



# PLAUCHÉ & STOCK

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November 23, 2010

Ms. Cedar Bouta  
Environmental Planner  
Shorelands & Environmental Assistance Program  
P. O. Box 47600  
Olympia, WA 98504-7600

RE: Comment Letter – Proposed Rule Change (SMA)

Dear Ms. Bouta:

We have prepared these comments on behalf of Taylor Shellfish (“Taylor”) to address the Department of Ecology’s proposed changes to its Shoreline Management Act Rules (“SMA Rules”); Governor Chris Gregoire’s Executive Order 10-06; and Ecology’s rulemaking process and economic analyses.

As an initial matter, Taylor requests that Ecology immediately suspend its proposed SMA Rules pursuant to Governor Gregoire’s Executive Order 10-06. Implementation of the SMA Rules as proposed will result in significant economic impacts to shellfish farmers, and particularly and disproportionately to small aquaculture businesses. Further, the SMA Rules differ significantly in substance and content from the direction given by the Legislature and the recommendations of the stakeholder committee formed to assist Ecology with development of the SMA Rules. Taylor does not oppose rules for geoduck aquaculture per se, and supports the development of a rule based on broad stakeholder input. However, given Ecology’s significant departure from the stakeholder recommendations, Ecology’s flawed economic analyses of the SMA Rules, the significant economic impact the SMA Rules will have on shellfish farmers, and the recently issued Executive Order 10-06, Taylor feels strongly that Ecology should suspend this rulemaking process as of the date of Executive Order 10-06, and that the rules should be reconsidered and revised at a later date.

The multi-year process to develop Ecology’s rules for geoduck aquaculture included extensive involvement from numerous stakeholders. For those stakeholders, including shellfish growers, this process took significant time and effort. Ecology’s proposed SMA Rules related to

aquaculture arose out of SSHB 2220, which directed Ecology to develop guidelines for geoduck aquaculture with the advice of the Shellfish Aquaculture Regulatory Committee (“SARC”). Diane Cooper, from Taylor Shellfish, participated extensively in SARC as one of two shellfish grower representatives. As directed by the legislature, SARC developed a set of recommendations for the content and scope of Ecology’s geoduck rule.

Prior to issuance of the SMA Rules, Ecology issued an early discussion draft based on the SARC recommendations and solicited comments from SARC representatives and other stakeholders. Taylor Shellfish, along with Arcadia Point Seafood and Seattle Shellfish, submitted a comment letter to Ecology expressing general support for Ecology’s discussion draft and expressing shellfish growers’ concerns with some of the proposed changes.

The SMA Rules differ significantly from the discussion draft in several important ways. Most notably, Ecology’s proposed SMA Rules include significant policy changes that affect all aquaculture, not just geoduck aquaculture, and remove essential water quality protections for shellfish farming and for Washington State’s marine waters. Taylor’s comments addressing the proposed SMA Rules and Ecology’s rulemaking process are set forth below. Suggested redline revisions to the SMA Rules are attached hereto as Attachment A.

#### **I. Governor Gregoire’s Executive Order 10-06**

On November 17, 2010, Governor Chris Gregoire issued Executive Order 10-06 directing state agencies to suspend development and adoption of rules through December 31, 2011. This Executive Order included the following declarations:

- The current recession is causing severe economic stress for small businesses and local governments
- A stable and predictable regulatory and policy environment will conserve resources for small businesses and local governments and promote economic recovery

In issuing the Executive Order, Governor Gregoire stated: “[I]n these unprecedented economic times, this [Executive Order] will provide businesses with stability and predictability they need to help with our state’s recovery. The time and effort small business owners would put into meeting new requirements would be better spent in improving their bottom line, and adding new employees.” Governor Gregoire additionally noted that small businesses are the key to our state’s economic recovery and that 95 percent of Washington small businesses have fewer than 50 employees.

