

Shoreline Management Act: Where does oversight of aquaculture siting and operation fit within the SMA?

The following background is provided on options for clarifying Shoreline permitting for aquaculture. The Committee will need to consider such options over the next couple months if they are included in recommendations for Task 1 – permit processes for shellfish aquaculture as a whole. This background may also be useful in considering recommendations on SMP rulemaking on intertidal geoduck aquaculture (Task 2)

Key issues regarding aquaculture permitting and the Shoreline Management Act:

- (1) What is included in the *State framework*? What is at discretion of *local governments*? Where does aquaculture fit (from statute and case law)?**
- (2) How has this been handled in SMPs to date?**
- (3) What can we anticipate re: policies and regulations after comprehensive SMP updates?**
- (4) What are the options for establishing a formal Shoreline permit process for Aquaculture, if this is desired?**
- (5) Committee perspectives and recommendations to Ecology: Discussion**

Discussion of key issues -

1. State framework: Shoreline activities covered by the Act and requiring an SDP

The SMA provides significant policy support for “water dependent” uses such as aquaculture. The policy basis for Shoreline land uses is focused on local Shoreline Master Programs. The statutory policy framework for local planning is further refined in Ecology’s Guidelines for SMP updates, which are adopted by rule.

The Act sets up three basic levels of regulation that aquaculture may fall into:

1. **Shoreline Use:** Even if an activity does not constitute “development” (see below), it is still required to meet any applicable regulations in an SMP. A key case on this topic is *Clam Shacks*, which found that mechanical harvesting of clams could be required to obtain a Conditional Use Permit (CUP) even if it was not development. Thus, the standards in an SMP apply whether a permit is required or not. This applies to broad issues such as allowable uses, as well as detailed use standards.
2. **Substantial Development (SDP):** SDPs are the “garden variety” Shoreline permit. Shoreline activities meeting the definition of “substantial development” must receive a Substantial Development Permit. The SMA provides specific statewide procedures that local jurisdictions must follow in issuing SDPs, including public notice and providing the opportunity for appeal (90.58.140). The timeframe for commencing and completing the

activity authorized by an SDP must also be specified (90.58.143). Ecology's only involvement in the SDP process is the opportunity to appeal.

The SMA requires a Substantial Development Permit for the following shoreline activities if the cost or value exceeds \$5000 (adjusted for inflation):

- Construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; OR
- Any use interfering with "normal public use of the surface waters" (no dollar threshold applies).
- Exemptions: Over a dozen specific activities are exempt from the requirement to obtain an SDP even if they otherwise meet the above criteria. Some SDP exemptions are very broad ("normal maintenance of repair", "farming practices.") Others are quite specific ("navigational aids" and "the marking of property lines or corners on state owned lands, when such marking does not significantly interfere with normal public use of the surface of the water").

All activities meeting the statutory threshold must obtain a Substantial Development Permit. If it does not meet the threshold (outside the definition or on the exemption list) a city or county **cannot** require an SDP.

- Whether a specific activity requires an SDP is part of the fundamental State framework, and is intended to be uniform in each city and county. The question as to whether specific shoreline activities are required to obtain an SDP is subject to the statewide, statutory criteria described above. HOWEVER:
- The local regulations and policies that implement this framework, including the decision as to whether to ultimately issue a permit and setting appropriate permit conditions are local discretion issues that should be identified in local Shoreline Master Programs.

Aquaculture is not explicitly identified in either the definition of "Development" or the laundry list of SDP exemptions.

3. **Conditional Use Permit (CUP):** When specified in a city or county SMP, a CUP may be required for a shoreline "use" or shoreline "development." The statute does not specify which uses must obtain a CUP—this is at the discretion of local governments. CUPs are also the default requirement for "unclassified" uses that are not specifically addressed by the SMP. As noted above, a CUP can be required for a shoreline *use* even if it is exempt from obtaining an SDP. CUPs may be subject to greater local scrutiny—and Ecology gives final approval to each CUP.

Guidance from case law or opinions on aquaculture and SMA - Several cases address parts of the picture:

- The absence of specific reference to aquaculture in the statutory definitions does not preclude requiring an SDP for aquaculture.
- Clam harvesting using dredging is substantial development. (Both from 1977 *English Bay* WA Supreme Court case.)
- Geoduck culture may interfere with public use of surface waters and thus require an SDP. In a recent Pierce County case, boats, rafts, floating nets, and lines were held to "interfere

with the normal public use of the surface waters” and thus constitute Development. The site was near a park, and this factor was discussed as being part of the decision that the operation clearly met the “interference” test. (*Washington Shell Fish* 2005 Court of Appeals.)

