

Margaret Barrette

Comment E0084

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| SMP Rulemaking 2010 | Margaret | Barrette | margaretbarrette@pcsga.org | 360-754-2744 | Pacific Coast Shellfish Growers Association | 11/23/2010 15:56 |

November 23, 2010. Ms. Cedar Bouta, WA Department of Ecology, PO Box 47600, Olympia WA, 98504-7600. Re: WAC 173-26 Proposed Rule Amendment

Dear Ms. Bouta,

Thank you for the opportunity to comment on draft shoreline rules (WAC 173-26) recently proposed by the Department of Ecology. I recognize the tremendous effort that was put forth to develop these rules and the hours of analysis by department staff as well as by several dedicated shellfish growers. In light of those efforts, I am somewhat disappointed to submit these comments. Given the extensive discussions that occurred during the Shellfish Regulatory Advisory Committee (SARC) process as well as the rule making process, I anticipated that the proposed draft would better reflect an outcome where the shellfish industry remains part of Washington's future. Instead, the proposed rules send a clear message that the future of the shellfish industry in this state is uncertain. The Pacific Coast Shellfish Growers Association (PCSGA) is comprised of approximately of 150 growers in Alaska, Washington, Oregon and California. These dedicated individuals pride themselves not only on the quality and freshness of their shellfish but also in their role as environmental stewards, mindful of the dynamic conditions in the marine environment. The industry contributes \$90-\$100 million annually to the state's economy. While this estimate does not consider the economic multiplier of industry-related elements such as boats, fuel, etc., it is still tremendously significant because most of the economic contribution is realized in some of our state's most rural counties. During a time of unprecedented unemployment and financial insecurity, the shellfish industry remains a vital economic engine in Pacific, Mason, Thurston, Jefferson and Grays Harbor Counties. Most of PCSGA's membership consists of at least third-generation shellfish farmers. The industry has been advocating for water quality and individual members are seen as leaders in environmental stewardship. The group is not opposed to regulation. In fact regulation is one way in which the industry has and will continue to evolve. Growers have invested both time and money in training employees to be conscientious of their interaction with wildlife and sensitive habitats and implementing practices to reduce noise and visual impacts. Yet the current rule not only overlooks these efforts to improve the industry but goes further by assuming that growers have little regard for the marine environment and are in need of intervention of local government to impose poorly thought out limits and conditions. To make matters worse, county staff are typically not well versed in the technical aspects of aquaculture and are unaware of the nuances of site conditions and species considerations. Given the current economic situation, it is unlikely that counties, or even the Department of Ecology, will provide necessary training for staff or hire qualified consultants to carry out the specifics of this rule. In general, the proposed rules will make it difficult for established shellfish growers to stay in

business. The added amount of regulation and the limits on not only where they may establish their business, but also the restrictions on how they may operate will stifle growth and present significant financial challenges. Given these proposed rules, I would be surprised if any new geoduck growers would be technically skilled enough to navigate the additional demands of permitting, let alone able to secure funding to establish a new business under the constraints laid out within the proposed rule. For the purposes of this letter, I have focused specific comments into four categories: the integrity of the rule-making process, general policy changes, proposed limits and conditions for geoduck farming, and the adequacy of the small business impact statement. Each of these categories will be expanded upon below. Integrity of the Rule Making Process has been compromised. On November 17, 2010 Governor Chris Gregoire issued Executive Order #10-06. This order clearly stated that cabinet agencies should suspend non-critical rule-making activities in recognition of both the state's current economic recession and severe budget constraints experienced by both small businesses and local governments. The direction from the Governor and the rationale for giving such an order was clear to me and to the many small business owners I represent: that State agencies should stop moving on rulemaking processes that will impose additional burdens on Washington's business community. Under this rationale, this rulemaking effort should be immediately suspended. In spite of the clarity of the Governor's order, the recent actions of the Department of Ecology have not only confused the situation but also put growers and other stakeholders in limbo. I have received questions from PCSGA members as to why Ecology has not suspended rulemaking in light of the Governor's Order. A tribal representative informed us yesterday that he was not moving forward with comments because he understood that the rulemaking process had been suspended in accordance with the Governor's order; I can only guess that some growers and other would-be commenters have met the intent of the order and stopped preparing comments so that they may, in the words of the Governor, return to work, returning focus on economic contribution and hiring employees. Ecology has argued that a message from a deputy posted on a list-serve should make it clear that until posted otherwise, this rule making process is not suspended. However, multiple pages on Ecology's website have language highlighted that is not the same message as the list-serve. If members of the general public seek information from the individual pages specific to this rule making project, which is a completely reasonable expectation, the language they will find is "On Wednesday, Nov. 17, 2010, Gov. Chris Gregoire issued Executive Order 10-06, directing state agencies under her jurisdiction to suspend non-critical rule development and adoption through December 31, 2011. This disjointed approach and inconsistent message is confusing and will result in an improperly conducted public comment period. I fully expect this situation will produce a tainted comment period and puts the integrity of this process into question. I believe the comments will not include input from all of the stakeholders that would have submitted comments due to the conflicting messages from the Department and the Governor. In order to achieve a complete record of comment, the rule should be suspended per the Governor's Order and reinitiated at a later time. It is widely known that late November through the Chinese New Year is the busiest period in a shellfish growers' year. The Governor's Order was well-received by an industry that could use every minute to prepare for their businesses' busiest and most profitable time of year. In light of the Governor's Order and given the choice, growers would likely choose to focus energy on their business rather than submitting comments. Ecology's attempt to seek an exemption under the Governor's Order is ironically in direct conflict to the intent of the Order. Growers have already spent hours away from their farm being engaging in or observing the SARC process. Additionally, growers have spent time reviewing the proposed rule language and understanding how these rules will affect their operations. Now, Ecology is proposing that growers be involved in an additional, month-long process to determine if the rule should be suspended per the order. Finally, if the rule is exempted from the Governor's Order, growers will need to be involved in the implementation of the rule as local