Taylor commends Governor Gregoire for recognizing that the current recession is causing severe economic stress for small businesses and governments, and for recognizing the significant time and expense small businesses incur in meeting new regulations. Ecology’s SMA Rules, specifically, will require all geoduck farming companies, the majority of whom are small businesses, to expend significant time and expense obtaining permits every five (5) years that will place substantial limitations and conditions on their farming operations. Those permit requirements will also require local governments with limited resources to

spend significant time and expense processing and issuing those permits. Shellfish farming opponents have stated unequivocally that they will oppose and appeal any permits issued for new geoduck farms; these appeals will result in an exponential increase in time and expense for shellfish farmers and local governments. Moreover, the permit limits and conditions themselves will have a significant and disproportionate impact on small businesses. There is no dispute about this; Ecology's own Small Business Economic Impact Statement has concluded that small businesses will be disproportionately impacted by the SMA Rules. Given this clear finding, it is frankly baffling that Ecology has not already suspended its rulemaking process in response to the Executive Order.

Unfortunately, since the issuance of the Executive Order on November 17, 2010, the regulated community has expended significant time and resources attempting to determine whether rulemaking is suspended, and has received conflicting communications from various Ecology representatives as to whether the SMA Rule will be suspended. In all likelihood, in light of the Executive Order and the press coverage the Executive Order has received, many individuals who would normally have commented are unlikely to submit comments based on a belief that Governor Gregoire's Executive Order suspended the rulemaking process. As a result, the comment period is now tainted. Ecology should take, and indeed should have already taken, swift and clear action to suspend this rulemaking process in response to the Governor's Executive Order.

It remains unclear at this point whether or not this rulemaking process will be suspended. Because the comment period is currently scheduled to close on November 23, Taylor is compelled to prepare and submit comments addressing both whether the SMA Rules should be suspended (above) and the content and scope of the SMA Rules and Ecology's rulemaking process and analysis (below). Ironically, this is just the sort of investment in time and energy that Governor Gregoire was attempting to avoid when she promulgated Executive Order 10-06.

Finally, regardless of whether or not Ecology decides to suspend the rulemaking process related to the SMA Rules, in light of the confusion surrounding Ecology's implementation of Executive Order 10-06, Taylor reserves, on its own behalf and on behalf of other growers, the right to submit additional comments until the SMA Rules are finalized.

## **II. Ecology's Economic Analyses and Rulemaking Process**

Ecology's economic analyses, including its Small Business Economic Impact Statement, Cost Benefit Analysis, and Least Burdensome Alternative determination, contain significant flaws; are plagued by faulty conclusions; propose inadequate mitigation measures; and violate the Regulatory Fairness Act and the Administrative Procedure Act, including RCW 34.05.328.

Ecology's Small Business Economic Impact Statement conducted for the SMA Rules contains significant flaws and proposes inadequate mitigation. The SBEIS analyzes only one of the fifteen proposed limits and conditions on geoduck farming in any detail (buffers), and makes assumptions regarding costs of permitting that are significantly lower than the

actual cost of obtaining and complying with the terms and conditions of a Conditional Use Permit. Even with this patently flawed analysis, Ecology determined that the SMA Rules impose a disproportionate impact on the State's small businesses. Specifically, the SBEIS found a ratio of cost 13.9 times higher per employee for small businesses. Ecology then proposed "mitigation" for that impact that it does not mitigate the impacts of the SMA Rules at all.

Because the SBEIS, flawed as it may be, concludes that the proposed SMA Rules have a disproportionate economic impact on small business, the proposed SMA Rules clearly should not go forward in light of the Executive Order 10-06. The express intent of that Executive Order is to reduce economic impacts to small businesses.

Ecology's Preliminary Cost Benefit and Least Burdensome Alternative analyses are also inadequate and contain significant flaws, in violation of the Administrative Procedure Act. Ecology's analysis gave insufficient consideration to identifying and evaluating alternatives to the SMA Rules, and the SMA Rules are clearly not the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives of the statute that the SMA Rules implement. The SARC recommendations provided a much less burdensome means of achieving the general goals and specific objectives at issue here, as did Ecology's previous draft rule, as does the revised rule attached to this comment letter.

