DEPARTMENT OF
ECOLOGY
State of Washington

Concise Explanatory Statement

Chapter 173-18 WAC: Shoreline management act – streams and rivers constituting shorelines of the state

Chapter 173-20 WAC: Shoreline management act – lakes constituting shorelines of the state

Chapter 173-22 WAC: Adoption of designations of shorelands and wetlands associated with shorelines of the state

Chapter 173-26 WAC: State master program approval/amendment procedures and master program guidelines

Chapter 173-27 WAC: Shoreline management permit and enforcement procedures

Summary of rule making and response to comments

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Introduction

The purpose of a Concise Explanatory Statement is to:

- Meet the Administrative Procedure Act (APA) requirements for agencies to prepare a Concise Explanatory Statement (RCW 34.05.325).
- Provide reasons for adopting the rule amendments.
- Describe any differences between the proposed rule amendments and the adopted rule amendments.
- Provide the state's response to public comments.
  This Concise Explanatory Statement provides information on the Washington State Department of Ecology's (Ecology's) amendment of five of the Shoreline Management Act (RCW 90.58) rules:
- Chapter 173-18 WAC: Shoreline management act – streams and rivers constituting shorelines of the state
- Chapter 173-20 WAC: Shoreline management act – lakes constituting shorelines of the state
- Chapter 173-22 WAC: Adoption of designations of shorelands and wetlands associated with shorelines of the state
- Chapter 173-26 WAC: State master program approval/amendment procedures and master program guidelines
- Chapter 173-27 WAC: Shoreline management permit and enforcement procedures

Adopted date: February 11, 2011

Effective date: March 14, 2011

To see more information related to this rule making or other Ecology rule makings, please visit our web site: www.ecy.wa.gov/lawsandrules

Reasons for Adopting the Rule Amendments

The purpose of the adopted rule amendments is to:

- Respond to a legislative directive (RCW 43.21A.681) to "adopt, by rule" guidelines that address the potential use conflicts resulting from commercial geoduck aquaculture in shoreline areas.
- Clarify the current WAC 173-26-201(1) regarding limited (non-comprehensive) amendments of local shoreline master programs.
- Complete some housekeeping changes – updating the rules to make them more consistent with recent changes to state statutes.

The Shoreline Management Act (SMA) of 1971 regulates uses of Washington's major waterways and adjoining shorelands on rivers and streams over 20 cubic feet per second; lakes over 20 acres; and marine waters. Ecology's statutory authority for rule making includes RCW 90.58.120 and 90.58.200. SMA rules administered by Ecology include the Shoreline Master Program Guidelines (Chapter 173-26 WAC, Part III) along with other procedural rules related to designation of shorelines and other measures to implement the SMA. Rule making for the Guidelines is limited to one rule-making process "per year".

Authorization is also provided in RCW 43.21A.681, which is the codification of Second Substitute House Bill 2220 from 2007 (SSHB 2220) regarding geoduck aquaculture rule making. Commercial geoduck aquaculture is an expanding and controversial form of shellfish aquaculture in intertidal areas of marine shorelines, especially in Puget Sound. SSHB 2220 was passed in response to the emerging controversy and use conflicts.

Differences between the Proposed Rule Amendments and Adopted Amendments

RCW 34.05.325(6)(a)(ii) requires Ecology to describe the differences between the text of the proposed rule amendments as published in the *Washington State Register* and the text of the rule amendments as adopted, other than editing changes, stating the reasons for the differences.

There are several differences between the proposed rules filed on August 3, 2010 and the adopted rule amendments filed on February 11, 2011. Almost all the changes are associated with commercial geoduck aquaculture. Ecology made these changes for all or some of the following reasons:

- In response to comments Ecology received.
- To ensure clarity and consistency.
- To meet the intent of the authorizing statute.

The following content describes the changes and Ecology's reasons for making them. Where a change was made solely for editing or clarification purposes, or was a housekeeping amendment made for compliance with existing statute, we did not include it in this section.

