

SHORELINE MASTER PROGRAM RULE AMENDMENTS: Preliminary Draft (3 of 5)

Water-dependent uses and floating aquaculture

Introduction

This document presents preliminary draft rule amendments¹ for addressing floating aquaculture during Shoreline Master Program (SMP) amendments, together with a new section addressing prohibitions on water-dependent uses.

Ecology is proposing these changes in response to issues raised during the comprehensive SMP update process surrounding regulation of commercial finfish aquaculture (often referred to as “net pens” after the netted cages where the fish are raised).

In 2007, Ecology approved **Whatcom County’s** comprehensive SMP update – the first county update approved under Ecology’s rules (the 2003 SMP Guidelines). The SMP included a prohibition on commercial finfish aquaculture. The county has no net pens and there were no formal comments objecting to the ban at the local or state level.

Jefferson County adopted a comprehensive SMP update in 2009 that contained a commercial finfish net pen prohibition based on the Whatcom County SMP. During the state public comment period, several finfish aquaculture businesses provided formal comment expressing concerns about a prohibition of this preferred, water-dependent use. The stakeholder comments spurred Ecology to examine its approach to reviewing prohibitions on net pens and other water-dependent uses.

Ecology ultimately cannot approve SMP provisions that are inconsistent with the SMA and Ecology rules that define aquaculture as a preferred, water-dependent use of statewide interest.² After lengthy deliberations, Ecology approved the county’s SMP in February 2014 with highly restricted locations for commercial net pens and detailed regulations derived in part on the state’s 1986 recommended “interim” net pen management guidance.³

Island County adopted a comprehensive SMP update in 2012 that included four regulations that collectively created a jurisdiction-wide prohibition on commercial net pens. Ecology found the county’s rationale for the regulations was not based on current scientific and technical information and the SMP contradicted SMA preferred-use policies.

Island County Commissioners requested Ecology accept a prohibition for a number of reasons, including the lack of interest in siting net pens in county waters. Unlike in Jefferson County, no formal comments

The Department of Ecology (Ecology) is updating rules implementing the Shoreline Management Act (SMA). Ecology is seeking comments on preliminary draft rule amendments before initiating formal rule-making in winter 2016.

Please send comments by August 26, 2016, at 5:00pm. Instructions are at <http://www.ecy.wa.gov/programs/sea/rules/1506ov.html>

For other questions contact [Michelle Wilcox](#) at (360) 407-7676.

¹ Ecology’s rule amendments are required by RCW 90.58.060.

² RCW 90.58.020, WAC 173-26-241(3)(b)

³ Science Applications International Corporation, December 1986. [Recommended Interim Guidelines for the Management of Salmon Net-Pen Culture in Puget Sound](#). Prepared for Ecology in conjunction with the Departments of Fisheries, Agriculture and Natural Resources.

from the commercial finfish industry were received by Island County or Ecology during the lengthy SMP update process.

Ecology and the County collaborated on an approach that attempted to address both local and state interests. The county removed the specific prohibitions that were not based on current science, and replaced them with a single regulation prohibiting net pens. The county also adopted a policy pledging to revisit the prohibition during the county's statutorily mandated "periodic review." The primary rationale was that commercial net pens were not a reasonably foreseeable use. The prohibition would also provide time for the state to update management recommendations for commercial finfish aquaculture. The most current state guidance from 1986 does not reflect current science and practice.

[Preliminary draft rule amendments address proposed prohibitions on water-dependent uses](#)

The preliminary draft rule amendments build on lessons learned from ten years of reviewing comprehensive SMP updates. The draft contains criteria to guide Ecology's review of proposed amendments that prohibit water-dependent uses. The draft emphasizes that aquaculture is a preferred water-dependent use of statewide interest that as a general principle should not be prohibited jurisdiction-wide. It clarifies that such prohibitions must be based on documented rationale and provides three independent reasons for prohibitions: 1) incompatibility with environmental conditions (e.g., water depth, circulation); 2) incompatibility with existing water-dependent uses or navigation; or 3) lack of reasonably foreseeable use (i.e., the "Island County approach").

The "Island County approach" acknowledges that prohibiting a use that is not reasonably foreseeable does not contradict the SMA policy to "plan for and foster all reasonable and appropriate uses." The rule clarifies that local governments must revisit such prohibitions during their periodic SMP reviews, to ensure that local governments continue to consider the statewide interest over time.⁴ If during a periodic review, the local government seeks to identify interest and finds none, they would be able to continue the prohibition. This approach to prohibiting a water-dependent use would not be appropriate where the use is reasonably foreseeable. For example, where a local government has existing commercial finfish aquaculture, or where fish growers have expressed interest during the SMP amendment process, commercial finfish aquaculture would be considered a reasonably foreseeable use.

[Preliminary draft rule addressing floating aquaculture](#)

The preliminary draft rule also includes new provisions that would apply to future SMP amendments that address floating aquaculture. The provisions would apply to commercial finfish aquaculture but also other types of floating aquaculture (e.g., nori or mussel rafts). It does not trigger a requirement for all jurisdictions to revisit floating aquaculture provisions. These provisions would only apply A) where a local government either chooses to amend their SMP sections that affect floating aquaculture, or B) where the jurisdiction has adopted a jurisdiction-wide ban based on lack of reasonably foreseeable use and there is subsequent interest expressed in that use during a periodic review.