Shellfish farming is critical to the State's rural economies and has tremendous potential for growth, new jobs, and new tax revenue. The inadequacies in Ecology's economic analyses mean that the full extent of the economic impact of the SMA Rules is unknown and has not been adequately evaluated and mitigated. Ecology should therefore suspend rulemaking and consider making changes to the proposed SMA Rules in the future only after conducting adequate analysis to ensure that any rule ultimately adopted is the least burdensome alternative and that any impacts that do occur are adequately mitigated.

### **III. Ecology's Proposed SMA Rules**

Comments on Ecology's SMA Rules are divided into three sections below: (i) Critical Saltwater Habitats; (ii) Aquaculture Policy Language; and (iii) Geoduck Aquaculture Provisions. For ease of reference, redline revisions representing Taylor's requested changes to Ecology's SMA Rules are included with this comment letter as Attachment A. Taylor's changes are derived from four sources: (i) Ecology's guidelines currently in effect; (ii) Ecology's discussion draft of the rule; (iii) the recommendations of SARC; and (iv) AGO 2007 No. 1.

#### **a. Critical Saltwater Habitats (WAC 173-26-221(2)(c)(iii))**

Ecology proposes to remove from the critical saltwater habitat designation subsistence, commercial, and recreational shellfish beds, and tidelands suitable for shellfish harvest. In proposing these changes Ecology fails to recognize that shellfish aquaculture and beds provide critical habitat functions. These areas should continue to be protected for their

ecological value; there is no basis for Ecology to modify the current definition of critical saltwater habitats.

Ecology should retain subsistence, commercial, and recreational shellfish beds in its list of critical saltwater habitats. In addition, Ecology should continue to require local governments to classify as critical saltwater habitats all private and public tidelands or bedlands suitable for shellfish harvest. Shellfish beds, like other critical saltwater habitats, require a higher level of protection due to the important ecological functions they provide, such as water quality improvement and the provision of three dimensional habitat. Shellfish are filter feeders and remove pollutants from ambient waters via filtration. The ability to provide these functions should be protected. Further, shellfish raised for human consumption require a high level of protection to protect against water quality degradation; the critical saltwater habitat designation helps to ensure that this high level of protection is achieved.

Ecology's rationale for de-designating subsistence, commercial, and recreational shellfish beds as critical saltwater habitats is that commercial aquaculture "is a use, not a habitat." In fact, shellfish aquaculture is both a use and a habitat, which is precisely the reason commercial shellfish beds are currently included in the list of critical saltwater habitats in Ecology's Guidelines. There is no basis in the Shoreline Management Act or in Ecology's Guidelines for the position that a use cannot also be a habitat, and Ecology has provided no reasoned justification for its decision to draw this arbitrary and false distinction.

In many other areas of the country and the world, governments and communities support, encourage, and protect shellfish aquaculture precisely because it is both a use and a habitat. We are submitting under separate cover a packet of studies and articles that we have compiled demonstrating the valuable ecological functions that shellfish aquaculture provides. We encourage Ecology to review these materials (that represent only a small portion of the full extent of materials available on this subject) and strongly reconsider its decision to remove subsistence, commercial, and recreational shellfish beds from critical saltwater habitats.

Ecology should also retain the existing language in this section stating that all public and private tidelands or bedlands suitable for shellfish harvest shall be classified as critical saltwater habitats and requiring local governments to include shellfish protection districts in the classification of critical saltwater habitats. Ecology should be protecting all shellfish, whether cultivated or harvested, commercially or recreationally, from water quality degradation, because of the critical ecological functions that these areas provide.

