November 23, 2010

Washington Department of Ecology

C/O Cedar Bouta

PO Box 47600

Olympia, WA 98504-7600

Re: Proposed Draft WDOE Shoreline Rule Comments due 11-23-10

Dear Cedar,

I am writing to provide public comment on ecologies proposed amendments to the State's Shoreline Management Act . Please include these comment in the formal record of this revision process.

In reviewing the proposed amendments I find that many go well beyond any recommendations coming out of the HB 2220 State Aquaculture Regulatory Committee (SARC) process. It's my understanding that HB 2220 acted to direct that the SARC process be used to develop recommendations from various stakeholder groups that were to be used by WDOE in any proposed amendments. It is clear in the proposed amended text to chapter 173-26 that WDOE staff has expanded the proposed amendments well beyond the scope intended by the SARC, and this was not the intent of the legislature in HB 2220. My specific comments on the amendments are:

1) 173-26-221. Staff has eliminated public and private tidelands suitable for shellfish harvest as critical areas. I oppose the removal of this classification. Shellfish are one of the oldest uses of tidelands that are historically recognized as a beneficial use of state waters. This beneficial use was recognized many years ago because of the added habitat value existing in shellfish beds. Shellfish beds provide a three dimensional habitat that provides for an array of species. These shellfish beds support more species diversity that any other tideland areas. This species diversity acts to directly support prey fish, commercial fisheries, vegetation, etc, and is clearly

of high ecological value. This was clear to the legislature over 100 years ago when one of the first marine spatial planning exercises was related to setting aside lands for shellfish cultivation. I request that WDOE staff strengthen the wording that recognizes shellfish beds as critical saltwater habitat, and that encourages the cultivation of shellfish as a method to improve habitat function.

In the definition of critical saltwater habitat staff has designated that only native shellfish beds deserve this designation. The fact is that native shellfish beds have declined most likely due to upland activities resulting in high levels of sediment runoff, water pollution, etc. It is documented that areas once highly populated by native shellfish are now barren except for monoculture high sediment vegetated areas, or where monoculture burrowing shrimp or other species have modified the areas to an extent where shellfish no longer exist. For all practical purposes these areas have been lost to natural shellfish as dense Eel grass, pests, or other vegetation has moved into the area, and caused high levels of sediment deposition. Adding to the unnaturally high sediment levels, the annual growth and die off of dense Eel grass meadows has caused semi anaerobic muck to build in the area where Eel grass stems decompose. The result is the loss of massive areas of critical habitat for shellfish who acted to filter water and maintain water chemistry balance. To offset this imbalance, other shellfish species introduced a hundred years ago have acted to fill in the gap of lost native shellfish populations, and this has allowed for a large benefit in regard to maintaining a level of critical habitat. I request that staff consider all shellfish as critical habitat so that natural levels of this habitat are retained.

2) 173-26-241.2.b.ii.d: This amendment would require a conditional use permit for commercial Geoduck aquaculture on land that specifically allows this use. I oppose this restriction of the use of properties that have historically and legally been used to allow shellfish to be grown including Geoduck. Science now developed clearly demonstrates that there is no significant probability that this allowed usage will result in any significant impact.

3) 173-26-241.3.a.i: This section refers to definitions as related to the term "agriculture" as defined under WAC 173-26-020.a-.d. I request WDOE amend its rules as necessary to assure upland aquaculture activities, products, equipment, and land are included as necessary in policy definition so as to provide clear direction to staff in SMA policy development. Aquaculture crops are considered a part of local, state, and federal agriculture per law and policy, and definition related to the production of aquacultural crops must align with definitions related to general agriculture. Aquacultural crops rely on upland facilities, equipment, activities, and land to be delivered into the agricultural crop sector, and thus require the same type land use considerations afforded to any general agricultural crop. While this is intuitive to all general policy makers, and to the general agricultural sectors and the communities in which they reside,

there is confusion within certain sectors of government and this needs to be addressed to provide clarification that aquaculture is to be treated as agriculture like any cultivated crop.