The intent of the proposed provisions is to set general sideboards to address use conflicts and environmental risks within the context of current science and practices. In addition to describing issues that should be addressed, the provisions direct local governments to consider Ecology guidance documents for more details. Ecology acknowledges the 1986 interim guidelines for salmon net pens need updating and is working to provide options and recommendations that could be used in tandem with regulations.

⁴ WAC 173-26-201(2)(d), WAC 173-26-251(3)

Preliminary draft amendments to WAC 173-26-241

The following presents Ecology's preliminary draft rule amendments to WAC 173-26-241(2) and (3)(b).

New language is shown in underline, deletions are shown in ~~strikethrough~~.

Colored text boxes are explanatory and are not part of the proposed amendment.

WAC 173-26-241 Shoreline uses

(2)(b) Addressing water-dependent use prohibitions in master program amendments

The following new section would be added to WAC 173-26-241 (2) General use provisions. This section is intended to provide sideboards around proposed amendments that include jurisdiction-wide prohibitions of water-dependent uses. Ecology's overall interpretation of the SMA policy to plan for water-dependent uses is that jurisdiction-wide prohibitions must be grounded in a fact-based rationale. Proposed amendments add considerations for Ecology review of proposed rationale for such prohibitions. The intent is to provide more clarity regarding Ecology's interpretations and acknowledge jurisdiction-wide prohibitions may be authorized where local governments determine as part of a public process that a given use is not reasonably foreseeable, provided such prohibitions are subject to ongoing reconsideration during the "periodic review" of the master program.

(b) Addressing water-dependent use prohibitions in master program amendments.

This section provides principles to guide the department's review of jurisdiction-wide water-dependent use prohibitions in master program amendments consistent with WAC 173-26-201(2)(d).

(i) As a general principle, master program amendments should not prohibit water-dependent uses throughout a jurisdiction. When prohibitions are proposed, local governments shall provide a documented rationale. Prohibitions shall be developed with public input and adopted as legislative findings with opportunity for review and comment by affected parties.

The department will consider the following when reviewing proposed amendments that prohibit water-dependent uses jurisdiction-wide:

(A) The proposed prohibition is based on scientific and technical information that demonstrates **the incompatibility of a water-dependent use with environmental conditions**. The scientific and technological information must be applicable to the use and environmental conditions of the areas where the restrictions will apply; or

(B) The proposed prohibition is based on an analysis that concludes a water-dependent use is incompatible with and would create **significant conflicts with existing water-dependent uses** or navigation; or

(C) Jurisdiction-wide prohibitions may be appropriate where the local government determines that a particular water-dependent use is **not reasonably foreseeable**. The determination must be informed by consultation with affected water-dependent users in addition to the required opportunity for public review and comment. Local governments shall revisit such prohibitions during the periodic review process required by RCW 90.58.080(4) and provide updated rationale for a continued prohibition.

(3)(b) Aquaculture

(v) Considerations for floating aquaculture.

The following new section WAC 173-26-241(3)(b)(v) addresses requests from local governments for more direction on how to address commercial finfish net pens. This draft proposes generalized guidance for all “floating aquaculture.”

§ (i) clarifies that this rule applies to proposed amendments where the jurisdiction has included policies to revisit floating aquaculture, or for jurisdictions that choose to revisit those provisions voluntarily. The intent is to clarify that all local governments do *not* need to revisit their aquaculture provisions during upcoming periodic reviews.

§ (ii) adds a definition for floating aquaculture, and clarifies the statewide policy that applies to floating aquaculture. This language is grounded in the policy of the act [RCW 90.58.020].

§ (iii) adds a reminder to address special provisions that apply to uses in “shorelines of statewide significance.” Floating facilities will almost necessarily be sited in these areas [i.e., all marine waters lying seaward from the line of extreme low tide are considered shorelines of statewide significance under RCW 90.58.030(2)(f)(iii)].

§ (iv) adds special considerations that should typically be addressed specific to floating systems. The rule directs attention to forthcoming detailed guidance on the topic. Ecology is working with an inter-agency team to update guidance.

(v) Considerations for floating aquaculture.

(i) These provisions are intended for local governments that have included policies to revisit floating aquaculture during their periodic reviews, or for local governments that choose to develop master program amendments affecting floating aquaculture.

(ii) For purposes of this chapter, floating aquaculture includes rafts, permanently anchored barges, walkways, net support systems, and other structures designed to suspend cultured species in the water column. Floating aquaculture is a preferred water-dependent use of the shoreline when consistent with control of pollution and prevention of damage to the natural environment.

(iii) When floating aquaculture facilities are sited in shorelines of statewide significance, local governments shall implement requirements of WAC 173-26-251(3).

(iv) In addition to the siting provisions of (2)(b)(i) of this subsection, shoreline master programs should, at a minimum, contain provisions to ensure that floating aquaculture facilities are located at sites with suitable physical and environmental conditions, access, and neighboring uses. Local governments should include provisions to minimize visual impacts. Local governments should consult department policies, programs, recommendations and guidance on these topics.