



STATE OF WASHINGTON
DEPARTMENT OF COMMERCE

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November 3, 2010

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Thank you for the opportunity to review proposed changes to Shoreline Master Program Guidelines (WAC 173-26). As the state agency charged with providing technical assistance on the Growth Management Act (GMA), we focused our review primarily on changes concerning GMA.

We support the changes in WAC 173-26-221(2)(a)(ii) that incorporate statutory direction found in EHB 1653 codified as RCW 36.70A.480(3)(d) and (4). Our primary concerns are with other changes to **Section 221(2)** addressing critical areas. We suggest this section retain its existing focus on GMA-designated critical areas. We also suggest the section on "critical saltwater habitat areas" be retained in its current form to avoid conflict with GMA designation criteria. Our concerns are described in detail below, with suggested revisions. We also include a number of minor suggested edits as well.

Background on Section 221(2) Critical Areas

Section 221 provides guidance on "General Master Program provisions" for (1) Archaeological and historic resources, (2) Critical areas, (3) Flood hazard areas, (4) Public access, (5) Vegetation conservation, and (6) Water quality. Section 221 provides guidance to local governments on regulations that apply throughout shoreline jurisdiction, regardless of environment designation. General Shoreline Master Program (SMP) provisions can simplify SMPs by eliminating the need to repeat regulations over and over for each environment designation. Environment designations and use regulations may include more specific protections that apply in addition to these "general" provisions.

The existing guidelines clearly indicate that Sections 221(2) and (3) together are intended to address "critical areas" defined by the GMA and locally designated by counties and cities.

WAC 173-26-221(2)(a) Applicability. Pursuant to the provisions of RCW [90.58.090\(4\)](#) as amended by chapter 321, Laws of 2003 (ESHB 1933), **shoreline master programs must provide for management of critical areas designated as such pursuant to [GMA] RCW 36.70A.170 (1)(d)** and required to be protected pursuant to RCW [36.70A.060\(2\)](#) that are located within the shorelines of the state...

The provisions of this section and subsection (3) of this section, flood hazard reduction, shall be applied to critical areas within the shorelines of the state. RCW [36.70A.030](#) defines critical areas as:

"Critical areas" include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable waters; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas."

The provisions of WAC 365-190-080 [GMA rules], to the extent standards for certain types of critical areas are not provided by this section and subsection (3) of this section flood hazard reduction, and to the extent consistent with these guidelines are also applicable to and provide further definition of critical area categories and management policies.

The standards for these GMA-defined critical areas are found in the following locations in the guidelines:

GMA critical areas	Where addressed in SMP guidelines (WAC 173-26)
RCW 36.70A.030(5)(a) Wetlands	-221(2)(c)(i) Wetlands
RCW 36.70A.030(5)(b) Areas with a critical recharging effect on aquifers used for potable waters	Not addressed in the guidelines
RCW 36.70A.030(5)(c) Fish and wildlife habitat conservation areas	-221(2)(c)(iii) Saltwater habitat areas -221(2)(c)(iv) Freshwater habitat areas
RCW 36.70A.030(5)(d) Frequently flooded areas	-221(3) Flood hazard reduction
RCW 36.70A.030(5)(e) Geologically hazardous areas	-221(2)(c)(ii) Geologically hazardous areas

Note the SMP guidelines divide GMA-defined “fish and wildlife habitat conservation areas” into saltwater and freshwater habitats. The intent of this section has always been to apply to GMA critical areas, to facilitate integration of the SMA and GMA. This is illustrated by Ecology’s response to comments on this section prepared during the original adoption of the guidelines (*see Appendix B*).

Retain the Focus in Section 221(2) on GMA Critical Areas

Commerce believes WAC 173-26-221(2) “Critical Areas” should retain this existing focus on critical areas defined by the GMA. The proposed changes expand the applicability of this section to “critical resource areas.” These are defined in proposed WAC 173-26-020(9) as “critical saltwater and freshwater habitats as used in these guidelines and additional shoreline and shoreland areas identified by local governments that warrant special protection necessary to achieve no net loss of ecological functions.”

Expanding the scope of Section 221 to include “critical resource areas” introduces uncertainty and ambiguity about the regulation of critical areas. One of the outcomes from every comprehensive SMP update is a transition in how *locally designated* critical areas will be managed in the shoreline area. The GMA directs that *regulation* of these areas transfers from critical areas ordinances (CAOs) to SMPs upon adoption of a comprehensive SMP update [RCW 36.70A.480](3)(d)]. Therefore, it is important to maintain a focus in the guidelines on how Ecology will evaluate regulation of critical areas.

In addition to this substantive concern, the phrase “critical resource areas” would be inappropriate in any case. In the nomenclature of Washington’s overarching land use framework, “resource lands” are areas primarily managed to ensure long-term economic use for forestry, agriculture, or mining. In the context of the Shoreline Management Act (SMA), the term would seem to indicate a parallel concept of areas designated primarily for resource use and management, such as aquaculture. However, the term is used to indicate areas that while not designated as critical areas under a local CAO are still important for preservation of ecological functions.