governments determine how the rules are to be applied to shellfish growers in their communities. Not only is Ecology asking shellfish growers for additional time away from farming, but the requests come at the busiest time of the year. Again, this rule-making effort should be suspended, based on the direction from the Governor, and growers should be able to spend time and energy on their farm, mindful of the state's economic situation. Policy Changes have negative result for Washington's Shellfish Industry. Some of the proposed changes are applicable to all aquaculture and represent a significant departure from Ecology's current policy. Specifically, the language removes important water quality protections for aquaculture and puts aquaculture last when balancing conflicting preferred shoreline uses. These types of changes will have devastating effects to the shellfish industry in this state. One specific example is the change that no longer classifies subsistence, commercial and recreational shellfish beds as critical saltwater habitats (WAC 173-26-221 (2)(c)(iii)). This change removes vital water quality protections for shellfish and marine waters. It is well documented that shellfish beds provide important ecological functions, such as water quality improvement and habitat. Therefore, they require a higher level of protection. Additionally, shellfish raised for human consumption also require a high level of protection against water quality degradation. Classification of subsistence, commercial and recreational shellfish beds as critical saltwater habitat helps to ensure that this high level of protection is achieved. Also of concern is that under the currently proposed language, aquaculture activities would not be allowed in areas designated as critical saltwater habitat. Ecology's position is that shellfish farming is a shoreline use and therefore cannot also be a habitat. This is incorrect shellfish farming is both a use AND a habitat. Ecology must restore the language that designates subsistence, commercial and recreational shellfish beds as critical saltwater habits. An additional general policy change that would severely impact Washington's shellfish industry is the removal of language that identifies aquaculture as an activity of statewide interest and when properly managed, it can result in long term over short term benefit and can protect the resources and ecology of the shoreline (WAC 173-26-241 (3) (b)). The outright removal of this language is unacceptable because it reduces the value of aquaculture when balancing between competing uses. This change would remove recognition of shellfish farming as an historic use and a culturally and economically significant activity along Washington's shorelines, particularly in rural counties. The change allows preference to be given to other uses in planning and permitting, making it difficult to receive permits to conduct aquaculture activities. This ultimately impacts rural communities the most with the potential loss of shellfish industry related jobs. Ecology must restore the original WAC language, which acknowledges aquaculture as being of statewide interest and recognizes the benefits of aquaculture in protecting the resources and ecology of the shoreline. The draft rule also changes aquaculture's designation as a water dependent use by including language stating that aquaculture is preferred 'when it is water dependent' (top of page 72). This change is unacceptable because it requires growers to argue, on a case-by-case basis, with project opponents regarding which aquaculture activities would be considered water-dependent. Not only will this result in additional costs to the grower, but also reduces the status of shellfish farming as an activity of statewide interest. The rule language should clearly recognize shellfish aquaculture as a water dependent use. The final general policy change of concern relates to permitting aquaculture in certain areas. The proposed language expands areas where aquaculture should not be permitted and proposes changes that place aquaculture behind other uses such as those related to navigation (i.e. docks) and other water-dependent uses (middle of page 72). This language impacts shellfish growers because it effectively reduces available area to conduct aquaculture activities. Also, within the planning and permitting process, preference may be given to other uses thus making it more difficult to receive permits to conduct aquaculture activities. Once again this type of change will significantly impact rural areas in particular due to their economic dependence on the shellfish industry. Ecology must restore the original language which gives aquaculture equal standing with other water