Removing these shellfish areas from the critical saltwater habitat classification takes away vital water quality protection for both shellfish and for marine waters in Washington State generally. Ecology's proposed changes unquestionably result in a net loss of protection for marine waters and bedlands in Washington State. For Ecology to remove these valuable protections based on the rationale that some of the areas it currently protects are used to grow food for human consumption on a commercial scale is irrational and lacks any support in the Shoreline Management Act. This is particularly the case in light of the fact that neither the Growth Management Act nor the Shoreline Management Act provide adequate protection for marine resource lands comparable to the protection for terrestrial agricultural lands under Growth

Management Act resource lands protections and Washington's right to farm provisions. This is so despite the fact that many of the areas in Washington State currently used for shellfish farming were set aside and privately deeded by the state for the express purpose of shellfish farming over 100 years ago.

**b. Aquaculture Policy Language (WAC 173-26-241(3)(b))**

Ecology also proposes to remove and/or amend policy language setting forth the state's policy regarding shellfish farming. Such an action represents significant, unwarranted, and troubling changes to the state's current policy. Such changes will create significant negative impacts on the shellfish farming industry in Washington State. These changes were neither considered nor proposed by SARC. Ecology should not implement any of its proposed changes to this section.

First, Ecology should retain the language stating that aquaculture is an activity of statewide interest and that properly managed, it can result in long term over short term benefit and can protect the resources and ecology of the shoreline. Shellfish aquaculture is a vital industry in Washington State and part of Washington's heritage, with a rich, 150 year history. The State's commitment to shellfish culture dates back to statehood and the passage of the Bush and Callow Acts. Today, Washington leads the country in farmed shellfish production, and shellfish farming is a key economic driver in many rural communities in Western Washington. As discussed in Section III(a), above, shellfish farming also provides valuable ecological functions. Shellfish farms often serve as a "canary in the coal mine" in that the closure or downgrade of shellfish growing areas are often the first signal that there are water quality issues in a given waterbody.

Ecology should also retain the language recognizing aquaculture as a water-dependent and a preferred use of the water area. Aquaculture is a water dependent use. Adding language that aquaculture is preferred when it is water dependent requires growers to argue on a case-by-case basis with project opponents regarding which aquaculture activities are water dependent, resulting in additional time, expense, and significant delays in implementation of approved projects.

Ecology should only include language limiting shellfish farming in areas where contaminated sediments could be resuspended if Ecology or local governments, and not the shellfish farmer/applicant, are required to identify such areas. Identifying contaminated sediments in the marine environment is a complex and technically sophisticated process that would be both economically and practically difficult, if not impossible, for shellfish growers to accomplish. The economic impact of this requirement has not been evaluated by Ecology, and could substantially and disproportionately impact small businesses.

Finally, deleting the word "significantly" before the word "conflict" in this section creates significant problems. Some allowed aquaculture activities may, at times, technically conflict with navigation or other water dependent uses, but they do not "significantly" conflict. For example, while a floating facility such as a mussel farm may, arguably, conflict with boat traffic or water dependent recreational activities at the farm site (to the same degree as any other floating structure), the conflict with navigation or other water dependent use in the water body

would not generally rise to a level of significance so long as there is there is adequate room for passage and to engage in other recreational or commercial activities within the waterbody. Omitting the word “significantly” could severely restrict areas where geoduck aquaculture would be able to locate.

**c. Geoduck Aquaculture Provisions (WAC 173-26-241(3)(b)(ii))**

Many of the proposed changes to both the aquaculture and geoduck-specific provisions of the proposed SMA Rules go well beyond the scope and intent of HB 2220 as well as what was discussed and agreed to by stakeholders in the SARC process. RCW 43.21A.681(2) requires Ecology to prepare its SMA Rules using the recommendations of SARC. Because Ecology’s proposed SMA Rules go above and beyond the advice of SARC in both substance and scope, and because Ecology failed to provide reasoned justification for its departure, Ecology failed to comply with RCW 43.21A.681(2). Ecology also failed to comply with RCW 43.21A.681(2) because it did not meet the deadline to file the SMA Rules for public review and comment within six months of delivery of SARC’s final report. Ecology’s departure from the specific directive of the statute being implemented, without proper analysis of the qualitative and quantitative benefits and costs of the SMA Rules, violates the Administrative Procedure Act. Ecology additionally failed to coordinate the SMA Rules with other federal, state, and local laws applicable to shellfish farming to the maximum extent practicable.