We emphasize that the guidelines include other means to address the concern that there may be areas worthy of protection outside those that have been designated locally as critical areas, such as through the environment designation process, or through use regulations. If Ecology believes it necessary to emphasize this point in the rule, please consider adding clarifying language to the

critical areas section, for example: “In addition to critical areas defined under chapter 36.70A RCW, local governments may identify additional shoreline and shoreland resource areas that warrant special protection necessary to achieve no net loss of ecological functions during the shoreline characterization process described in WAC 173-26-201. These areas may be protected through environment designation regulations or use regulations.”

Retain GMA Designation Criteria for “Critical Saltwater Habitats”

As described above, “critical saltwater habitats” are a subset of GMA “fish and wildlife habitat conservation areas.” The existing rule includes an applicability section that mirrors existing GMA-designation criteria found under WAC 365-190-130 (see Appendix A). The applicability section is essentially a cross-reference to GMA rules, included in the SMP guidelines for convenience.

The proposed changes would eliminate “subsistence, recreational and commercial shellfish growing areas” from the critical saltwater habitats applicability section, and add “naturally occurring beds of native shellfish species.” These amendments are inconsistent with WAC 365-190-130. The proposed amendments also conflict with many existing adopted CAOs that have incorporated shellfish growing areas or areas suitable for growing shellfish as fish and wildlife habitat conservation areas based on those rules. *(See Appendix C for existing designation language from a representative sample of County CAOs.)*

There is no direction in either the GMA or the SMA for local governments to revisit existing critical area *designations* when updating SMPs. We are concerned that proposed amendments to the applicability section implies that counties and cities must amend their designation criteria. In addition, please note that shellfish growing areas overlap with a number of other designation criteria for fish and wildlife habitat conservation areas, including “waters of the state,” and “areas where priority species have a primary association,” so it is not clear what the effect of “de-designating” these areas would be.

Suggested Changes

We offer the following suggested changes shown in ~~double-strikethrough~~ and double-underscore to address these concerns. These edits are intended to maintain direction to local governments on how to address protection of critical areas in shoreline jurisdiction while avoiding the implication that local governments must revisit critical area designations as part of their SMP update process. These changes essentially return the rule to its existing language. Note also that we suggest retaining the phrase “significant vegetation removal” in the wetlands rule, because the guidelines include a definition in WAC 173-26-020(33). That definition clarifies what is meant and excludes pruning of trees and removal of invasive species. Removing the word “significant” implies that somehow there are no exceptions and that wetlands regulations must regulate even insignificant vegetation removal.

As noted above, we suggest adding an additional sentence in the last paragraph of WAC 173-26-221(2)(a) to emphasize that there may be other areas that might not be designated but are worthy of protection. In addition, we suggest new language in the applicability section that clarifies that “critical saltwater habitats” and “critical freshwater habitats” are subsets of GMA-designated “fish and wildlife habitat areas.”

Commerce Suggested Amendments to WAC 173-26

WAC 173-26-020

~~(8) "Critical areas" include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas. (9) "Critical resource areas" includes critical saltwater and freshwater habitats as used in these guidelines and additional shoreline and shoreland areas identified by local governments that warrant special protection necessary to achieve no net loss of ecological functions.~~

WAC 173-26-201(2) (c)

Master programs shall contain policies and regulations that assure, at minimum, no net loss of ecological functions necessary to sustain shoreline natural resources. To achieve this standard while accommodating appropriate and necessary shoreline uses and development, master programs should establish and apply:...

Provisions for the protection of critical areas ~~and critical resource areas~~ within the shoreline; and

WAC 173-26-221

(2) *Critical areas* ~~and other critical resource areas.~~

(a) **Applicability.** Pursuant to the provisions of RCW 90.58.090(4) and 36.70A.480(3) as amended by chapter ((324)) 107, Laws of ((2003 (ESHB 1933)) 2010 (EHB 1653)), shoreline master programs must provide for management of critical areas designated as such pursuant to RCW 36.70A.170 (1)(d) ((and required to be protected pursuant to RCW 36.70A.060(2) that are)) located within the shorelines of the state with policies and regulations that:

- (i) Are consistent with the specific provisions of this subsection (2) critical areas and subsection (3) of this section flood hazard reduction, and these guidelines; and
- (ii) Provide a level of protection to critical areas within the shoreline area that ((is at least equal to that provided by the local government's critical area regulations adopted pursuant to the Growth Management Act for comparable areas other than shorelines.

~~When approved by ecology pursuant to RCW 90.58.090(4), a local government's SMP becomes regulations for protection of critical areas in the shorelines of the state in the jurisdiction of the adopting local government except as noted in RCW 36.70A.480 (3)(b) and (6)) assures no net loss of shoreline ecological functions necessary to sustain shoreline natural resources.~~

Pursuant to RCW 36.70A.480(3), upon department approval of a shoreline master program, critical areas within shorelines of the state are protected under chapter 90.58 RCW and are not subject to the procedural and substantive requirements of RCW 36.70A, except as provided in RCW 36.70A.480(6).

The provisions of this section and subsection (3) of this section, flood hazard reduction, shall be applied to critical areas within the shorelines of the state. RCW 36.70A.030 defines critical areas as:

"Critical areas" include the following areas and ecosystems:

(a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable waters; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas."

[This section provides guidance on "fish and wildlife habitat conservation areas" under subsections addressing "critical saltwater habitat" and "critical freshwater habitat."](#)

The provisions of WAC 365-190-080 [through 365-190-130](#), to the extent standards for certain types of critical areas are not provided by this section and subsection (3) of this section flood hazard reduction, and to the extent consistent with these guidelines are also applicable to and provide further definition of critical area categories and management policies.