I request the following changes (indicated in Blue text) be made to WAC 173-26-020.a through .d:

(3)(a) "Agricultural activities" means agricultural uses and practices including, but not limited to: Producing, breeding, or increasing agricultural and aquacultural products; rotating and changing agricultural and aquacultural crops; allowing land used for agricultural and aquacultural activities to lie fallow in which it is plowed and tilled but left unseeded; allowing land used for agricultural and aquacultural activities to lie dormant as a result of adverse ~~agricultural~~ market conditions; allowing land used for agricultural and aquacultural activities to lie dormant because the land is enrolled in a local, state, or federal conservation program, or the land is subject to a conservation easement; conducting agricultural operations; maintaining, repairing, and replacing ~~agricultura~~l equipment; maintaining, repairing, and replacing ~~agricultural~~ facilities, provided that the replacement facility is no closer to the shoreline than the original facility; and maintaining agricultural lands under production or cultivation;

(b) "Agricultural products" includes, but is not limited to, aquaculture, horticultural, viticultural, floricultural, vegetable, fruit, berry, grain, hops, hay, straw, turf, sod, seed, and apiary products; feed or forage for livestock; Christmas trees; hybrid cottonwood and similar hardwood trees grown as crops and harvested within twenty years of planting; and livestock including both the animals themselves and animal products including, but not limited to, meat, upland finfish, shellfish and shellfish products, poultry and poultry products, and dairy products;

(c) "Agricultural equipment" and "agricultural facilities" includes, but is not limited to:

(i) The following used in agricultural and aquacultural operations: Equipment; machinery; constructed shelters, buildings, and ponds; fences; upland finfish rearing facilities; water diversion, withdrawal, conveyance, and use equipment and facilities including, but not limited to, pumps, pipes, tapes, canals, ditches, and drains;

(ii) Corridors and facilities for transporting personnel, livestock, and equipment to, from, and within agricultural and aquacultural lands;

(iii) Farm residences and associated equipment, lands, and facilities; and

(iv) Roadside stands and on-farm markets for marketing fruit, shellfish, fish or vegetables; and

(d) "Agricultural land" means those specific land areas on which agricultural and aquaculture activities are conducted as of the date of adoption of a local master program pursuant to these guidelines as evidenced by aerial photography or other documentation.

After the effective date of the master program, land converted to agricultural use is subject to compliance with the requirements of the master program.

4) 173-26-241.3.b: Staff has eliminated wording identifying aquaculture as an activity of statewide interest and also other wording long established that recognizes shellfish aquaculture as a benefit to the citizens of Washington State. There is no basis for this change and these ideas have been critical to the recognitions long ago of the legislature that shellfish areas deserve special protections. Also eliminated is wording that recognizes that aquaculture when properly managed results in long term over short term benefit and can protect the resources and ecology of the shoreline. I request that this language be retained and other language that act to degrade this recognition be stricken.

Wording in regard to the dependency of shellfish aquaculture on water has also been amended to infer that it may not a water dependent use. Aquaculture is a completely water dependent use and this wording needs to clearly indicate this. This new inference that aquaculture is a non-water dependent use is then used to place other uses such as navigation and "water dependent" uses such as boat ramps, port facilities, etc. in front of aquaculture in regard to shoreline planning. It was recognized many years ago that shellfish aquaculture deserves special consideration because it adds value to habitat and function above and beyond other water dependent activities that have long been understood to simply be uses of the water area. The added habitat value from shellfish aquaculture has been recognized by state, local, federal, and global entities based on Best Available Science (BAS). It is unthinkable that WDOE staff would intentionally alter shoreline planning language to infer that it is simple a use activity.

This section also states that aquaculture should not be permitted where it would suspend sediment in excess of state water quality standards. Like any farming activity there is going to be temporary disturbance of sediments when crops are cultivated and harvested. The sediment disturbance from these historic activities is negligible compared to daily tidal influences, storm events, tributary sediment in flushes, etc. Installing new shoreline management policy wording in regard to restricting 150 year old farm activities that have never been shown to cause impact will undoubtedly be used to impose unnecessary and over reaching restrictions not based on BAS. If Staff is concerned about sediment increases it would be wise to look at the uncontrolled expansion of invasive and native SAV within the estuaries. The fact is that invasive weeds such as Zostera Japonica trap massive amounts of sediment. This has turned tide flat areas that were naturally sand, into areas now consisting of sediment muck that acts to highly increase turbidity over the entire estuary area through natural tidal wave and current action. In short, the direction of staff to somehow tie aquaculture to increased sedimentation is misplaced, and is not based on real world data.

5) I request that the following wording be added to section 173-26-241.3.b:

"Aquaculture is to be defined such that it is clarified that aquacultural products, activities, equipment, etc. are included under the definitions related to agriculture contained in WAC 173-26-020.a-.d . Aquacultural products and crops are included under definitions of agriculture, and rely on upland facilities, equipment, and land to be maintained, produced, distributed, and sold to the public. This use is aligned with all other agricultural activities and requires clarification to local government.