Permit Requirements

Ecology proposes to require that all new geoduck farms obtain conditional use permits that must be renewed every five years. Ecology further proposes that local governments require extensive permit limits and conditions. These requirements will have a significant economic impact on all geoduck farmers, and will have a disproportionate impact on small geoduck farming businesses. This requirement should be replaced with (i) a statement giving local governments the discretion to require conditional use permit for new geoduck farms; (ii) a requirement that local governments require a conditional use permit for new geoduck farms in critical saltwater habitats; and/or (iii) a conditional use permit requirement for new geoduck farms that does not have an end date.

Regardless of the approach taken on conditional use permits, Ecology should also include a section in the SMA Rules clarifying that shoreline substantial development permits are not required for new geoduck farms unless a specific project or practice causes substantial interference with normal public use of the surface waters. Local government shoreline master programs must be approved by the state and are therefore state law. As state law, they are bound by Attorney General Opinions, including AGO 2007 No. 1. Ecology justified its removal of discretion from local governments regarding conditional use permit requirements for new geoduck farms by arguing for statewide consistency with regard to what, if any, permits are required for this activity. Based on this reasoning, Ecology should restate the formal opinion of the Attorney General regarding whether geoduck farming requires a shoreline substantial development permit, particularly in light of the fact that some local governments are currently acting in a manner inconsistent with the AGO 2007

No. 1. To ensure consistency statewide, Ecology should include a provision in its SMA Rules as follows:

(A) Shoreline substantial development permit.

(I) The planting, growing, and harvesting of farm-raised geoduck clams requires a substantial development permit if a specific project or practice causes substantial interference with normal public use of the surface waters, but not otherwise.

This language is taken directly from the conclusion of AGO 2007 No. 1.

#### Permit limits and conditions

Ecology should follow SARC's recommendations regarding limits and conditions for geoduck farming permits; these recommendations were the result of a two-year process involving significant stakeholder investment of time and energy. Ecology has not provided reasoned justification for departure from SARC's recommendations, and has not provided any scientific basis for the limits and conditions proposed in the SMA Rules. A table setting forth the discrepancies and inconsistencies between SARC's recommendations and Ecology's proposed SMA Rules is attached hereto as Attachment B.

In addition, Ecology should follow SARC's recommendations and issue any of these permit limits and conditions in the form of guidance rather than formal Shoreline Guidelines. Technologies utilized in geoduck aquaculture are evolving, which necessitates some latitude in the regulation of this use. Issuing recommended terms and conditions in the form of guidance to local governments, rather than formal Ecology Guidelines, will allow Ecology more latitude and flexibility to modify recommended terms and conditions as additional scientific information becomes available and farming technologies evolve.

The following limits and conditions are of particular concern to Taylor and many other growers due to their potentially significant economic impact and/or their departure from SARC's recommendations. Every farm site will be affected by the limits and conditions differently; some companies may be significantly impacted by limits and conditions not specifically called out or addressed here. Taylor requests that Ecology revise all of the limits and conditions, not just those discussed here, to make them consistent with SARC's recommendations as set forth in redline form in Attachment A to this comment letter.

- Prohibiting or limiting the practice of placing tanks or pools or other impervious materials directly on the intertidal sediments.