Chapter 173-18, 20, and 27 WAC – No changes between the proposed and adopted rule amendments.

Chapter 173-22 WAC
WAC 173-22-030(2) – Definition of floodplain simplified.

Chapter 173-26 WAC

WAC 173-26-020(9), WAC 173-26-221(2) and other locations – The concept of critical resource areas has been removed to avoid potential complications with administration of critical areas ordinances at the local level. Changes were made in response to comments from the Department of Commerce.

WAC 173-26-080 – City of Oakville and Yelm are removed from the list of local governments required to develop and administer a shoreline master program.

WAC 173-26-201(3)(c)(i) – Language was added to ensure special attention will be paid to identification of "ecologically intact blocks of upland vegetation, developed areas with largely intact riparian vegetation". This is consistent with other rule amendments.

WAC 173-26-201(3)(d) (i) – Text removed: "…and tidelands not reserved for water dependent use or development" to make more consistent with intent of reserve areas subsection.

WAC 173-26-201(3)(d) (vii) –Proposed water quality and quantity language referring to shellfish areas was replaced with: "Review data and information specific to shellfish areas. Identify measures to protect water quality for human health as described in WAC 173-26-221(6)." This adds more clarity regarding what's expected of local governments.

WAC 173-26-211(2)(c) – Text at end of subsection deleted to correct reference to Growth Management Act (GMA) statutes. Now ends at "map".

WAC 173-26-211(5)(b)(iii)(E), (5)(d)(iii), and (5)(e)(iii) – The word "rural" was added to read "…limited areas of more intensive rural development" . This section was reworded to be consistent with GMA statutes.

WAC 173-26-211(5)(c)(ii)(G) – Deleted in response to comment about redundancy.
WAC 173-26-211(5)(c)(ii)(H) – Renumbered as (G)

WAC 173-26-221(2)(b)(i)(A) – In response to public comments, "significant" was added back in regarding vegetation removal to exclude noxious weeds.

WAC 173-26-221 Critical saltwater habitats

The scope of critical saltwater habitats in WAC 173-26-221(2)(c)(iii)(A) was restored to the original language, restoring "subsistence, commercial, and recreational shellfish beds". The purpose of the proposed language was to enhance local government abilities to address geoduck impacts on critical saltwater habitats essential to salmon recovery, and to address other use conflicts. Affected businesses, tribes, and the Department of Commerce all expressed concerns over the proposed language. The Department of Commerce was especially concerned that the proposed language created inconsistencies with Growth Management Act statutes regarding critical areas ordinances. Commerce made suggestions for how environmental designations (WAC 173-26-211), master program provisions (WAC 173-26-221), and other elements of local shoreline programs could be used to address use conflicts and accomplish adequate environmental protection.

Ecology restored the original language and added language to the principles section (WAC 173-26-221(2)(c)(iii)(B)) and WAC 173-26-241(3)(b)(i)-(iv) to clarify the intended relationship between commercial geoduck aquaculture, critical saltwater habitats, and other uses. Local governments shall now require a conditional use permit for all new commercial geoduck aquaculture, not just in critical saltwater habitats.

WAC 173-26-241(2)(b)(ii)(D) – To be consistent with changes made to 241(3)(b), "expanded" commercial geoduck aquaculture was removed and no longer explicitly requires a conditional use permit.

WAC 173-26-241(3)(b) – Aquaculture

In seeking to make the format of the Guidelines structurally more consistent, Ecology had proposed to delete certain language from the principles subsection. Affected businesses interpreted the proposed change as a change in the state's policy toward aquaculture. Given there has not been an official change in the state's policy, Ecology restored the original language.

WAC 173-26-241(3)(b)(i)-(iv) Commercial geoduck aquaculture provisions

Ecology changed the commercial geoduck aquaculture provisions in response to public comment and concerns over the economic impacts to small aquaculture businesses. Ecology also changed the geoduck provisions based on consultation with businesses, tribes, and local governments as directed by Governor's Order 10-06. The subsection has been reorganized and rewritten for clarity, which has resulted in all subsections being modified or moved.