As provided in RCW 90.58.030 (2)(f)(ii) and 36.70A.480, as amended by chapter 321, Laws of 2003 (ESHB 1933), any city or county may also include in its master program land necessary for buffers for critical areas, as defined in chapter 36.70A RCW, that occur within shorelines of the state, provided that forest practices regulated under chapter 76.09 RCW, except conversions to nonforest land use, on lands subject to the provision of ~~((f)(ii) of this subsection))~~ [WAC 173-26-241 \(3\)\(e\)](#) are not subject to additional regulations. If a local government does not include land necessary for buffers for critical areas that occur within shorelines of the state, as authorized above, then the local jurisdiction shall continue to regulate those critical areas and required buffers pursuant to RCW 36.70A.060(2).

[In addition to critical areas defined under chapter 36.70A RCW ~~and critical saltwater and freshwater habitats as described in these guidelines~~, local governments ~~should~~ may identify additional shoreline and shoreland ~~resource~~ areas that warrant special protection necessary to achieve no net loss of ecological functions during the shoreline characterization process described in WAC 173-26-201. These areas should be protected through environment designation regulations or use regulations.](#)

(b) Principles. Local master programs, when addressing critical areas ~~and critical resource areas~~, shall implement the following principles:

- (i) Shoreline master programs shall adhere to the standards established in the following sections, unless it is demonstrated through scientific and technical information as provided in RCW 90.58.100(1) and as described in WAC 173-26-201 (2)(a) that an alternative approach provides better resource protection.
- (ii) In addressing issues related to critical areas ~~and critical resource areas~~, use scientific and technical information, as described in WAC 173-26-201 (2)(a). The role of ecology in reviewing master program provisions for critical areas in shorelines of the state will be based on the Shoreline Management Act and these guidelines ~~((and a comparison with requirements in currently adopted~~

~~critical area ordinances for comparable areas to ensure that the provisions are at least equal to the level of protection provided by the currently adopted critical area ordinance)).~~

- (iii) In protecting and restoring critical areas ~~and critical resource areas~~ within shoreline jurisdiction, integrate the full spectrum of planning and regulatory measures, including the comprehensive plan, interlocal watershed plans, local development regulations, and state, tribal, and federal programs.
 - (iv) The planning objectives of shoreline management provisions for critical areas ~~and critical resource areas~~ shall be the protection of existing ecological functions and ecosystem-wide processes and restoration of degraded ecological functions and ecosystem-wide processes. The regulatory provisions for critical areas ~~and critical resource areas~~ shall protect existing ecological functions and ecosystem-wide processes.
 - (v) Promote human uses and values that are compatible with the other objectives of this section, such as public access and aesthetic values, provided ((they do not significantly adversely)) that impacts to ecological functions are first avoided, and any unavoidable impacts are mitigated.
- (c) **Standards.** When preparing master program provisions for critical areas ~~and critical resource areas~~, local governments should implement the following standards and ((the provisions of WAC 365-190-080 and)) use scientific and technical information, as provided for in WAC 173-26-201 (2)(a).

(i) Wetlands.

- (A) Wetland use regulations. Local governments should consult the department's technical guidance documents on wetlands.

Regulations shall address the following uses to achieve, at a minimum, no net loss of wetland area and functions, including lost time when the wetland does not perform the function:

- The removal, excavation, grading, or dredging of soil, sand, gravel, minerals, organic matter, or material of any kind;
- The dumping, discharging, or filling with any material, including discharges of storm water and domestic, commercial, or industrial wastewater;
- The draining, flooding, or disturbing of the water level, duration of inundation, or water table;
- The driving of pilings;
- The placing of obstructions;
- The construction, reconstruction, demolition, or expansion of any structure;

- Significant ~~Significant~~ vegetation removal, provided that these activities are not part of a forest practice governed under chapter 76.09 RCW and its rules;

(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, subsistence, commercial and recreational shellfish beds~~ ~~naturally occurring beds of native shellfish species;~~ mudflats, intertidal habitats with vascular plants, and areas with which priority species have a primary association.

(iv) **Critical freshwater habitats.**

(A) **Applicability.** The following applies to master program provisions affecting critical freshwater habitats within shorelines of the state designated under chapter 36.70A RCW ~~together with other critical freshwater habitat areas,~~ including those portions of streams, rivers, wetlands, and lakes, their associated channel migration zones, and flood plains (~~designated~~) ~~identified designated~~ as such ~~in the master program.~~

WAC 173-26-241 (3)(b) Aquaculture

Aquaculture should not be permitted in areas where it would (~~result in a net loss of ecological functions,)~~ ~~result in a net loss of ecological functions,~~ adversely impact (~~eelgrass and macroalgae~~) ~~eelgrass and macroalgae~~ ~~critical areas and critical resource areas, suspend contaminated sediments that exceed state sediment standards,~~ or (~~significantly~~) ~~significantly~~ conflict with navigation and other water-dependent uses.

