

1 Hearing date: 11/09/2018  
2 Hearing time: 9:00 AM  
3 Judge/Calendar:  
4 Honorable Christopher Lanese

5  
6  
7 SUPERIOR COURT OF WASHINGTON  
8 FOR THURSTON COUNTY

9 PROTECT ZANGLE COVE, et al.,

10 Petitioners,

11 v.

12 WASHINGTON DEPARTMENT OF FISH  
13 AND WILDLIFE, et al.,

14 Respondents.

No. 18-2-01972-34

PACIFIC NORTHWEST  
AQUACULTURE, LLC'S AND  
TAYLOR SHELLFISH  
COMPANY INC.'S OPPOSITION  
TO PETITIONERS' REQUEST  
FOR JUDICIAL NOTICE AND  
MOTION TO SUPPLEMENT  
THE RECORD

15  
16  
17 **I. INTRODUCTION**

18 Petitioners' Request for Judicial Notice ("Request") is a misuse of the judicial  
19 notice process in an attempt to establish as "fact" contested allegations that Petitioners  
20 acknowledge are not relevant to this proceeding. This Court should deny Petitioners'  
21 Request because the documents at issue do not contain adjudicative facts, and Petitioners'  
22 allegations arising from these documents are controverted, often by the documents  
23 themselves. In addition, the Court should strike the first four pages of Petitioners'  
24 Opening Brief, which rely exclusively (and inappropriately) on the documents that are the  
25

OPPOSITION TO REQUEST FOR JUDICIAL NOTICE  
AND MOTION TO SUPPLEMENT THE RECORD - 1

PLAUCHÉ & CARR LLP  
811 First Avenue, Suite 630  
Seattle, WA 98104  
Phone: 206-588-4188  
Fax: 206-588-4255

1 subject of Petitioners' Request.<sup>1</sup>

2 **II. ARGUMENT**

3 **A. Petitioners' Request Should be Denied because Exhibits A through G Do Not**  
4 **Contain Adjudicative Facts that Are Judicially Noticeable under ER 201.**

5 Judicial notice under ER 201 only applies to adjudicative facts. ER 201(a). "An  
6 adjudicative fact is a 'controlling or operative fact, rather than a background fact; a fact  
7 that concerns the parties to a judicial or administrative proceeding and that helps the court  
8 or agency determine how the law applies to those parties.'" *In re Disciplinary Proceeding*  
9 *Against Sanai*, 177 Wn.2d 743, 750 n.2, 302 P.3d 864 (2013) (quoting BLACK'S LAW  
10 DICTIONARY 669 (9th ed. 2009)). *See also Cameron v. Murray*, 151 Wn. App. 646,  
11 658, 214 P.3d 150 (2009) (an adjudicative fact is one that is offered as proof of a claim to  
12 be considered by a jury).<sup>2</sup> Judicial Council Comment 201, reproduced in 5 Wash. Prac.,  
13 Evidence Law and Practice, § 201.1 (6th ed.) ("An adjudicative fact is the 'what-  
14 happened', 'who-did-what-and-when' kind of question that normally goes to a jury.").  
15 "The purpose of judicial notice is to save time during trial." *In re Marriage of Campbell*,  
16 37 Wn. App. 840, 846, 683 P.2d 604 (1984).

17 Petitioners themselves acknowledge that the "facts" that are subject to their  
18 Request are not adjudicative facts: "The outcome of this case does not hinge upon any of  
19 the facts contained in this documents (*sic*), and Petitioners do not ask the Court to take  
20 judicial notice of the truth of any of the facts asserted within these public documents."  
21 Pet'rs' Mot. 2 n. 2. Rather, Petitioners' claim that the documents that are the subject of

22 \_\_\_\_\_  
23 <sup>1</sup> Pacific Northwest Aquaculture LLC ("PNA") and Taylor Shellfish Company, Inc. ("Taylor Shellfish")  
24 support and adopt by reference Washington Department of Fish and Wildlife's opposition to Petitioner's  
25 Motion, which addresses Petitioners' motion to supplement the record. This brief is submitted to separately  
address Petitioners' request for judicial notice.

<sup>2</sup> As discussed in *Cameron*, courts may also take judicial notice of legislative facts in some instances.  
Petitioners do not request the Court to take judicial notice of Exhibits A through G as legislative facts.