Key changes are:

A conditional use permit is required for all new commercial geoduck aquaculture projects, not just those in critical saltwater habitats. Existing and ongoing projects are not required to obtain additional permits.
A conditional use permit provides for local government and Ecology review of all new geoduck projects, enabling better consistency with the Section 404/401 permits for new geoduck aquaculture, integration of new science as it becomes available consistent with SSHB 2220, and consideration of cumulative impacts as required by current statue.

By not requiring new permits for successive plantings at existing projects, the costs to businesses and local governments associated with permitting is reduced. Chapter 173-27 WAC has language that still applies and stipulates local authority, civil penalties, triggers and other aspects of permit renewals or revisions.

The rule no longer requires a conditional use permit for 'expanded' geoduck aquaculture.

The term "expanded" was difficult to define clearly in the rule and, due to other wording changes, is no longer necessary.

There is a wide variety in aquaculture culture methods, operations, timing of activities, and equipment – and all these elements are influenced by evolving technology. This variety makes it beyond the scope of a rule to address all possible current and future projects. Local governments must have discretion in assessing impacts and use conflicts in light of current science and knowledge, and flexibility in meeting the intent of the Act and rules.

If aquaculture is introduced onto property not covered by an existing permit, this falls under the category of new geoduck aquaculture and requires a permit.

If a site is converted from existing non-geoduck aquaculture to geoduck aquaculture, local governments have the discretion to require a conditional use permit. This allows local government to consider the impacts of conversions on a case-by-case basis.

Wording related to permit limits and conditions has been changed.

SARC did not reach broad consensus on detailed limits and conditions or the nexus between local, state and federal permits. This was primarily due to the Section 404/401 permitting process for geoduck aquaculture not being very far along. Significant progress has occurred in the past two years since the SARC recommendations were submitted to the legislature.

Since March 2010, Ecology has been consulting with geoduck growers seeking federal permits for new projects, and the associated 401 Water Quality Certification administered by Ecology. Through these consultations and related field work, Ecology has gained a better understanding about water quality and habitat impacts from geoduck aquaculture. The permit limits and conditions in the rule amendments have been modified to better align with those Ecology expects to include in federal permits. Ecology feels such alignment meets the intent of SSHB 2220 and Governor's Order 10-06.

"At a minimum, conditional use permit limits and conditions should include, where applicable and appropriate," has been changed to read: "In order to avoid or limit impacts from geoduck aquaculture siting and operations and achieve no net loss of ecological functions, local governments should consider the following:." This language change was made to allow local governments more flexibility to respond to local conditions and current science, yet be clear that the intent of the permit is to avoid or limit impacts.

Also, the list of permit limits and conditions has been shortened and the wording directing local governments to specifically either "prohibit" or" limit" certain actions has been removed to provide local governments more flexibility and reduce costs to businesses.

Response to Comments and Commenter Index

Ecology accepted comments until November 23, 2010. Four public open houses/hearings were held in September at Moses Lake, Everett, Lacey and Aberdeen. A web site with an on-line comment form and a specific email box (ShorelineRule@ecy.wa.gov) were provided for sending comments. Ecology received 37 emails, 9 letters, and 14 hearing testimonies. (Please see Appendix B and C.)

Appendix A: Comment and Response Summary displays comments and Ecology's responses.

A few people chose to comment more than once. If a commenter submitted the same comment more than once, that comment is only presented once in Appendix A. The comments may be edited for clarity. The original content of the comments are in Appendix B of this document.

Table 1 (below) lists all commenters and the line number(s) associated with their comment(s).

Table 1: List of Commenters and where their comments may be found in Appendix A.