dependent uses. Proposed Limits and Conditions for Geoduck Farming. The first concern with the language regarding siting for geoduck farming is that the proposed language goes outside the scope and intent of HB2220. Not only does the proposed language differ from the recommendations discussed and agreed to by stakeholders at the Shellfish Aquaculture Regulatory Committee (SARC) but in some cases the draft rules prescribe methods that are impracticable. I know that a significant contribution of time and energy was made in the SARC by several shellfish growers who participated in the process in good faith. It is disappointing and unfortunate that the proposed language represents such a significant diversion from not only the intent of HB2220 but also from the current-day realities of the shellfish industry. We have concerns with several specific provisions. However, it is important to note that impacts will vary from grower to grower and from farm to farm. For example differences in site conditions or growing methodology is likely different among farms. Also the farm's ability to obtain off-site resources, such as access to hatchery, will be different. In some cases the specific conditions are too broad. Some conditions may or may not apply based on the uniqueness of the farm and there are others that demonstrate complete disregard for the nature of the shellfish industry. Finally, and perhaps most discouraging, a few conditions attempt to solve problems with uses that are not specific to the shellfish industry. An example of this is a condition regarding the use and moorage of vessels. Specifically, we have some concerns about the conditional use permit (CUP) requirement. It is unclear how this permitting process will coincide with existing state and federal permits, not only in process but also in the types of information required for each permit. It seems overly burdensome for different government agencies to ask for different information in order to process applications. I anticipate that shellfish growers, particularly small growers and new growers to the industry will find it especially difficult to meet yet another permit approval process. Similarly, the fact that the CUP will only give five years for planting seems arbitrary and is inconsistent with both the uncertain nature of shellfish farming and the structural certainty of financial lending. This five-year cycle will certainly impact smaller and newer growers within the industry. Finally, given the economic hardships felt by all county and state agencies, it remains unclear how a requirement for a CUP will be implemented. There will be additional costs associated with ensuring staff have the technical knowledge to support the CUP process. Concerning the limits and conditions, because of the language at a minimum it remains unclear if these are actually prohibitions where applicable or if they are limitations. As currently written, I am not clear how a prohibition could also be a minimum. How does one strengthen or add to a prohibition? Ecology must clarify this language to make it simpler to understand and implement. Also, Ecology should attempt to better understand the industry they are trying to regulate with these rules and develop conditions that better reflect the industry.

Adequacy of the Small Business Economic Impact Statement: The analysis within the Small Business Economic Impact Statement is flawed as it significantly underestimates the costs imposed to growers through the draft rules. For example, the analysis looks at the cost of a conditional use permit, but does not consider the additional costs associated with applying for and obtaining such a permit, including survey costs and likely appeal costs. Further, the proposed rules will impact the shellfish aquaculture community as a whole, yet the economic analysis only focuses on the impacts related to geoduck aquaculture only. In order to be complete, the economic analysis should include how the many house-keeping changes impact non-geoduck shellfish growers as well. Additionally, the mitigation measures prescribed to offset impacts to small business are inadequate and will not mitigate for all impacts imposed by the proposed language. Mitigation measures are necessary because the result of the economic analysis is that the proposed rules will disproportionately impact small business the same small business community that, per the Governor's order, needs focus on their bottom line. The result of the Small Business Economic Impact Statement, despite the errors in the analysis, should be

justification to suspend this rule making process under the Governor's order issued on November 17th. Once again, I appreciate the opportunity to comment on the proposed rule language. If you have any questions or need further information, please do not hesitate to contact me.

Respectfully, Margaret P. Barrette Executive Director Pacific Coast Shellfish Growers Association