6) 173-26-241.3.b.i: This is a new section in regard to the management of upland use so that they do not degrade shellfish growing area. I request that this section be amended as follows:

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

I question the thinking behind DOE simply requesting that local governments ensure that upland activities be managed such that they do not degrade water quality. As I understand this is a requirement and this needs to be stated clearly in DOE's policy.

7) 173-26-241.3.b.ii.B.I-III: Geoduck, like all shellfish aquaculture is an allowed use on tidelands and shellfish beds per RCW. I oppose any requirement for a farmer to obtain a conditional use permit to cultivate Geoduck on property they own or lease. I oppose any restriction in regard to a farmer converting from an existing crop to any other crop allowed per RCW. Crop rotation is a basic requirement of any farm necessary to meet an array of issues associated with operating the farm in regard to markets, environmental conditions, etc. Writing prescriptive policy that requires a grower to go through a bureaucratic process to change a crop type from one legally allowed crop to another legally allowed crop is absurd. It's no different than requiring a terrestrial farmer to file for a conditional use permit when they want to plant carrots on their property, or change from carrots to peas. BAS related to Geoduck cultivation has been completed to a point where it is now clearly evident that there is no significant environmental impact. The restrictions proposed in this amended policy language are clearly based not on science, but on objective biases driven by upland developers and other groups who lack the ability to accept sound science. DOE must assure BAS is used above subjective social commentary in regard to any proposed policy creation. The idea that a farmer would agree to a 5 year use of their property for crop production illustrates a complete lack of understanding of how any farm operates. How can WDOE propose that farms, some of whom have been operating for over 100 years, now agree to be granted 5 year permits where at any

time the permitting entity could deny their farm activity? It is simply unthinkable for any farmer to agree to this.

There is a reference to somehow ensuring that public access to public lands is included in the proposed CUP. If the intent here is to force public access across private property this would of course be illegal in regard to encouraging trespass. From a logistical standpoint this encourages what is already a significant problem for property owners in regard to allowing theft of shellfish. One common method used by those who perpetuate an existence by stealing shellfish is to pretend to be going to public lands to harvest in legal quantities. The reality is that they use the public access and land to gain access near a cultivated commercial shellfish bed so they can steal shellfish in commercial quantities and then sell that shellfish illegally without any licensing or permitting. I oppose any language that provides for any encouragement of the public to trespass across private upland or tideland property.

I oppose limiting farm activities to only low tides. The right to farm their land as necessary to cultivate and deliver a crop is a basic requirement for any farmer and is covered in an array of right to farm legislation and law. The reality is that for a high percentage of time a crop is simply growing toward harvest so there is minimal activity on the site. However, when a crop is planted and harvested there must not be any restriction to the growers property so they can complete these activities in a way that is efficient and that meets needs based on an array of weather, seasonal, market, and other conditions.

Proposing that local governments impose restrictions on lighting and noise in areas farmed for generations is not acceptable. This is clearly being proposed to address upland shoreline developer and owners who do not want working water fronts. Its similar to those who move next to an airport and then complain about the noise and lights. Farming has existed in its historic fashion since well before shorelines were degraded by shoreline developers. The negative impact to shellfish farmers because of the noise and lighting caused by upland development is what needs to be addressed here. WDOE needs to be writing policy to restrict lights shining from new upland development that seriously interfere with navigation, and night vision of crews working in the dark. The impact on shellfish farmers by the massive encroachment of upland development needs to be the focus of a policy revision so that the long term aesthetics of farm areas is not impacted, and so that the impacts over the past decade are reversed to allow farmers to operate in the peaceful environment that has existed on their historic farms for generations. The burden needs to be on the upland developers who are invading historic farm areas and not on the shellfish farmer.

I oppose any reporting requirements related to the normal operation of a farm in order to cultivate and harvest a crop beyond what is already required in regard to production reporting and/or related to public health.

I oppose a limitation on the use of normal farm equipment on aquatic farms. Access to farms with farm equipment wouldn't seem to be a self evident requirement for basic farm operation, but WDOE has proposed that it be prohibited or restricted. This access has been an established practice since the invention of the wheel and cart and must be allowed as a basic operational requirement for any farm. It concerns me greatly that DOE would attempt to encourage a prohibition on this necessary activity. This is no different than telling a terrestrial farmer he can no longer access his farm with a tractor, truck, or hay bailer. I do support requirements that help reduce the potential for contaminates to enter the water body, but a farm can't be operated without equipment.

