copies of applications for an ECF permit or an aquatic farm registration to affected Indian tribes.

**Q5: Must I directly notify affected treaty Indian tribes of my intent to cultivate shellfish and, if so, will WDFW or DOH help me to do that?**

**A5: Yes. If you want to cultivate shellfish, you must notify affected tribes in writing at least 60 days beforehand, and WDFW and DOH will help you do so.**

Section 6.3 of the federal court’s Revised Shellfish Implementation Plan requires that someone who wants to create an artificial bed of shellfish or to enhance a natural bed of shellfish must first notify the affected treaty Indian tribe(s) at least 60 days beforehand. This “Section 6.3 notice” must include:

- Your name and contact information
- The location of the shellfish bed and the species proposed for cultivation
- A summary of the history of shellfish cultivation and harvests on the property
- Your belief as to whether or not these lands contain a natural shellfish bed, based upon the density of naturally-occurring shellfish present (which varies by

species and location). These details are described in the Consent Decree and Settlement Agreement for Manila Clams, Native Littleneck Clams, and Pacific Oysters and the Consent Decree and Settlement Agreement for Geoduck

- The basis for your belief, including any shellfish population estimates

The State of Washington and the tribes have developed a Section 6.3 notice form to help you meet this notice requirement. If you complete this form and submit it to WDFW or DOH along with your permit/license application or aquatic farm registration, the agency will forward it to affected tribes for you. You may also mail this form directly to the affected tribes, which are identified on the form along with their mailing addresses. This notification process and any pre-cultivation surveys assist you and the tribes in the sharing of harvestable shellfish. Without a pre-cultivation survey, it will be hard for you to distinguish between the natural productivity, which may be subject to treaty harvest, and the enhanced productivity from farming, which is not subject to treaty harvest.

**Q6: What should I do if a treaty Indian tribe responds to my Section 6.3 notice or notifies me under Section 7, informing me that it would like to survey shellfish on private aquatic lands and may want to harvest wild shellfish?**

**A6: Stop! You should not begin any harvest or cultivation activities until the tribe has been provided with an opportunity to survey the shellfish and, where appropriate, a harvest sharing agreement has been negotiated with the tribe.**

If a treaty tribe responds to your Section 6.3 notice, or notifies you of its intent to survey and harvest wild shellfish under Section 7 of the Revised Shellfish Implementation Plan, you should work cooperatively with the tribe to resolve treaty right questions. Absent some other agreement with the tribe, you should not harvest or cultivate until the tribe has the opportunity to survey the shellfish on your tidelands, and where appropriate, a harvest sharing agreement has been negotiated with the tribe.

If you intend to **harvest wild shellfish** in commercial quantities from private tidelands under an ECF permit/license, federal court orders provide the following:

- The tribe is entitled to take up to 50% of the harvestable wild shellfish on your tidelands if it chooses to do so.
- Unless you agree otherwise, the tribe must notify you at least one month before surveying shellfish on your lands. You or your representative may be present for the tribe's survey.
- You and the tribe must enter a harvest plan that provides the tribe an opportunity to harvest up to 50% of the wild shellfish.
- Unless you agree otherwise, the terms of the harvest plan are governed by Section 7.2 of the Revised Shellfish Implementation Plan

If you intend to commercially **cultivate** shellfish under an aquatic farm registration, federal court orders provide the following:

- If your Section 6.3 notice states that you believe the tidelands do not contain a natural shellfish bed, and if a tribe disputes that claim, the tribe must notify you within 30 days of receiving the notice.
- Unless you agree otherwise, the tribe must notify you at least 14 days before surveying the shellfish populations. You or your representative may be present at the tribe's survey.
- If the survey confirms your belief that the tidelands do not contain a natural shellfish bed, then the tribe does not have a right to harvest shellfish there while the site is used for a commercial shellfish farming operation.
- If the survey reveals that a natural shellfish is present (or if your Section 6.3 notice states your belief that the tidelands *do* contain a natural bed), then you and the tribe must enter a harvest plan that provides the tribe up to a 50% share of the naturally-occurring shellfish on a continuing basis.
- Unless you agree otherwise, the terms of the harvest plan are controlled by the Consent Decree and Settlement Agreement for Manila Clams, Native Littleneck Clams, and Pacific Oysters. That agreement specifies the density of shellfish that qualifies as a natural bed of shellfish. The natural bed threshold varies by species and location. Natural beds are subject to treaty harvest of up to 50% of the natural sustainable production, on an annual or other periodic basis.
- The tribe is not entitled to any share of the increase in production from a natural bed that is the product of your cultivation activities. A pre-cultivation survey is thus important to establish whether a natural shellfish bed is present, and if so, the natural sustainable production of that bed.
- Under the Consent Decree and Settlement Agreement for Geoduck, whether a natural bed of geoducks is present is determined by an initial harvest of the standing stock under an agreement between you and the tribe, unless you agree otherwise.

**Q7: Why must treaty tribes receive notice before I harvest and cultivate shellfish, and why can the tribes survey or harvest shellfish on my tidelands?**

**A7: The tribes have a treaty right to take naturally-occurring shellfish on public and private tidelands in Washington, and they exercise that right under the federal court's Shellfish Implementation Plan**

In the 1850s, Indian tribes entered treaties with the United States that ceded virtually all of the lands of Western Washington to the United States, but reserved the right to take shellfish at all usual and accustomed grounds and stations, except from beds staked or cultivated by citizens. The federal courts have interpreted the treaties to guarantee the tribes up to a 50% share of the naturally-occurring shellfish on public and private tidelands, except on tidelands subject to shellfish cultivation that do not contain a natural bed of shellfish at the time cultivation begins. *United States v. Washington*, 157

F.3d 630 (9th Cir. 1998). So, tribes may harvest wild shellfish from all non-cultivated shellfish beds, but not from cultivated beds where there is no natural bed. The tribes are also not entitled to a share of the increased production of shellfish arising from cultivation. The specific rules governing the tribes' implementation of their treaty rights, including surveys and harvests on private tidelands, are located in the Revised Shellfish Implementation Plan, the Consent Decree and Settlement Agreement for Geoduck, and Consent Decree and Settlement Agreement for Manila Clams, Native Littleneck Clams, and Pacific Oysters.

It is important for Treaty tribes to receive advance notice of your plans to commercially harvest or cultivate shellfish so that they have the opportunity to exercise their treaty rights. Commercial shellfish harvesting on private lands should not interfere with the tribes' exercise of treaty harvest rights.

The initial information that you provide a tribe helps it determine whether it is interested in implementing its rights on your tidelands. If you are cultivating shellfish, these requirements also ensure that you will enjoy the fruits of your labors, and will avoid disputes over whether the shellfish on your tidelands are naturally-occurring or cultivated. Some public and private tidelands are exempt from these requirements and from tribal harvest, and are identified in the court's Consent Decree and Settlement Agreement.

The State of Washington and the Northwest Indian Tribes are committed to working with state citizens to ensure that harvesting activity is undertaken in ways that are consistent with the rights and responsibilities of all affected parties. You may contact treaty Indian tribes directly with any questions or concerns or to receive a sample harvest plan. WDFW can provide you contact information for each tribe.

This pamphlet is available at:

The Washington Department of Health Help Desk  
The Washington Department of Fish and Wildlife Help Desk  
The Northwest Indian Fish Commission  
<http://wdfw.wa.gov/fishing/commercial/>  
<http://wdfw.wa.gov/licensing/commercial/>  
<http://www.doh.wa.gov/ehp/sf/commercial.htm>  
<http://nwifc.org/about-us/shellfish/downloads/>