

Department of Ecology
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Shorelands & Environmental
Assistance Program

November 3, 2010

Ms. Cedar Bouta
WA Department of Ecology – SEA Program
PO Box 47600, Olympia WA, 98504-7600

Re: WAC 173-26 Proposed Rule Ammendment

Dear Ms. Bouta:

Thank you for this opportunity to comment on the proposed final draft Shoreline Guidelines WAC 173-26. Unfortunately, the draft aquaculture rule represents a broad divergence from both the legislative direction given to Ecology in SHB 2220 and the recommendations put forward by the Shellfish Aquaculture Regulatory Committee (SARC). While several of the proposed geoduck sections are problematic, what is most disturbing is Ecology’s redraft of the Aquaculture Policy guidance and the redefinition of Critical Saltwater Habitats. Moreover, the Small Business Impact Statement associated with this rule is woefully inadequate in that it fails to recognize most of the impacts of the rule as proposed, and provides no real mitigation for the effects that are identified.

The Aquaculture Policy and Critical Salt Water Habitat language redraft is a complete departure from current policies that protect aquaculture and ultimately will eliminate shellfish aquaculture from the most productive shorelines of Washington State. None of the Aquaculture Policy or Critical Salt Water Habitat language was included in draft rules before Ecology published its final draft rule. It is short-sighted, has no basis in science, will lead to a net loss of ecological functions and is not in keeping with the basic and fundamental tenets of the Shoreline Management Act. Ecology needs to withdraw this rule and review the Shoreline Management Act (SMA), the directives of SHB 2220, the recommendations of SARC and the findings of the Sea Grant research and literature review. If enacted in its current form, this rule will likely result in legal and legislative recourse that will take years to resolve. **With this proposed rule, Ecology has failed to protect the environment and will place one of Washington’s oldest and most ecologically sustainable food production sectors in peril. Given all of the rule development activities and public input opportunities on other parts of the proposed rule, to introduce such a radical change without prior notice is an untrustworthy and deceptive way to operate a state agency.**

Comments specific to each section are included below.

173-26-221 (2) C iii (a) Critical Saltwater Habitat. Ecology proposes to redefine critical salt water habitat to exclude subsistence, commercial and recreational shellfish beds and replace it with “naturally occurring beds of native shellfish species.” Ecology goes on to propose removal of the language that reads...

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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.))

Ecology has stated that these changes are needed to separate aquaculture use from habitat areas. This point makes absolutely no sense, has no basis in science and will lead to a net loss of ecological functions in the shoreline. There are currently many uses that co-exist with critical habitat areas including agriculture, forestry, hunting, commercial fishing and recreation, to name but a few. Aquaculture and critical habitat areas have a long history of co-existing and the habitat and water quality benefits of shellfish aquaculture are well documented. (Note: a cursory reading of the literature review provided by Sea Grant or the annotated bibliography submitted to SARC by the Pacific Coast Shellfish Growers Association will validate this point.)

Moreover, the stewardship benefits afforded the natural environment through shellfish aquaculture are immense. Look at the net environmental benefits from shellfish aquaculture and shellfish protection districts created for Henderson Inlet, Discovery Bay, Drayton Harbor or Liberty Bay to name but a few. Without shellfish aquaculture, there would be no ongoing monitoring system for checking the water quality of these bays, and no government systems to expedite their clean up. Without the protections provided by shellfish aquaculture, the remaining shorelines of Puget Sound will soon look like Snohomish, King and most of Pierce Counties where almost all of the shellfish beds and eelgrass beds have been lost due to pollution. Without the protections provided by critical area status, there will be continued pressure from upland development and shellfish beds will be lost.

This language applies to ALL forms of shellfish aquaculture, not just geoduck aquaculture. If enacted, fifty percent of the shorelines of Jefferson County would no longer be considered critical area, or shellfish aquaculture would become a nonconforming use in the county.