WAC 173-26-241 (3)(f) Industry

Regional and statewide needs for water-dependent and water-related industrial facilities should be carefully considered in establishing master program environment designations, use provisions, and space allocations for industrial uses and supporting facilities. Lands designated for industrial development should not include shoreline areas with severe environmental limitations, such as critical areas ~~and critical resource areas.~~

WAC 173-26-241 (3)(g) In-stream structural uses

In-stream structures shall provide for the protection and preservation, of ecosystem-wide processes, ecological functions, and cultural resources, including, but not limited to, fish and fish passage, wildlife and water resources, shoreline critical areas ~~and critical resource areas,~~ hydrogeological processes, and natural scenic vistas.

WAC 173-26-241 (3)(h) Mining

(i)(A) New mining and associated activities shall be designed and conducted to comply with the regulations of the environment designation and the provisions applicable to critical areas ~~and critical resource areas~~ where relevant.

Commerce Suggested Minor Edits to WAC 173-22 and WAC 173-26

We suggest the following minor edits for clarity and consistency with other existing rules.

WAC 173-22-030

WAC 173-22-030 is a definition section. The current definition of “floodplain” conflicts with the definition found in WAC 173-26-020(15). The suggested change would make this definition identical to that found in existing WAC 173-26-020(15).

(4) "Flood plain" is synonymous with one hundred-year flood plain and means that land area susceptible to inundation ~~being inundated by stream-derived waters~~ with a one percent chance of being equaled or exceeded in any given year. The limit of this area shall be based upon flood ordinance regulation maps or a reasonable method which meets the objectives of the act;

WAC 173-22-040

WAC 173-22-040 provides criteria for designation of shoreland areas. The current definition does not include recognition that the Legislature has provided additional criteria for counties and cities to designate additional optional areas as “shorelands” in their master programs. We suggest including this statutory language for completeness.

(4) Optional shoreland areas.

(i) Any county or city may determine that portion of a one-hundred-year flood plain to be included in its master program as long as such portion includes, as a minimum, the floodway and the adjacent land extending landward two hundred feet therefrom.

(ii) Any city or county may also include in its master program land necessary for buffers for critical areas, as defined in chapter 36.70A RCW, that occur within shorelines of the state, as authorized under RCW 90.58.030(2)(d);

WAC 173-26-191(1)(e)

In this section the guidelines quote Department of Commerce WAC 365-~~195~~-500. This rule was repealed and has been replaced by WAC 365-~~196~~-500, which was effective February 19, 2010. Commerce amended the language for clarity but the meaning has not changed. We suggest simply replacing the repealed language with the new language as follows.

(e) **Consistency with comprehensive planning and other development regulations.** Shoreline management is most effective and efficient when accomplished within the context of comprehensive planning. For cities and counties planning under the Growth Management Act, chapter 36.70A RCW requires mutual and internal consistency between the comprehensive plan elements and implementing development regulations (including master programs). The requirement for consistency is amplified in WAC 365-~~195~~
196-500:

~~"Each comprehensive plan shall be an internally consistent document and all elements shall be consistent with the future land use map. This means that each part of the plan should be integrated with all other parts and that all should be capable of implementation together. Internal consistency involves at least two aspects:~~

~~(1) Ability of physical aspects of the plan to coexist on the available land;~~

~~(2) Ability of the plan to provide that adequate public facilities are available when the impacts of development occur (concurrency);~~

~~Each plan should provide mechanisms for ongoing review of its implementation and adjustment of its terms whenever internal conflicts become apparent."~~

“(1) Comprehensive plans must be internally consistent. This requirement means that differing parts of the comprehensive plan must fit together so that no one feature precludes the achievement of any other

(3) The development regulations must be internally consistent and be consistent with and implement the comprehensive plan.”

WAC 173-26-201(3)(d)(vii)

WAC 173-26-201(3) is the section of the rule that describes “Steps in preparing and amending master programs.” Subsection -210(3)(d), provides direction to “Analyze shoreline issues of concern.” Subsections (i) – (ix) are topic areas that should be analyzed as part of the update process. We suggest Ecology clarify language providing guidance on identifying areas vulnerable to water quality pollution for human health. The suggested alternative matches the active voice of the rest of the paragraph and more clearly indicates what local governments should do as part of this analysis step.

(vii) **Water quality and quantity.** Identify water quality and quantity issues relevant to master program provisions, including those that affect human health and safety. ~~Shellfish for human consumption are particularly vulnerable to poor water quality and data should be reviewed specific to this water-dependent use.~~ Review data and information specific to water-dependent commercial and recreational shellfish growing areas. Identify measures to protect water quality for human health as described in WAC 173-26-231(6). At a minimum, consult with appropriate federal, state, tribal, and local agencies.

WAC 173-26-211(2)(c)

In this section the guidelines quote Department of Commerce WAC 365-~~195~~-300. This rule was repealed and has been replaced by WAC 365-~~196~~-300, effective February 19, 2010. The content of the cited language was not changed.

(c) To facilitate consistency with land use planning, local governments planning under chapter 36.70A RCW are encouraged to illustrate shoreline designations on the comprehensive plan future land use map as described in WAC ~~365-195-300~~ 365-196-300 (2)(d).

WAC 173-26-211(5)(b)(iii) Rural Environment designation criteria

Suggested revisions match current Growth Management Act terminology.