1 their request are offered to “supply factual background.” *Id.* at 2. As noted above,  
2 Washington Courts have clearly held that the only facts subject to judicial notice are facts  
3 that are offered as proof of a relevant issue, not “background facts.” *In re Disciplinary*  
4 *Proceeding Against Sanai*, 177 Wn.2d at 750 n.2; *Cameron*, 151 Wn. App. at 658.

5 Because Petitioners’ Request does not seek judicial notice of adjudicative facts,  
6 the Request is inappropriate under ER 201 and should therefore be denied.<sup>3</sup>

7 **B. Petitioners’ Request for Judicial Notice Should be Denied Because the**  
8 **“Facts” that are the Subject of Petitioners’ Request are Disputed.**

9 ER 201 makes clear that only facts that are not reasonably disputed can be the  
10 subject of judicial notice. ER 201(b) (“A judicially noticed fact must be one not subject to  
11 reasonable dispute....”). In the first four pages of their Opening Brief, Petitioners cite the  
12 documents that are the subject of their Request as the basis for a litany of disputed claims.  
13 Petitioners rely on these allegations to create a false impression that shellfish farming in  
14 Washington State results in significant adverse environmental effects. Not only are  
15 Petitioners’ factual claims contested, many are disproved by the very documents on which  
16 Petitioners base their Request.

17 As an initial matter, contrary to the picture of environmental destruction that  
18 Petitioners attempt to paint, it is well recognized that farmed shellfish provide a myriad of  
19 ecological benefits. *E.g., Ass’n to Protect Hammersley, Eld, & Totten Inlets v. Taylor*  
20 *Res., Inc.*, 299 F.3d 1007, 1010 (9th Cir. 2002) (“But it must also be recognized that the  
21 [farmed] mussels act as filters and are considered by many to enhance water quality by  
22 filtering excess nutrients or other matters in the water that can be destructive to marine

23 <sup>3</sup> Petitioners later suggest that Exhibits F and G are relevant to their attempt to demonstrate standing and  
24 justiciability with respect to Petitioners’ Uniform Declaratory Judgment Act (“UDJA”) claim against PNA.  
25 Pet’rs’ Mot. 4. As discussed in PNA’s reply brief on the motion for judgment on the pleadings, Petitioners  
did not bring a UDJA claim against PNA, and even if they did, such a claim would fail as a matter of law  
and require dismissal.

1 environments.”); Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1924  
2 (Jan. 6, 2017) (“Commercial shellfish aquaculture activities also provide some ecosystem  
3 functions and services, such as water filtration that removes plankton and particulates from  
4 the water column, secondary production that results in food, and habitat for other organisms  
5 in the waterbody including fish and invertebrates.”); WAC 173-26-221 (Recognizing  
6 commercial shellfish beds as a type of critical saltwater habitat with important ecological  
7 functions that require protection).

8 In recognition of the myriad ecological, economic, and cultural benefits of shellfish  
9 farming, former Governor Christine Gregoire launched the Washington Shellfish Initiative in  
10 2011.<sup>4</sup> The Initiative, which was continued under Governor Inslee, is a partnership between  
11 the state and the federal governments, Tribes, shellfish farmers and non-governmental  
12 entities that, among other things, identifies several programs to restore and expand shellfish  
13 resources throughout the State. The Washington Shellfish Initiative implements and is  
14 consistent with the National Shellfish Initiative, which seeks to increase production of  
15 bivalve shellfish given the broad suite of economic, social, and environmental benefits  
16 shellfish aquaculture provides.<sup>5</sup>

17 With regard to the specific factual allegations that Petitioners claim are supported  
18 by the documents subject to its Request, Petitioners’ Opening Brief selectively excerpts  
19 pages of those documents to purportedly establish “facts” related to shellfish farming. The  
20 vast majority of those “facts” are actually contested allegations that are contradicted in  
21

---

22 <sup>4</sup> A discussion of the Washington Shellfish Initiative can be found at the following website.  
23 <https://www.governor.wa.gov/issues/issues/energy-environment/shellfish>. While PNA and Taylor Shellfish  
24 maintain that citation to extra-record information is inappropriate in this proceeding, such citation is  
25 necessary here for the limited purpose of demonstrating that the “facts” alleged in Petitioners’ Motion and  
Opening Brief are highly contested.