This language was not included in any of the predraft versions, it was not recommended by SARC, it is outside of the scope of SHB 2220, it has no basis in science, it is contrary to the fundamental tenets of the Shoreline Management Act and it must be removed and the original language reinstated. If this language is adopted it will directly result in the net loss of ecological functions and is likely to result in legal action by the shellfish growers and the tribes. Furthermore, the Small Business Impact Statement fails to recognize or quantify the impacts from this language. b

Proposed changes to WAC 173-26-241 (b) Aquaculture, paragraph 1. Ecology proposes to remove the reference to aquaculture as an activity of statewide interest, remove the reference to long term benefits and remove the language that aquaculture is a water dependent use. These changes ignore the historic, physical, and cultural nature of shellfish aquaculture in Washington State. Shellfish were the first farmed commodity exported from this territory prior to statehood. Shellfish are extremely important to the economies of Grays Harbor, Island, Jefferson, Mason, Pacific, Skagit, and Thurston Counties. Jefferson County is home to c

two of the largest shellfish hatcheries in the country. Shellfish seed from these hatcheries are used both in-state and are exported to other states and countries. Washington State is a world leader in farmed shellfish production. Our shellfish are prized throughout the country and the world. Clearly it is an activity of statewide interest with long-term benefits.

The proposed changes to this paragraph are not supported by SHB 2220 or by SARC and they were not included in any predraft version of the proposed language. All of the changes to paragraph 1 should be withdrawn and the paragraph should be restored to its original form.

Paragraph 2 is stricken in its entirety but reinstated in its entirety below. It really does not matter where this paragraph is located.

Paragraph 3. Changes proposed to Paragraph 3 are extremely problematic. Ecology proposes to eliminate language that holds aquaculture to the “no net loss of ecological functions” standard and replaces it with language that requires that aquaculture “should not be permitted in areas where it would adversely impact critical areas, critical resource areas, suspend contaminated sediments...” This policy would hold aquaculture to a different standard than any other use covered by the Shoreline Management Act. “No net loss of ecological function” is a tenet of WAC 173-26 that is consistent throughout the use policies. “No adverse impact” is a different standard than “no net loss of ecological function.” Arguably even walking across a tideland may cause an adverse impact. This proposed language specifically ignores and disregards the habitat, water quality, socio-economic and stewardship benefits afforded by shellfish aquaculture. Why is Ecology proposing a different and unattainable standard for aquaculture? Why is Ecology negating the known benefits of shellfish aquaculture? Nothing in the SMA or SHB2220 supports this change. d

Under Jefferson County’s newly adopted Critical Areas Ordinance and under the proposed Shoreline Master Program update, ALL marine shorelines are determined to be critical areas. This language will effectively make aquaculture a non-conforming use in the entire county. New farms will not be permitted and changes to existing farms that require a new permit will most likely not be permitted. Alternatively, Jefferson County would have to rewrite its critical areas ordinance and Shoreline Master Program to exclude those areas where aquaculture occurs - approximately half the county’s marine shorelines. Is it Ecology’s goal to forgo the protections provided by critical area status in these areas? Moreover, it is likely that other counties will follow Jefferson County’s lead in establishing broader critical areas so this problem will be compounded in the future.

If permits are not grantable for shellfish aquaculture projects on tidelands that were sold by the state under the Bush or Callow Acts, then the state and the county will be liable for a “take” of private property. Bush or Callow Act tidelands can ONLY be used for shellfish aquaculture. No other use is allowed. To deny all use is a take. Clearly, Ecology has not been mindful of the ramifications of the proposed language. In Jefferson County, most of the tidelands in Discovery Bay, Thorndyke Bay, Tarboo Bay, Dabob Bay, Quilcene Bay and the Brinnon area are Bush or Callow Act tidelands. The Small Business Impact Statement also fails to recognize or quantify the impacts from this language.

Ecology goes on to remove the adjective “significantly” from the first sentence of paragraph 3 so that aquaculture may not “conflict with navigation or other water dependent uses.” This means that all other water dependent uses may not be affected by aquaculture. This creates a policy that will make aquaculture subservient to all other water dependent uses. Nothing in the SMA or SHB2220 supports this change.

These changes were never vetted through a public process (they first appeared in the final draft), they are not supported by the SMA or SHB 2220, they were not discussed at SARC, and they will likely lead to a net loss of ecological functions of the state’s shoreline. Ecology should remove all of the proposed changes to the third paragraph and reinstate the original language. All of the proposed changes to the Aquaculture Policy section should be abandoned and the original language should be re-instated.

Proposed Geoduck regulations:

WAC 173-26- 241 b (ii)

In general Ecology does not heed the advice of the majority of SARC members. The intent of SARC was to provide recommendations to Ecology in drafting rules. While SARC had difficulty coming to consensus on most issues, often there was a clear majority with only one or two dissenting opinions. Ecology seems to value the dissenting opinions much more than the majority. Surely this was not the legislature’s intent in passing SHB 2220.