Areas designated in a local comprehensive plan as ~~“rural areas of more intense development,”~~ “limited areas of more intensive development” as provided for in chapter 36.70A RCW, may be designated an alternate shoreline environment, provided it is consistent with the objectives of the Growth Management Act and this chapter. “Master planned resorts” as described in RCW 36.70A.360 may be designated an alternate shoreline environment, provided the applicable master program provisions do not allow significant ecological impacts.

WAC 173-26-211(5)(d)(iii) “High intensity” environment designation criteria

Suggested revisions match current Growth Management Act terminology and planning concepts.

(iii) **Designation criteria.** Assign a “high-intensity” environment designation to shoreline areas within incorporated municipalities, urban growth areas, and industrial or commercial ~~“rural areas of more intense development,”~~ “limited areas of more intensive development”

as described by RCW 36.70A.070, if they currently support high-intensity uses related to commerce, transportation or navigation; or are suitable and planned for high-intensity water-oriented uses.

WAC 173-26-211(5)(e)(iii) "Shoreline residential" environment designation criteria

Suggested revisions match current Growth Management Act terminology and planning concepts.

(iii) **Designation criteria.** Assign a "shoreline residential" environment designation to shoreline areas inside urban growth areas, as defined in RCW 36.70A.110, incorporated municipalities, ~~"rural areas of more intense development,"~~ "limited areas of more intensive development" or "master planned resorts," as described in RCW 36.70A.360, if they are predominantly single-family or multifamily residential development or are planned and platted for residential development.

WAC 173-26-241(2)(b)(ii)

Suggested revision makes this internal reference consistent with others throughout the guidelines.

~~(D) New and expanded commercial geoduck aquaculture as described in subsection (b)(i)(B)(I) of this section WAC 173-26-241(3).~~

WAC 173-26-241(3)(b)

We recommend this section that begins with (3)(b)(i) be renumbered so that every paragraph that follows can be cited precisely. The proposed organization of this detailed guidance on regulating geoduck aquaculture relies on extensive unnumbered paragraphs and two levels of bullets. It would be challenging to cite an individual paragraph or bullet in proposed WAC 173-26-241(3)(b)(II) and (III). These details become important over time in citing provisions in legal documents. See attached suggested minor edits that allow each specific provision to be cited clearly.

~~(i)~~ Local government should ensure proper management of upland uses to avoid degradation of water quality of existing shellfish areas.

~~ii) Additional provisions for commercial geoduck aquaculture:~~

~~(A) (i) Siting considerations for commercial geoduck aquaculture.~~

Commercial geoduck aquaculture should be located where water quality meets department of health certification requirements, and sediments, topography, land and water access support geoduck aquaculture operations without modification of the site such as grading or rock removal.

~~(B) (ii) Conditional use permit requirements for commercial geoduck aquaculture.~~

~~(A) (A) Conditional use permits are required for any new commercial geoduck aquaculture in areas that have not been previously planted with geoduck, including the expansion of existing geoduck aquaculture planting area beyond that previously used for commercial geoduck aquaculture. In addition, a conditional use permit is required when changes to existing commercial geoduck aquaculture operations result in a new significant adverse impact.~~

(B) Where the applicant proposes to convert existing nongeoduck aquaculture to geoduck aquaculture, the requirement for a conditional use permit is at the discretion of local government, unless the area of planting is new or being expanded as described above.

(C) A single conditional use permit may be submitted for multiple sites within an inlet, bay or other defined feature, provided the sites are all under control of the same applicant and within the same shoreline permitting jurisdiction.

(D) Conditional use permits shall be effective for five years unless extended for one year pursuant to WAC 173-27-090(2). Any subsequent plantings beyond this time frame shall require a new conditional use permit.

(E) Conditional use permits apply to any subsequent harvesting of permitted plantings. Conditional use permits must take into account that commercial geoduck operators have a right to harvest geoduck once planted.

(F) Per WAC 173-27-090(3), permit time periods in this subsection do not include the time during which geoduck could not be planted due to the pendency of administrative appeals or legal actions or due to the need to obtain any other government permits and approvals.

~~(H) (iii)~~ Conditional use permit application requirements, review and approval for commercial geoduck aquaculture.

(A) Commercial geoduck aquaculture conditional use permit and enforcement procedures shall comply with all applicable sections of chapter 173-27 WAC.

(B) Local governments are encouraged to develop conditional use permit applications that mirror federal or state permit applications to minimize redundancy between federal, state and local commercial geoduck aquaculture permit application requirements.

(C) In addition to complying with chapter 173-27 WAC, the application must contain:

(I) A narrative description and timeline for all geoduck planting and harvesting activities anticipated within the permit period if not already contained in the federal or state permit application or comparable information mentioned above.

(II) A baseline survey of the proposed site to allow consideration of the ecological effects if not already contained in the federal or state permit application or comparable information mentioned above.

(III) Copies of department of fish and wildlife harvest records for the site, if they exist.

(IV) Any monitoring or reporting requirements set by the local government.

~~And, if not contained in the provided federal or state permit documents or comparable information:~~

(V) Measures to achieve no net loss of ecological function consistent with the mitigation sequence described in WAC-173-26-201 (2)(e).

(VI) Measures to ensure public access to publicly owned lands and waters will be maintained.

(VII) Management practices that address impacts from mooring, parking, noise, lights, litter, and other activities associated with geoduck planting and harvesting operations.