<sup>5</sup> A discussion of the National Shellfish Initiative can be found at the following website:  
<https://www.fisheries.noaa.gov/content/national-shellfish-initiative>

1 many cases by the documents themselves. While page limitations prohibit a response to  
2 each of Petitioners' inaccurate claims, a few examples are telling:

- 3 • While Petitioners' claim that shellfish farming replaces "thriving ecosystems" with  
4 "a single shellfish species" or a "monoculture," Petitioners' Opening Brief at 1 and  
5 3, the National Marine Fisheries Service, in an omitted page of Exhibit D to  
6 Petitioners' Request, notes, quite to the contrary, that studies show that "species  
7 abundance, biomass, and diversity are often enhanced in areas where oysters are  
8 cultured" and "species richness of macroinvertebrates was higher in areas seeded  
9 with geoduck than in unseeded areas."<sup>6</sup>
- 10 • While Petitioners' criticize the use of gravel to enhance substrates for shellfish  
11 culture, Petitioners' Opening Brief at 1, the National Marine Fisheries Service, in  
12 an omitted page of Exhibit D to Petitioners' Request, found that the greater  
13 diversity created by such substrate enhancement "is expected to indirectly benefit  
14 rearing habitats for juvenile fishes, including ESA-listed species."<sup>7</sup>
- 15 • While Petitioners claim that shellfish farming "threatens apex predators such as  
16 Southern Resident Killer Whales," Petitioners' Opening Brief at 4, the National  
17 Marine Fisheries Service, in an omitted page of Exhibit D to Petitioners' Request,  
18 found that shellfish farming activities are not likely to adversely affect Southern  
19 Resident Killer Whales.<sup>8</sup>
- 20 • With regard to Petitioners' claim that commercial shellfish operators typically  
21 clear tidelands of native plants and animals prior to planting shellfish, Petitioners  
22 Opening Brief at 2, the cited document does not support that broad claim.<sup>9</sup> Further,  
23 one of the Petitioners, Coalition to Protect Puget Sound Habitat, attempted and  
24 failed to prove this claim in an appeal of a geoduck farm permit before the  
25 Shorelines Hearings Board. Petitioner's claims were demonstrated to be  
unfounded and were rejected by the Shorelines Hearings Board in its decision  
affirming the permit.<sup>10</sup>

21 <sup>6</sup> [https://www.nws.usace.army.mil/Portals/27/docs/regulatory/160907/NMFS\\_2016\\_09-02\\_WA%20Shellfish%20Aquaculture\\_WCR-2014-1502.pdf](https://www.nws.usace.army.mil/Portals/27/docs/regulatory/160907/NMFS_2016_09-02_WA%20Shellfish%20Aquaculture_WCR-2014-1502.pdf) at 76.

22 <sup>7</sup> *Id.* at 77.

23 <sup>8</sup> *Id.* at 104.

24 <sup>9</sup> At most, one document states debris and predators may be removed prior to planting an oyster bed, but this is a far cry from the wholesale clearing of tidelands that Petitioners contend occurs. Davis Decl. Ex. C at 17.

25 <sup>10</sup> *Coal. to Protect Puget Sound Habitat v. Pierce County*, SHB No. 14-024, 2015 WL 2452870 (Findings of Fact, Conclusions of Law and Order, May 15, 2015). Also available at <http://www.eluho.wa.gov/Global/RenderPDF?source=casedocument&id=1710>

- 1 • Petitioners claim shellfish farming has expanded rapidly in recent years, and that a  
2 significant part of this expansion has been geoduck aquaculture. Petitioners’  
3 Opening Brief at 2, citing Davis Exhibit C at 98. The cited page says nothing of  
4 the sort. Rather, it provides total shellfish farming acreage at the time the  
5 document was prepared (active plus fallow) across the state. The document  
6 projects there will only be a 3.8 percent increase of new farm acreage (1,401 acres)  
7 over the next 20 years. This slight increase over a 20-year timeframe is  
8 inconsistent with Petitioners’ rapid expansion theory.<sup>11</sup>  
9
- 6 • Petitioners state Exhibit F, which is a portion of PNA’s geoduck farm application,  
7 establishes that “Zangle Cove is nearly pristine estuary.” Exhibit F says no such  
8 thing. It states, among other things, that the PNA project site has no eelgrass beds  
9 or other priority features, the uplands along the shoreline are native forest with  
10 some landscaping, and adjacent properties are characterized by single family  
11 homes and related outbuildings. Exhibit F at 4.<sup>12</sup>

10 ER 201 requires that facts subject to judicial review are those that are not subject  
11 to reasonable dispute. As demonstrated above, the “facts” that Petitioners attempt to assert  
12 based on the documents that are the subject of the Request are strongly disputed. For this  
13 additional reason, Petitioners’ Request should be denied.