Nursery systems are a necessary part of farming as growers attempt to increase the size of the geoduck seed in an effort to increase survival and reduce the duration that predator controls, including tubes, are needed. Nursery systems allow seed to grow out to a larger size prior to being planted; this practice can result in less worker time on the beach because it increases survival rates, and thus reduces the need for replanting. Additionally, nursery systems are

necessary for the storage of seed between the time seed is available through a hatchery and when planting can occur. While it may be appropriate to limit the overall area or number of tanks or pools, an outright prohibition on such nursery gear is neither justified nor feasible. Significantly, SARC did not recommend that nursery systems be prohibited:

“Many Committee members recommend that intertidal holding pools, those placed directly on the intertidal substrate, should be *limited* in the total area covered and number of sites where they are permitted. Several Committee members recommend that intertidal holding pools not be included in the Ecology guidelines for geoduck aquaculture operations.”

(Emphasis added).

This provision should be revised as follows:

~~Prohibiting or~~ Limiting, to the extent practicable, the practice of placing nursery tanks or holding pools or other impervious materials directly on the intertidal sediments.

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

SARC recommended that limitations apply to very intensive activities where specific fish and wildlife features were identified in the initial farm plan. Ecology’s proposed limitation is overly broad and should be revised to make it consistent with SARC’s recommendation. This provision should be revised as follows:

Limiting on-site activities during specific periods to minimize impacts on sensitive fish and wildlife. The need for such measures should be identified in the baseline ecological survey conducted for the site.

- 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.

This limitation is overly broad and needs clarification. Some small rocks and vegetation may need to be relocated, and there is no evidence that this activity causes harm. This could be an element identified in the initial farm plan and, if some specific environmental harm is associated with this activity, mitigation could be required. We recognize that some limitation on grading may be appropriate.

This provision should be revised as follows:

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

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

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

These provisions will have a significant and disproportionate impact on small businesses and others with a smaller number of farms or farming footprint, and should be stricken.

- Requiring buffers between geoduck operations and sensitive habitat features like critical saltwater habitats.

We strongly disagree with a blanket buffer requirement between geoduck operations and sensitive features like critical habitats in the absence of scientific justification for such buffers. Such measures should be taken only where best available science demonstrates such measures are necessary to ensure no net loss of ecological functions. This provision should be amended to read:

Requiring mitigation measures or buffers between geoduck operations and sensitive habitat features where best available science demonstrates such measures are necessary to ensure no net loss of ecological functions ~~like critical saltwater habitats.~~

- Requiring measures to minimize impacts to fish and wildlife.

It may be helpful to local governments for Ecology to identify measures that may be appropriate to minimize potential impacts to fish and wildlife, but this limitation is overly broad as currently written. This provision should be stricken.

Sincerely,



Amanda M. Stock

AMS:tt

## Attachment A: Taylor's Proposed Revisions to Ecology's SMA Rules

### WAC 173-26-221(2)(c)(iii) Critical saltwater habitats.

#### (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~~naturally occurring beds of native shellfish species~~; 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 saltwater habitats. 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 saltwater habitats.

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

(b) **Aquaculture.** Aquaculture is an activity 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 a water-dependent use and, when consistent with control of pollution and prevention of damage to the natural environment ~~and when it is a water-dependent use~~, is a preferred use of the water area~~aquatic environment~~. 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 of ecological functions~~adversely impact critical areas or critical resource areas~~, suspend contaminated sediments that exceed state sediment standards, or significantly conflict with navigation and other water-dependent uses. Aquaculture 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 173-26-201 (2)(e).

~~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.~~

(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) Siting.

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 significant clearing or grading~~modification of the site such as grading or reek removal~~.

(B) Shoreline substantial development permit.

(I) The planting, growing, and harvesting of farm-raised geoduck clams requires a substantial development permit if a specific project or practice causes substantial interference with normal public use of the surface waters, but not otherwise.

~~(B)~~ (C) Conditional use permit.

(I) Conditional use permits are required for ~~any~~ new commercial geoduck aquaculture in designated critical saltwater habitats~~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.

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.

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.

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.

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.

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.