(VIII) Local governments should provide public notice to all property owners within three hundred feet of the proposed project boundary.

~~(H) (iv)~~ Commercial geoduck aquaculture conditional use permit limits and conditions.

(A) Local governments should set forth conditional use permit limits and conditions and follow the mitigation sequence adopted consistent with WAC 173-26-201 (2)(e) to assure no net loss of ecological functions.

(B) Commercial geoduck aquaculture workers accomplish on-site work during low tides, which may occur at night or on weekends. Local governments must allow work during low tides but may require limits and conditions to reduce impacts, such as noise and lighting, to adjacent existing uses.

(C) Local governments should establish monitoring and reporting requirements necessary to verify that geoduck aquaculture operations are in compliance with shoreline limits and conditions set forth in conditional use permits and to support cumulative impacts analysis.

(D) Conditional use permits should be reviewed using the best scientific and technical information available.

(E) Local governments should apply best management practices such as buffers to accomplish the intent of the limits and conditions.

(F) At a minimum, conditional use permit limits and conditions shall include, where applicable and appropriate:

(I) Prohibiting or limiting the practice of placing tanks or pools or other impervious

materials directly on the intertidal sediments.

(I) Prohibiting or limiting the use of trucks, tractors, forklifts, and other motorized equipment below the ordinary high water mark and requiring that such equipment, when authorized, use a single identified lane to cross the upper intertidal to minimize impacts.

(II) Limiting on-site activities during specific periods to minimize impacts on fish and wildlife.

(III) Limiting alterations to the natural condition of the site, including removal of vegetation or rocks, regrading of the natural slope and sediments or redirecting freshwater flows.

(IV) Limiting the area of the site that can be planted or harvested at one time, to limit the areal extent of impacts.

(V) Limiting the portion of a site that can be covered by predator exclusion devices at any one time.

(VI) Requiring compliance with the Washington department of fish and wildlife shellfish transfer permitting system to minimize the risk of transferring or introducing parasites and disease into areas where they currently do not exist.

(VII) Requiring installation of property corner markers that are visible at low tide.

(VIII) Requiring buffers between geoduck operations and sensitive habitat features like critical saltwater habitats.

(IX) Requiring measures to minimize impacts to fish and wildlife.

(X) Requiring the use of predator exclusion devices with minimal adverse ecological effects and requiring that they be removed as soon as they are no longer needed for predator exclusion.

(XI) Requiring the use of the best available methods to minimize turbid runoff from the water jets used to harvest geoducks.

(XII) Establishing limits on the number of barges or vessels that can be moored or beached at the site as well as duration limits.

(XIII) Requiring measures to minimize impacts to navigation, including recreational uses of the water over the site at high tide.

(XIV) Requiring good housekeeping practices at geoduck aquaculture sites, including removing equipment, tools, extra materials and all wastes at the end of each working day.

Thank you again for considering these changes. If you have any questions, please contact me at 360.725.3055.

Sincerely,



Leonard Bauer, AICP
Managing Director
Growth Management Services

cc: Dave Andersen, AICP, Plan Review and Technical Assistance Manager, Growth Management Services

Appendix A: GMA designation criteria and SMP guidelines

This comparison illustrates that Ecology’s SMP guidelines mirror existing GMA designation criteria for fish and wildlife habitat. The “applicability” section of the guidelines

<p>WAC 365-190-130 Fish and wildlife habitat conservation areas.¹</p> <p>(2) Fish and wildlife habitat conservation areas that must be considered for classification and designation include:</p> <p>(a) Areas where endangered, threatened, and sensitive species have a primary association;</p> <p>(c) Commercial and recreational shellfish areas;</p> <p>(d) Kelp and eelgrass beds; herring, smelt, and other forage fish spawning areas;</p> <p>(f) Waters of the state;</p> <p>(4) Sources and methods.</p> <p>(c) Shellfish areas. All public and private tidelands or bedlands suitable for shellfish harvest shall be classified as critical areas. Counties and cities should consider both commercial and recreational shellfish areas. Counties and cities should consider the Washington state 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. Shellfish protection districts established pursuant to chapter 90.72 RCW shall be included in the classification of critical shellfish areas.</p> <p>(d) Kelp and eelgrass beds; herring, smelt and other forage fish spawning areas. Counties and cities must classify kelp and eelgrass beds, identified by the Washington state department of natural resources and the department of ecology. Though not an inclusive inventory, locations of kelp and eelgrass beds are compiled in the Washington coastal atlas published by the department of ecology. Herring, smelt and other forage fish spawning times and locations are outlined in WAC 220-110-240 through 220-110-271.</p> <p>(f) Waters of the state.</p> <p>(i) Waters of the state are defined in RCW 90.48.020 and include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters, and all other surface waters and water courses in Washington.</p>	<p>WAC 173-26-221(2)(c)</p> <p>(iii) Critical saltwater habitats</p> <p>(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.</p> <p>(B) Principles. 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.</p> <p>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.</p> <p>(iv) Critical freshwater habitats</p> <p>(A) Applicability. The following applies to master program provisions affecting critical freshwater habitats, including those portions of streams, rivers, wetlands, and lakes, their associated channel migration zones, and flood plains designated as such.</p>
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Note the only difference in the SMP “applicability” section for saltwater critical habitat areas is Ecology added “mudflats, and intertidal habitats with vascular plants.” This was added in response to a comment on the guidelines during initial rule-making (see Appendix B).