I oppose language that infers a restriction on directing fresh water flows across shellfish beds. Most times these flows are caused and/or influenced by upland development that causes or increases runoff water volume. Increased or new volumes of freshwater cause instability and this in turn causes lateral movement of this water across the tideland. In addition, natural runoff water volumes vary by season and if not stabilized can destroy an entire shellfish beds if they begin to move across the bed. Like any farmer, shellfish growers must be able to keep these upland runoff flows stabilized on their beds. WDOE should pursue policy that prohibits the increase in freshwater runoff flows into the marine areas through more intelligent and enforced upland development restrictions, instead of attempting to restrict shellfish growers who are negatively impacted downstream.

I oppose any wording that restricts the area of a farm that can be cultivated or harvested at one time, and any restriction that limits the amount of predator exclusion devices that can be implemented. For years it has been understood that to operate a farm a grower must carry out activities efficiently. Beds are already limited in the amount of area that can be planted by naturally occurring conditions that restrict planting some portions of the bed. In regard to predator control devices, it is simply not acceptable to propose a limitation on normally utilized Integrated Pest Management (IPM) devices that help protect a crop. I do support encouraging local governments to promote IPM as a basic farm requirement for all agricultural activities.

I oppose language that restricts the number of vessels that can be moored on a farm site at any one time. The need for equipment is dictated by the activity being conducted, or by the need to located equipment when not in use. Most times this area is private farm property and like any farm there are times when equipment may not be in use and must be stored. This is a long term historic logistical need for any farm. A farm operation will not allow farm equipment to lie idle any more than necessary as a basic operational necessity so this isn't an issue that requires more unnecessary policy guidance. The proposed language again appears driven by upland property developers who propose to implement their subjective want of a non-working water front. I oppose this type subjectively driven anti-aquaculture agenda in general.

I oppose a proposal to require farmers to implement special measures to reduce impact to navigation and recreational water use. There are already existing rules in place in regard to navigable waters and farmers are required to adhere to these in regard to marking beds. Recreational use is no different than any form of navigation and there is a responsibility to understand the long term methods to mark shellfish beds by those choosing to use water over privately owned and farmed tideland so crops and beds are not damaged. Farmers respect the desire for others to utilize waters over their property and expect these others to also respect and not damage their farm.

Small Business Economic Impact: As the third generation owner and operator of 76 year old family shellfish farm I find the small business economic impact Statement prepared by WDOE staff to inaccurately reflect the true cost of this rule revision. I find that this impact statement fails to include many of the impacts to small businesses. I also find the proposed mitigation steps proposed for the inequalities identified do not in anyway offset the cost to small business, or the local governments charged with rewriting and implementing the changes to their SMP documents. The restrictions placed on privately owned farmlands prevent the use of those lands to efficiently produce crops, and this results in massive economic loss to the grower and communities who depend on the jobs and services the farm brings to the community. Prohibitions on the use of equipment on the farm land adds immeasurable cost to an operation. Restriction around the use of pest management tools results in increased crop losses. Measures to limit the time a grower can farm their property reduces the amount of crop they can cultivate, and thus again reduces the ability to farm profitably.

Degrading the classification of shellfish as a water dependant and recognized beneficial use results in a direct taking of the protection long established to protect shellfish beds under law. This will have a direct economic impact as growers are forced further into the legal arena to challenge upland developments one by one not considering water dependant and beneficial uses of shellfish growing areas.

The proposed amendments will clearly result in a reduced ability of a farm to produce shellfish, and this results in an ecological value loss to the estuary that has economic ramifications. Using BAS it has become clear that ecological values exist from shellfish in regard to carbon sequestering, nutrient uptake, etc. and these are economic values for the grower that must be considered. A recent study by the Pacific Shellfish Institute shows that there is significant economic impact when shellfish are planted in areas where water quality issues occur. WDOE must consider these economic impact as a part of its economic review. These are tangible values to the grower that are becoming more defined by science, and forcing a grower to reduce their crop size results in a take of this economic benefit.

Thank you for considering my input on this proposed rule revision and please provide me with a response to the actions staff will be taking to incorporate these proposed changes.

Sincerely,

Brian Sheldon

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