Requirement for Conditional Use Permits. Ecology should not require a conditional use permit for geoduck aquaculture. This was not a recommendation from SARC and should be left to the discretion of each local jurisdiction.

The requirement that conditional use permits for geoduck aquaculture expire after 5 years is untenable for new farms. Such an expiration requirement on a conditional use permit is unprecedented in WAC 173-26. Counties are given discretion on setting the limits of individual CUPs. Does Ecology truly believe that potential impacts from geoduck aquaculture are greater than potential impacts from mining, dredging, dock construction, or marina development? If the intent is to provide opportunity for adaptive management, then Ecology should state that the CUPs contain adaptive management criteria that should be reviewed periodically.

Moreover, most farm contracts are written with a minimum of a ten year lease and often longer. No small farmer would sign a long term lease with annual payment commitments if continued operation through the end of the lease was in question. Furthermore, no lending institution would make a loan with such permit conditions. The five year CUP limit creates a situation where only the largest, most established corporations would be able to start a new farm because they have the resources to underwrite such an effort and they can place short term profits from a single parcel above long term economic sustainability of that parcel. The Small Business Impact Statement fails to recognize or quantify the impacts from this language. Permit time limits were considered at SARC but were dismissed as impracticable. The 5 year expiration requirement is unworkable, unprecedented and should be dropped.

Measures to ensure public access to publically owned lands and water. This requirement should be rewritten to clarify that public access is not required on private tidelands and that only existing public access be maintained.

Prohibiting or limiting the use of tanks or pools or other impervious materials. Nursery systems are an integral part of most if not all geoduck farms. Often the only seed that is available from the hatchery is too small to plant directly on the farm and must be nursed to a larger size. Also, seed availability may not coincide with a farm's planting schedule and seed must be held for a few weeks to a few months. Nursery systems that support a single farm are small in size. The nursery system for our 15 acre geoduck farm requires only 600 square feet of impervious surface (0.1% of the total farm area), and is only in place from May to August. This language is particularly onerous for the small farmer. Small farms have limited alternatives for siting nursery systems. A prohibition on nursery systems would negate the viability of small farms. The Small Business Impact Statement failed to recognize or quantify the impacts from this language. The SARC did not recommend a prohibition on nursery systems, but some limits may be appropriate. For example, a CUP may be needed for nursery systems that support more than one farm or that will be in place longer than 6 months.

Prohibiting or limiting use of trucks, tractors, forklifts, and other motorized equipment below high water line. This was not recommended by SARC and is problematic for a number of reasons. While Ecology does not state its reasoning for this language, one can only assume that it is trying to minimize impact to the environment. However, this requirement may actually increase impacts to the environment. The North Sound is home to prolific eelgrass beds. Added boat traffic and requisite anchoring will have greater impact on subtidal eelgrass beds than motorized vehicles operated in the intertidal zone.

Water access in the North Sound is difficult and dangerous with long runs from mooring sites through some of the roughest waters in the state. For example, Jefferson County has many sites with good upland access, while water access is very limited due to the existence of only two public marinas in the county and a limited number of commercial boat ramps. Specifically, there is no commercial public access in Discovery Bay. The nearest public marina is at Port Townsend, seven miles from the mouth of the bay and requires rounding Point Wilson at strong ebb and flood times prior to and after low tides. Point Wilson has some of the roughest water in the Sound. A cursory review of ferry cancelations records will verify this point. Are Ecology and counties willing to take on the added liability of requiring water access where upland access presents a safer alternative?

Many farms have more than one species under cultivation. According to this rule, motorized equipment could be used to access oyster and clam beds, but the geoduck beds would have to be accessed via a water route. This makes no sense and the rule will be difficult or impossible to enforce.

This language will incur additional hardship on small farms. An all terrain vehicle and trailer that could support a geoduck farm cost less than \$10,000. Barges, commercial moorage, and added fuel costs will be at least ten times more expensive. It will be much harder for small farms to absorb such costs. The Small Business Impact Statement failed to recognize or quantify the impacts from this language.

No other use has such a prohibition. Is motorized vehicle use in support of geoduck aquaculture more of a threat than motorized vehicles in support of all other uses (e.g. bulk head construction and maintenance, dredging of marina channels, dock construction and maintenance, recreation, etc...)? This requirement will risk human life, has potential

negative environmental impacts, is difficult or impossible to enforce, was not a SARC recommendation and should be dropped from the proposed rule.