¹ Formerly codified as WC 365-190-080

Appendix B: Historical Background on Section 221(2)

The Department of Commerce suggestion that Ecology maintain the critical areas section as a distinct section concerning GMA-designated critical areas is consistent with Ecology's position when the guidelines were first adopted. See quotes below from the initial Responsiveness Summary on the Guidelines (*comments in italic, Ecology response in Roman*):

220(2) Critical areas

The proposed rule includes a critical areas section with specific requirements for wetland buffers, mitigation, etc. The GMA specifically directs each local jurisdiction in the state to adopt regulations to identify and protect critical areas. However, the legislature did not meld critical areas and shorelines, nor did it establish a hierarchy placing shoreline rules "above" critical areas standards. DOE was expressly not given the authority to approve or reject critical area regulations. The proposed shoreline rule would force all local jurisdictions to essentially cede their authority over critical area regulations to DOE.

✘ Ecology is expressly given authority to protect shoreline resources in RCW 90.58.020. The guidelines are specific to compliance with SMA policies and apply only to SMA jurisdiction. **The use of the critical area format is intended to facilitate integration of the SMA and GMA.** Local governments may keep SMPs and CAOs separate.

220(2)

The definition for critical areas should be moved to page 3 of the definition section for easier reference.

✘ **Because the critical area definition depends on another statute and WAC, Ecology believes it is better not to redefine it in the definition section of the guidelines.**

220(2)(c)(iv) Critical freshwater habitats

Change the name of this section to acknowledge that riverine corridors are a subset of GMA-designated "Critical freshwater habitats."

✘ **Ecology has revised the title to add the phrase "Critical freshwater habitats."**

220(2)

Critical areas should also include Channel Migration Zones and riparian areas.

✘ **In many cases critical areas may well include CMZs and riparian areas, however in this context, critical areas refer only to those areas defined by the GMA as critical areas.**

The one existing deviation from GMA rules in the existing "Applicability" section of the "critical saltwater habitats" sections is that the guidelines include "mudflats and aquatic vegetation." This inconsistency has not been an issue when Ecology has reviewed SMPs that reference critical areas because these areas end up overlapping with existing criteria.

220(2)(c)(iii)(A) Critical saltwater habitats

The definition of critical saltwater habitat must include aquatic vegetation. The exclusion of "aquatic vegetation" does not make sense. The language of the proposed rule does not protect nearshore habitat.

✘ The definition includes aquatic vegetation, but is only intended to include "critical" saltwater areas, not all saltwater areas. The first sentence has been amended as follows: "Critical saltwater habitats include all kelp beds, eelgrass beds, spawning and holding areas for forage fish, such as herring, smelt and sandlance, ~~and smelt~~, commercial and recreational shellfish beds, mudflats, intertidal habitats with vascular plants, and areas with which priority species have a primary association."

Appendix C. Examples of County designation criteria for fish and wildlife habitat conservation areas

Clallam County

Part Three. Aquatic and Wildlife Habitat Conservation Areas

27.12.310 Classification and Designation.

(1) Classification. The following classifications shall be used in designating aquatic and wildlife habitat conservation areas:

(a) Aquatic Habitat Conservation Areas. Includes those streams, lakes, marine waters and their associated wetlands and floodplains defined as shorelines of the State in the Shoreline Management Act of 1971 and the Clallam County Shoreline Master Program, which are also categorized as “shorelands” under Chapter 90.58 RCW, Shoreline Management Act, as now or hereafter amended, and those streams, lakes and wetlands which meet the criteria for Type 1 – 5 waters as defined herein....

(2) Designation. All lands and shorelands classified as aquatic and wildlife habitat conservation areas are hereby designated as aquatic and wildlife habitat conservation areas. These areas shall be mapped whenever possible. These maps shall be advisory and used by the Administrator and/or review authority to provide guidance in determining applicability of the standards to a property. Sites which include aquatic and wildlife habitat conservation areas which are not mapped shall be subject to the provisions of this section and chapter. The Administrator shall provide maps in a critical areas resource map portfolio as guidance in identifying the presence of aquatic and wildlife habitat conservation areas. These maps may be based on the following information sources:

- (a) Department of Wildlife Non-Game and Priority Habitat and Species Data Bases;
- (b) Department of Wildlife Washington Rivers Information System Data Base;
- (c) Washington State Department of Health Commercial and Recreational Shellfish Area Inventory;

Grays Harbor County

18.06.140(A) Fish Habitat Conservation Areas

Fish Habitat Conservation Areas are also those areas containing commercial and recreational shellfish areas. These areas include all public and private tidelands and bed lands suitable for shellfish harvest, including shellfish protection districts established pursuant to the Washington Administrative Code.

Mason County Critical Areas Ordinance

B. FISH AND WILDLIFE HABITAT CONSERVATION AREA CATEGORIES.

Fish and wildlife habitat conservation areas include both aquatic and terrestrial areas within Mason County. The approximate location and extent of critical fish and wildlife habitat areas are displayed in the Washington Department of Fish & Wildlife's (WDFW) Priority Habitat and Species (PHS) Program database. Mason County will also use other available information for these critical fish and wildlife habitat areas, including tribal and federal databases and local knowledge. The following categories shall be used in classifying critical areas to be regulated under this ordinance:

1. Commercial and recreational shellfish areas.
2. Kelp and eelgrass beds; herring, sand lance, and smelt spawning areas.
3. Naturally occurring lakes and ponds under twenty acres and their submerged aquatic beds that provide fish or wildlife habitat.