(II) Conditional use permit application requirements, review and approval.

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

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.

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

- 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.

- A baseline ecological 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.

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

- 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:

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

- Measures to ensure public access to publicly owned lands and waters will be maintained.

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

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

(III) Commercial geoduck aquaculture conditional use permit limits and conditions.

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.

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.

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.

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

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

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

- ~~Prohibiting or limiting~~ Limiting, to the extent practicable, the practice of placing nursery tanks or holding pools ~~or other impervious materials~~ directly on the intertidal sediments.

- ~~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.~~

- Limiting on-site activities during specific periods to minimize impacts on sensitive fish and wildlife. The need for such measures should be identified in the baseline ecological survey conducted for the site.

- Limiting alterations to the natural condition of the site, including significant removal of vegetation or rocks, and regrading of the natural slope and sediments ~~or redirecting freshwater~~

flows.

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

~~• Limiting the portion of a site that can be covered by predator exclusion devices at any one time.~~

~~• 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.~~

• Requiring installation of property corner markers that are visible at low tide.

• Requiring mitigation measures or buffers between geoduck operations and sensitive habitat features where best available science demonstrates such measures are necessary to ensure no net loss of ecological functions ~~like critical saltwater habitats.~~

~~• Requiring measures to minimize impacts to fish and wildlife.~~

• 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.

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

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

~~• Requiring measures to minimize impacts to navigation, including recreational uses of the water over the site at high tide.~~

• Requiring good housekeeping practices at geoduck aquaculture sites, including worker training and removing regular removal of equipment, tools, extra materials, and all wastes ~~at the end of each working day.~~

**Attachment B: Table Comparing Ecology’s Proposed Rules with SARC’s Recommendations**

<p align="center"><b><u>Aquaculture (General)</u></b>  <b><u>Limits or conditions proposed by the new rule</u></b></p>	<p align="center"><b><u>Aquaculture (General)</u></b>  <b><u>SARC Recommendation</u></b></p>
<p><u>Definition change: Critical Saltwater Habitat—</u>  Remove “<i>subsistence, commercial and recreational shellfish beds</i>” and replace with “<i>naturally occurring beds of native shellfish species.</i>”</p>	<p>No recommendation from SARC.</p>
<p><u>Remove the following language from the existing rule:</u>  “<i>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.</i>”</p>	<p>No recommendation from SARC.</p>
<p><u>Remove all of the following language from the existing rule:</u>  “<i>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.</i>”</p>	<p>No recommendation from SARC.</p>
<p><u>Changed definition of aquaculture from “... dependent on the use of the water area” and replaced with “...when it is a water-dependent use.”</u></p>	<p>No recommendation from SARC.</p>
<p><u>Added language:</u> Aquaculture should not be permitted in areas where it would adversely impact <i>critical areas or critical resource areas, suspend contaminated sediments that exceed state sediment standards or</i>” and removed the word “<i>significantly</i>” from “<i>conflict with navigation and other water-dependent uses.</i>”</p>	<p>No recommendation from SARC.</p>