- Aquaculture “uses” can be regulated by the local SMP independent of the “development” question. In the 1987 *Clam Shacks* case, the Washington Supreme Court found that a county could require a Conditional Use Permit for the shoreline use of mechanical clam harvesting, regardless of whether it was “development.”
- Harvesting geoducks: A Kitsap case upheld the County’s ability to require permits for harvesting wildstock geoducks, due to substrate disturbance (it was “development” in that instance)
- 2007 AGO: This opinion continued the logic of Pierce County case – i.e. the issue hinges on the site-specific situation regarding “interference”. The AGO does NOT say permits cannot be required by counties. It says:
 - Geoduck aquaculture is not *always* development requiring a SDP. The opinion states that current protective devices do not constitute “structures” and the harvest technique does not constitute “dredging”; **but**
 - It is development if the geoduck operation causes “interference with use of surface water”—boats, barges, floating nets and lines, etc.—and a permit must be required if it exceeds the dollar threshold.

(2) How has Intertidal Aquaculture been handled in SMPs to date?

Due to the lack of specific direction in the statute, applicability to aquaculture has been a gray area. Result: County SMPs are highly variable re: requirement for SDP. Net pens and intertidal aquaculture are generally lumped into the same policy chapter. “Floating aquaculture” is often required to obtain an SDP. The following is a general summary that does not include several details from local plans. In summary:

SDP generally required for intertidal aquaculture:
Pierce, San Juan, Whatcom, Thurston
(per recent administrative decision)

SDP sometimes required for intertidal aquaculture:
Mechanical or hydraulic harvesting Clallam
If “materially interferes” with public use of water Pacific
If it constitutes Substantial Development Skagit, Whatcom

CUP required for aquaculture (essentially takes place of an SDP):
Kitsap, Island,

SDP/CUP generally not required for intertidal aquaculture:
Floating aquaculture only (not intertidal) Snohomish, Grays Harbor
Clallam, Jefferson, Mason (CUP)

As described above, counties have inconsistent Shoreline permit processes for nearly-identical proposals. One proposal could be subject to a SDP, while in another county a very similar project is exempted, even on the same bay.

Potential Gaps:

Inconsistency or uniqueness? The current situation could be viewed as inconsistent with the state framework concept. In this view, the basic Shoreline policy and processes (including when an SDP is to be required) are set by statute; the details of policies and regulations are contained in local SMPs.

The alternate perspective is that the SMA emphasizes local planning for appropriate Shoreline uses – and that the current diversity on Substantial Development Permits is appropriate.

Lack of clarity and predictability: In several cases, county SMPs are not clear on whether an SDP is required for aquaculture proposals. (For example, Skagit County SMP loops the issue back to the statutory definition of “substantial development”.) The lack of clear guidance in these SMPs could be seen as a gap: There is not a clear predictable review process for proponents, staff or other interested parties.

Prescribed time limits for SDPs: SDPs have time limits to begin and complete the permitted activity. This may be a challenge in on-going shellfish uses. Set permit renewal timeframes are unlikely to match the varying cycles of shellfish planting and harvesting. Outcome of the permit renewal process could theoretically include denial.

Staff perspectives on gaps: Local governments, including Thurston and Pierce, have requested clarification from Ecology on the permitting requirements for aquaculture.

Ecology staff agree with the perception of these counties that our agency has not provided clear guidance on the topic. We were working on such guidance when the legislative process began that led to HB 2220. Clarity on permit requirements is an agency and a Governor’s priority.

(3) What can we anticipate after comprehensive SMP updates?

After a comprehensive SMP update, we should anticipate clearer policies and standards regarding aquaculture. However, updated SMPs may still not be clear or consistent on *process* – specifically, whether an SDP is required.

Ecology’s SMP Guidelines address fundamental policy issues regarding aquaculture; each SMP must address these topics. See Attachment 1.

- Aquaculture is considered of “statewide interest.” The Guidelines support aquaculture, if property managed.
- Basic location and design criteria sideboards are provided which must be included in each SMP.
- Aquaculture areas are included in the definition of Critical Saltwater Habitats.

Potential Gaps:

- **Substantial Development Permit question for Aquaculture is not addressed in SMP Guidelines or updates:** New SMPs could still have a gray area regarding whether various types of intertidal aquaculture require an SDP.
- **Time delay for SMP updates:** SMP updates will not be complete until ~2014 (assuming additional funding is provided). Thus, it will be several years before the new policies and standards envisioned in the Guidelines will be in place in local SMPs.

(4) What are the options if clarification of the Shoreline permit process for Aquaculture is desired?

Options:

Option 1 - Status quo: Continue to leave the “development”/permitting question regarding intertidal aquaculture entirely to each county.