4. Streams.

5. Saltwater Shorelines, and Lakes 20 Acres and Greater in Surface Area.

6. Lakes, ponds, streams, and rivers planted with game fish by a governmental or tribal entity.

7. State Department of Natural Resources natural area preserves and natural resource conservation areas.

8. Areas with which Federal or State endangered, threatened and sensitive species of fish and wildlife have a primary association. Those species known to be found in Mason County are listed in Table 1. Table 1. Species of Importance that may occur in Mason County

Species

Bull Trout

Puget Sound Chinook

Hood Canal Summer Chum

C. DESIGNATION

The areas classified in Section B above as Fish and Wildlife Habitat Conservation Areas (FWHCA) are hereby designated under RCW 36.70A.060 and RCW 36.70A.170, as critical areas requiring proper land management to protect their value and functions.

Jefferson County

18.22.200 Classification/Designation.

(3) Designation. The following are designated as Fish and Wildlife Habitat Conservation Areas (FWHCAs):

(a) Areas with which endangered, threatened, and sensitive species listed by the federal or state government have a primary association.

(i) Federally designated and threatened species ...

(ii) State endangered, threatened, and sensitive species ...

(d) Commercial and recreational shellfish areas, including designated Shellfish Habitat Conservation Areas (note: shellfish aquaculture activities within all public and private tidelands and bed lands suitable for shellfish harvest are allowed uses; such activities include but are not limited to bed marking, preparation, planting, cultivation, and harvest).

Island County

17.02.050.C. Fish and Wildlife Habitat Conservation Areas.

1. Designation. The following are designated as Fish and Wildlife Habitat Conservation Areas:

a) Areas with which endangered, threatened, and sensitive species listed by the federal or state government have a primary association.

b) Streams.

c) Commercial and recreational shellfish beds.

d) Kelp and eelgrass beds.

e) Herring and smelt spawning areas.

f) State natural area preserves.

g) State natural resource conservation areas

Pacific County

Section 6. Shellfish, Kelp, Eelgrass, Herring and Smelt Spawning Areas Regulations.

A. Purpose. The purpose of this section is to ensure the protection of shellfish, kelp, eelgrass, herring, and smelt spawning areas by regulating incompatible upland land uses and development, and by controlling associated no-point pollution impacts.

B. Identification. Shellfish, kelp, eelgrass, herring, and smelt spawning critical areas are those public and private saltwater tidelands or beds that are devoted to the process of growing, farming, or cultivating shellfish, including commercial clam and oyster grounds, oyster and mussel raft areas,

and recreational shellfish harvest areas. In addition, all property located 300 feet landward from the boundary of upland vegetation shall be designated as shellfish, kelp, eelgrass, herring, and smelt spawning critical areas.

San Juan County

18.30.160 Fish and Wildlife Habitat Conservation Areas.

5. **Marine Habitat Areas.** These areas include the following:

- a. All kelp and eelgrass beds;
- b. Priority shellfish areas as follows:
 - i. All public and private tidelands or bedlands which are approved or conditionally approved by the Washington Department of Health for shellfish harvest;
 - ii. Any shellfish protection districts created under Chapter 90.72 RCW; and
 - iii. Areas with all of the following attributes: broad intertidal areas, bays with geographically restricted wave action and circulation, poor or limited flushing, warmer water temperatures, seasonally reduced salinities, and increased potential for algae bloom; and
- c. All identified smelt spawning areas.

Skagit County

14.24.500 Fish and Wildlife Habitat Conservation Area Designations.

(2) Habitat Conservation Areas are designated by definition in SCC 14.04 and are referenced as follows:

- (a) An area with which anadromous fish, endangered, threatened or sensitive species have a primary association and/or their habitat such as those designated and mapped by the Washington State Department of Fish and Wildlife, Priority Habitats and Species Program.
- (b) A water of the State as defined under WAC 222-16-030.
- (c) Any public or private tidelands available for shellfish harvest, kelp or eelgrass beds, herring or smelt spawning areas such as those designated in the Priority Habitats and Species Map of Skagit County. For commercial and recreational shellfish areas, this includes but may not be limited to those areas identified in the Lower Skagit River Basin Water Quality Study (November 1993), the Padilla Bay/Bay View Watershed Nonpoint Action Plan (May 1995) and the Samish Bay Watershed Nonpoint Action Plan and Final Closure Response Strategy (December 1995).
- (d) A Critical Biological Area as designated and mapped by the Department of Ecology Coastal Zone Atlas dated June 1978 and/or the maps.
- (e) Designated species and habitats of local importance pursuant to SCC 14.24.500.
- (f) Naturally occurring ponds under 20 acres and their submerged aquatic beds that provide fish or wildlife habitat.
- (g) Lakes, ponds, streams, and rivers planted with game fish by a government or Tribal entity;
- (h) Areas with which anadromous fish species have a primary association; and
- (i) State Natural Area Preserves and Natural Resource Conservation Areas.