<p align="center"><b><u>Geoduck Specific</u></b> <b><u>Limits or conditions proposed by the new rule</u></b></p>	<p align="center"><b><u>Geoduck Specific</u></b> <b><u>SARC Recommendations</u></b></p>
<p>Conditional Use Permit (CUP) Requirement</p> <p>Measures to ensure public access to publicly owned lands and waters will be maintained.</p> <p>Prohibiting or limiting the practice of placing tanks or pools or other impervious materials directly on the intertidal</p> <p>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.</p> <p>Limiting on-site activities during specific periods to minimize impacts on fish and wildlife.</p> <p>Limiting alterations to the natural condition of the site, including removal of vegetation or rocks, regarding of the natural slope and sediments or redirecting freshwater flows.</p>	<p>Several Committee members recommend that all new or expanded geoduck aquaculture operations in Puget Sound obtain either a SDP or CUP. Many Committee members recommend against a CUP.</p> <p>The Committee recommends the guidelines not require public access to private tidelands used for geoduck aquaculture. Two Committee members recommend allowing public access on public shorelines that are leased for geoduck aquaculture.</p> <p>Many Committee members recommend that intertidal holding pools, those placed directly on the intertidal substrate, should be limited in the total area covered and number of sites where they are permitted. Several Committee members recommend that intertidal holding pools not be included in the Ecology guidelines for geoduck aquaculture operations.</p> <p>No recommendation from SARC.</p> <p>Many Committee members recommend a general statement in the guidelines that local jurisdictions may restrict intensive aquaculture activities like inserting tubes or harvesting clams during times when sensitive fish or wildlife may be present. The need for such restrictions should be identified in the baseline identification of sensitive habitat features for the site. Several Committee members recommended that guidelines developed by the Washington Department of Fish and Wildlife for in-water construction be considered.</p> <p>The Committee recommends restricting geoduck aquaculture to sites that are fundamentally suitable for geoduck culture without the need for grading or rock removal. SARC did not recommend freshwater flow restrictions.</p>

<p>Limiting the area of the site that can be planted or harvested at one time, to limit the areal extent of impacts.</p>	<p>Many Committee members recommend against establishing a limit for the number of tubes or clams per square foot or square meter. Many Committee members recommend local consideration of the overall carrying capacity of the affected water body and the overall scale of the geoduck aquaculture operations in each region. Many Committee members recommend dropping the issue of planting density from the guidelines.</p>
<p>Limiting the portion of the site that can be covered by predator exclusion devices at any one time. 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.</p>	<p>The Committee recommends the guidelines address the ecological effects of tubes, nets, and other predator exclusion devices. Several recommend including a general statement, removing tubes and nets as soon as they are no longer needed, and several recommended limiting the portion of the site that is covered.</p>
<p>Requiring installation of property corner markers that are visible at low tide.</p>	<p>Many Committee members recommend surveying and marking geoduck aquaculture sites when they are established.</p>
<p>Requiring buffers between geoduck operations and sensitive habitat features like critical habitats.</p>	<p>The Committee recommends requiring buffers between sensitive habitats and planted geoducks. Many Committee members recommend a general statement about buffers be included in the guidelines and recommended distances be included in technical guidance documents as recommended best management practices. Several Committee members recommend buffers of at least 25 feet from sensitive habitat elements.</p>
<p>Requiring measures to minimize impacts to fish and wildlife.</p>	<p>No specific recommendation from SARC.</p>
<p>Requiring the use of the best available methods to minimize turbid runoff from the water jets used to harvest geoducks.</p>	<p>Many Committee members recommend the guidelines include a general statement on the need to manage the effects of water jets or other methods used to harvest geoduck. They recommend including best management practices in the technical guidance. Several Committee members recommend against harvesting during periods of spawning and incubation in identified forage fish spawning areas. Many Committee members recommend that local jurisdictions consider performance-based standards tailored to the locations where geoduck aquaculture is allowed.</p>

<p>Establishing limits on the number of barges or vessels that can be moored or beached at the site as well as duration limits.</p> <p>Requiring measures to minimize impacts to navigation, including recreation uses of the water over the site at high tide.</p> <p>Requiring good housekeeping practices at geoduck aquaculture sites, including removing equipment, tools, extra materials and all wastes at the end of each working day.</p>	<p>Many Committee members recommend a general statement that local jurisdictions consider restricting barge and vessel mooring. They recommend including best management practices for barge and vessel mooring in the technical guidance document.</p> <p>No specific recommendation from SARC.</p> <p>The Committee recommends that growers make every effort to prevent the loss of tubes, nets and other items and should recover litter and debris to the extent feasible. Many Committee members recommend the guidelines include a general statement on the importance of site maintenance, sanitation and worker training with best management practices included in a technical guidance document.</p>
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