Since the SMP Guidelines do not address this issue, the status quo (a wide range of approaches regarding applicability Substantial Development Permits to aquaculture) would likely continue into the future.

Strength:

- The status quo approach would maximize local flexibility. This supports the local policy emphasis of the SMA.
- Avoids adding permit requirements to this arena. There is already adequate permit processes to address all issues.

Weakness:

- The varying permitting requirements are inconsistent with the “state framework” on SDPs. This is a topic which should be consistent.
- Some SMPs lack clarity re: whether a particular aquaculture proposal requires an SDP or not. Predictability is fundamental to solid permit processes.
- Without Shoreline permitting, there is little consistent review of aquaculture operations. They are exempt from HPA review of fish impacts. The 401/404 review does not adequately consider state and local priorities.

Option 2 - Ensure adoption of the AGO approach: Use proposal-specific analysis to determine whether “interference” triggers requirement for an SDP

Following the AGO approach to determining “interference” would require a change in most counties (as shown on the table above). This approach has some of the strengths and weaknesses of option 1 regarding unique local conditions versus predicable process.

Strength:

- Local conditions would determine the decision, including 1.) Nature of the aquaculture techniques to be used and 2.) Site considerations regarding public use of waters.
- This approach may provide an incentive for BMPs, rather than relying on regulation: If a proponent agreed to use BMPs that had been pre-determined to avoid “interference”, they would be exempt from the SDP process.
- Confines the SDP decision to interference with navigation.

Weakness:

- Applicants, property owners and others would not have predictability before the site-specific decision.
- Some counties have clear requirements for “pre-permit” administrative review; others may not. The AGO and board/court cases provide minimal guidance. Decisions could vary widely between counties and even within one county over time.

- Confines the SDP decision to interference with navigation.

Process - There are at least 3 paths if this option were desired:

Option 2A: Ecology Guidance - Ecology could distribute the AGO through an advisory letter. Counties are not bound to follow the AGO in the administration of their current SMPs. However, this guidance may be followed especially where the county SMP is not explicit on whether agriculture falls under “development.”

Ecology could also require counties to follow the AGO approach when they update their SMPs.

Option 2B: Revise the SMP Guidelines rule - This would clearly create the policy requirement that SMP updates follow the AGO to clarify when aquaculture is “development.” The rulemaking process would provide opportunity for comment. The implementation of this approach would take several years, per the SMP update schedule. (Counties that have already updated SMPs would adopt this approach during the next 7-year update cycle,)

Option 2C: Statutory revision – Revising the statute would provide clarity at the highest level. Opportunity for input is provided through the legislative process. This approach would take effect when the signed bill became effective. This would be significantly earlier than relying on the SMP update cycle.

Option 3 - Clarify that certain types of aquaculture activities are categorically considered “development” requiring an SDP when over \$5000

This approach would go beyond presence/absence of interference with public use of surface water. Certain types of activity could be categorically “development”. Such an approach would need to link aquaculture activities with criteria such as “structure” and “dredging”. One example of a framework based on intensity of use: The “low/medium/high intensity” aquaculture regulations in Jefferson County.

Strength:

- Allows considerations of impacts on shoreline that go beyond navigation.
- Improves procedural predictability for all parties. Creates basic consistency in permit review of similar projects on all marine waters.

Weakness:

- Creates additional subjective criteria adopted on the state level.
- It could be a significant challenge to create clear criteria, applicable to all existing and future types of aquaculture, in all coastal regions of the state.

Process – Consideration of the 3 paths:

Option 3A: Ecology Guidance - Ecology guidance that directly contradicts the AGO would be problematic. In addition, Ecology guidance may not be followed in administration of current SMPs.

Option 3B: Revise the SMP Guidelines rule - Similar strengths and drawbacks as Option 2 above. Would be several years before this was effective in all counties.

Option 3C: Statutory revision – See option 2 above. Highest level clarification.

Option 4 - Stipulate a Conditional Use Permit for (certain types of) aquaculture

This approach would engage the state to a larger extent. Ecology provides final review and approval of each CUP, after local government action.

Strength:

- A significant advantage of CUP over SDPs (under current statute and practice) is that a CUP can be *more flexible regarding timeframes* – it does not necessarily expire, but could have on-going requirements. For example, CUPs for aquaculture could specify that updated BMPs be applied when an area is replanted.
- There would be state-level consistency in standards regarding siting and operation. This could provide a direct link between new scientific information and operating standards.

Weakness:

- Adds unnecessary regulation. Emphasis of SMA permitting is on local processes and policies.
- Permit structures may not necessary or conducive to encouraging BMPs.