14 **C. The Court Should Disregard Pages 1-4 of Petitioner’s Opening Brief.**

15 Petitioners claim that they are not asking the court to take judicial notice of the  
16 truth of any facts asserted in Exhibits A through G. *Id.* at 2. This claim is belied by a  
17 cursory review of the first four pages of their Opening Brief, in which Petitioners’ make  
18 numerous factual assertions about the environmental impact of shellfish farming that they  
19

20 <sup>11</sup> The cited page reports a total of 36,999 combined continuing active and fallow acres, and it projects there  
21 will be 1,401 new aquaculture acres over the next 20 years (the anticipated term of the document’s  
22 coverage). Petitioners appear to be confused by the high number of “subtidal geoduck acreage” in the cited  
23 document. However, those totals reference the wild subtidal geoduck fishery, which is distinct from the  
24 geoduck farming activities at issue in this proceeding. As the rest of the table makes clear, geoduck farming  
25 represents a small percentage of shellfish farming acreage.

23 <sup>12</sup> Two of the documents included in Petitioners’ Request, Exhibits B and E, are associated with a draft  
24 Habitat Conservation Plan prepared by the Washington Department of Natural Resources (DNR). DNR  
25 abandoned its Habitat Conservation Plan over three years ago, and the documents relied upon by Petitioners  
were never finalized. <https://www.dnr.wa.gov/programs-and-services/aquatics/aquatic-lands-habitat-conservation-plan>. The preliminary draft documents cited by Petitioners are obviously of limited value.

1 contend are supported by the documents that are the subject of this Request. Petitioners'  
2 objective is transparent: they seek to prejudice this proceeding with improper and  
3 inaccurate factual allegations that they themselves acknowledge are completely irrelevant  
4 to the legal issues before the Court. The Court should reject Petitioners' attempt to inject  
5 factual controversy into this record review proceeding.

6 Because the first four pages of Petitioners' Opening Brief are based exclusively on  
7 the documents that are the subject of Petitioners Request, if the Court denies Petitioners'  
8 Request it should also strike the first four pages of Petitioners' Opening Brief.

### 9 III. CONCLUSION

10 Petitioners' Request for Judicial Notice fails to meet the requirements of ER 201  
11 for two independent reasons. First, Petitioners' Request does not present adjudicative  
12 facts, as required by ER 201, because the documents that are the subject of Petitioners'  
13 Request are not relevant to this record review case. Second, the "facts" that Petitioners  
14 attempt to inject into these proceedings based on the documents that are the subject of its  
15 Request are subject to significant dispute and, therefore, not appropriate for judicial notice  
16 under ER 201. Petitioners' Request should therefore be denied, and the portions of  
17 Petitioners' Opening Brief that rely on these documents, particularly the first four pages of  
18 that brief, should be stricken.

19 DATED this 6<sup>th</sup> day of November 2018.

20 PLAUCHÉ & CARR LLP

21  
22 By: 

Samuel W. Plauché, WSBA #25476

Jesse DeNike, WSBA #39526

*Attorneys for Pacific Northwest Aquaculture,  
LLC and Taylor Shellfish Company, Inc.*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**CERTIFICATE OF SERVICE**

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on November 6, 2018, as follows:

Claire Loeb Davis, WSBA# 39812 Richard A. Lintermans, WSBA# 51313 Lane Powell PC 1420 Fifth Avenue, Suite 4200 Seattle, WA 98111 <i>Attorneys for Petitioners</i>	<input type="checkbox"/> By United States Mail <input type="checkbox"/> By Legal Messenger <input type="checkbox"/> By Federal Express, Priority Mail <input checked="" type="checkbox"/> By E-mail
Noelle Lea Chung, WSBA# 51377 Attorney General's Office 1125 Washington Street SE Olympia, WA 98504 <i>Attorneys for Washington Department of Fish and Wildlife</i>	<input type="checkbox"/> By United States Mail <input type="checkbox"/> By Legal Messenger <input type="checkbox"/> By Federal Express, Priority Mail <input checked="" type="checkbox"/> By E-mail

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington on November 6, 2018.

  
\_\_\_\_\_  
Sarah Fauntleroy, Legal Assistant