Limiting on-site activities during specific periods to minimize impacts on fish and wildlife. It has already been determined in NOAA Fisheries ESA Consultation for the Army Corps Nationwide 48 permit that geoduck aquaculture is not coincident with forage fish spawning areas. Sandlance and surf smelt spawn at higher tidal levels. Herring require structure to spawn and do not spawn on open tideflats. County staff does not have the expertise and time to evaluate or enforce this requirement on a site-by-site basis and fish and wildlife impacts are already addressed through state and federal permits. Since this issue is already covered by other regulatory agencies and is not enforceable at the county level, Ecology should not be including it in this rule. This requirement should be dropped from this proposed rule.

Limiting the area of the site that can be planted or harvested at one time to limit the extent of impacts. To date, all the research has shown that impacts from geoduck aquaculture are short term and confined to the growing site. There is no need to limit the area of the site that can be planted or harvested at one time. Such limits would have few to no environmental benefits and could limit the economic viability of a farm. Neither Ecology nor county staff has the expertise to propose such limits to an individual site in a meaningful way. This was not a recommendation from SARC. This requirement should be dropped from the proposed rule. The Small Business Impact Statement failed to recognize or quantify the impacts from this language.

Requiring compliance with WDFW shellfish transfer permits. All shellfish transfers are governed by RCW 77.60.060 and WAC 220-72-076 which empowers WDFW to regulate and permit such activities. SARC identified this issue as not pertinent to development of this rule. County staff has no enforcement authority regarding WAC 220-72-076. This requirement only adds confusion to existing regulations and provides no additional environmental benefits. This requirement should be removed from the proposed rule.

Requiring buffers between geoduck operations and sensitive habitat. There is no science to support this requirement. How are “sensitive habitats” defined? In the North Sound, planting geoduck without canopy nets actually encourages eelgrass growth. County staff does not have the expertise to evaluate this requirement on a site-by-site basis, and fish and wildlife impacts are already addressed through state and federal permits. This requirement should be dropped from this proposed rule. While the Small Business Impact statement did recognize the impacts from this language, the proposed mitigation measures offered by Ecology will not mitigate the effects of this language.

Requiring measures to minimize impacts to fish and wildlife. County staff does not have the expertise to evaluate this requirement on a site by site basis and fish and wildlife impacts will be addressed through state and federal permits. Since this issue is already covered by other regulatory agencies and is not enforceable at the county level, Ecology should not be including it in this rule. This requirement should be dropped from this proposed rule.

Requiring the use of best management practices to minimize turbid runoff from water jets. All of the studies to date, including studies conducted by Ecology’s staff have shown

that water quality standards for turbidity due to geoduck harvest are not exceeded even without controls. Why is Ecology requiring controls when none are needed to meet state standards? This requirement has no environmental benefit and should be dropped from the proposed rule. The Small Business Impact Statement failed to recognize or quantify the impacts from this language.

On review of all these comments, it seems that much of the proposed language concerning aquaculture is arbitrary and capricious. It has no basis in science; it does not recognize the Sea Grant research and literature review; it does not reflect the majority of SARC members' opinions; it is outside of the scope of SHB 2220; it establishes new standards that are not applied to any other use; and in many instances will create a net loss of environmental functions in direct conflict with the Shoreline Management Act. With this proposed rule, Ecology has failed to protect the shoreline resources of the state and will place one of Washington's oldest and most ecologically sustainable food production sectors in peril. Ecology needs to take a step back from this language and re-evaluate SARC recommendations, Sea Grant research including literature review, directives from SHB 2220 and the fundamental tenets of the Shoreline Management Act. Only then should Ecology attempt to create a new rule.

Note that I am copying the director of Ecology, my county commissioners, state representatives, the Governor's Office of Regulatory Assistance and the Governor to ensure that they understand the ramifications of Ecology's proposed rule making. I find it most unfortunate that Ecology staff has acted unilaterally and chose to propose final draft rules on Aquaculture Policy and Critical Salt Water Habitat without ANY chance for prior public or stakeholder input. Hopefully Ecology will see fit to rectify their mistakes in drafting the final rule.

Sincerely,



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cc. Mr. Ted Sturdevent –Director of Washington Department of Ecology
Mr. David Sullivan - Jefferson County Board of County Commissioners
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