Process – Consideration of the 3 paths to Option 4:

Option 4A: Ecology Guidance - Ecology could send a letter to counties encouraging this approach. This may not be followed.

Option 4B: Revise the SMP Guidelines rule - This appears to be an appropriate topic for rulemaking. The existing SMP Guidelines rule already identifies certain uses where CUP should be required. In the Shoreline statute, application of the CUP process is addressed in Ecology guidelines and city/county SMPs.

However, it would be seven or more years before this was effective in all counties through SMP updates.

Option 4C: Statutory revision – This proposal would create an unprecedented new “categorical CUP” within the Shoreline Management Act. However, such a statutory action would provide consistency, would provide clear authority to Ecology and the local governments, and could take effect very rapidly.

(5) Committee perspectives and recommendations to Ecology: Discussion

The following questions appear to be key considering the options outlined above:

1. **Lack of uniformity versus local discretion:** Do you see the current disparate treatment of Aquaculture among counties as a concern (not in harmony with state framework) or a validation of SMA (emphasis is on local plans)?
2. **Site-specific analysis versus state guidance:** Do you feel that the site-specific “interference” analysis (per AGO) is the best framework for resolving the SDP

question? Or should Ecology (or the Legislature) provide a broader framework for permitting Aquaculture under the Shoreline Management Act?

3. **BMP versus permit:** Is the BMP approach best (follow regs without permit) or should we require Substantial Development Permits? Why (what is gained/lost)? Is there a path that may include both a permit and BMPs?
4. **Timely application of new approach:** Is the 2014+ timeframe for SMP updates suitable? Or do you feel that earlier action is needed to clarify SMA status of Aquaculture proposals in all counties?

Attachment 1: **Washington State Shoreline Master Program Guidelines, Chapter 173-26 WAC Page 83 of 100** (bullet points added)

(b) Aquaculture.

Aquaculture is the culture or farming of food fish, shellfish, or other aquatic plants and animals.

This activity is of statewide interest.

- Properly managed, it can result in long-term over short-term benefit and can protect the resources and ecology of the shoreline.
- Aquaculture is dependent on the use of the water area and, when consistent with control of pollution and prevention of damage to the environment, is a preferred use of the water area.
- Local government should consider local ecological conditions and provide limits and conditions to assure appropriate compatible types of aquaculture for the local conditions as necessary to assure no net loss of ecological functions.

Potential locations for aquaculture are relatively restricted due to specific requirements for water quality, temperature, flows, oxygen content, adjacent land uses, wind protection, commercial navigation, and, in marine waters, salinity.

The technology associated with some forms of present-day aquaculture is still in its formative stages and experimental. Local shoreline master programs should therefore recognize the necessity for some latitude in the development of this use as well as its potential impact on existing uses and natural systems.

Aquaculture should not be permitted in areas where it would:

- result in a net loss ecological functions,
- adversely impact eelgrass and macroalgae, or
- significantly conflict with navigation and other water-dependent uses.

Aquacultural facilities should be designed and located so as not to:

- spread disease to native aquatic life,
- establish new nonnative species which cause significant ecological impacts, or
- significantly impact the aesthetic qualities of the shoreline.

Impacts to ecological functions shall be mitigated according to the mitigation sequence described in WAC 173-26-020.

Shellfish beds are defined as part of “critical saltwater habitats”:

Page 59 of 100 (Excerpts: Critical Habitats section)

(iii) Critical saltwater habitats

(A) Applicability.

Critical saltwater habitats include:

- all kelp beds,

- eelgrass beds,
- spawning and holding areas for forage fish, such as herring, smelt and sandlance,
- **Subsistence, commercial and recreational shellfish beds,**
- mudflats,
- intertidal habitats with vascular plants, and
- areas with which priority species have a primary association.

Critical saltwater habitats require a higher level of protection due to the important ecological functions they provide. Ecological functions of marine shorelands can affect the viability of critical saltwater habitats. Therefore, effective protection and restoration of critical saltwater habitats should integrate management of shorelands as well as submerged areas...

All public and private tidelands or bedlands suitable for shellfish harvest shall be classified as critical areas. Local governments should consider both commercial and recreational shellfish areas. Local governments should review the Washington department of health classification of commercial and recreational shellfish growing areas to determine the existing condition of these areas. Further consideration should be given to the vulnerability of these areas to contamination or potential for recovery. Shellfish protection districts established pursuant to chapter 90.72 RCW shall be included in the classification of critical shellfish areas. Local governments shall classify kelp and eelgrass beds identified by the department of natural resources' aquatic resources division, the department, and affected Indian tribes as critical saltwater habitats.