Commenter	Line Number(s)
Al Scalf - Jefferson County	1, 2, 3, 7, 27, 54, 75, 82, 85, 88
Al Schmauder	151, 179, 181, 200
Allan Griffen (sent by Mary Cunningham)	30
Amanda Stock - Plauche and Stock LLP for Taylor Shellfish	72, 79, 91, 92, 99, 105, 109, 120, 125, 157, 161, 163, 165, 166, 178, 187, 190
Bill Dewey - Chuckanut Shellfish Inc.	72, 78, 102, 113, 157, 190
Brady Engvall - Brady's Oysters	72
Brian Allen - Allen Shellfish LLC	100, 110, 122
Brian Sheldon - Willapa Bay Oysters	10, 11, 12, 13, 72, 108, 111,116, 121, 123, 134, 144, 157, 159, 166, 168, 172, 185, 190
Bryan Harrision – Pacific County	29, 47, 69, 80, 83, 79
Bruce Wishart - People for Puget Sound	32, 33, 43, 71, 106, 126, 135
Clayton Johnson	151
Curt Puddicombe - Coalition to Protect Puget Sound Habitat	41, 45, 107, 124, 128, 130, 150, 169
Dan O'Donnell	8, 9, 22, 35, 50
Dave Steel - Rock Pt. Oyster Co.	14, 72, 157, 190

Table 1: List of Commenters and where their comments may be found in Appendix A.	
Commenter	**Line Number(s)**
Dean Patterson - Futurewise	15, 24, 25, 34, 37, 38, 48, 49, 51, 61, 62, 77, 101, 118, 164
Diane Cooper – Taylor Shellfish	145, 146, 157, 158, 190
Don and Debbie Gilles - Stony Point Oyster Co. LLC	72, 157
Doug Peters - WA Department of Commerce	36, 55, 70
Douglas Morrill - Lower Elwha Klallam Tribe	87
Eric Hall	76, 78
Harry Branch	89, 147, 152, 167
Jeff Nichols	72, 190
Jim Gibbons - Seattle Shellfish LLC	72, 157
John P. Lacy	72, 74
John Lentz or John & Linda Lentz - Chelsea Farms LLC	86, 103, 115, 156, 190
Judy Surber - Port Townsend	177
Kelly Toy - Jamestown S'Klallam Tribe	72, 157, 199
Kim Merriman	96
Laura Hendricks - Sierra Club, Washington chapter	44, 45, 86, 101, 107, 124, 128, 131, 184
Leonard Bauer - WA Department of Commerce	4, 5, 6, 16, 26, 31, 39, 40, 42, 52, 53, 57, 58, 59, 63, 64, 65, 66, 67, 68, 73, 81, 84, 139, 153, 173, 174, 175
Lisa Bishop - Little Skookum Shellfish Growers	72, 157, 182, 191
Margaret Barrette - Pacific Coast Shellfish Growers Association	72, 110, 114, 133, 157165, 182, 190, 191
Marian Lahav - City of Vancouver	18, 20, 21, 28, 46, 60
Mark Ballo - Brady's Oysters	72, 76,
Mark Schaffel - Northwest Shellfish Co., Inc.	72, 121, 189
Michael A. Morales - City of Yakima	29
Mike Grayum (sent by Tony Forsman)- Northwest Indian	157

Table 1: List of Commenters and where their comments may be found in Appendix A.	
Commenter	**Line Number(s)**
Fisheries Commission	
Nick Jambor - Ekone Oyster Co.	93, 94, 109, 121, 127, 136, 143, 145, 148, 161, 165, 170, 190, 191, 193, 197
Pat Wadsworth for State Representative Kevin Van de Wege	17, 78
Peggy Toepel - Everett Shorelines Coalition	186
Peter Downey - Discovery Bay Shellfish Inc.	72, 92, 97, 98, 102, 109, 110, 121, 132, 141, 142, 155, 157, 159, 170, 171, 192, 194, 195
R. Bruce Olsen - So Happy Farms LLC	72, 157, 166, 180
Richard L. Wilson - Bay Center Farms	72
Sean Gaffney - Pierce County	56, 77, 90, 140, 156, 188
Sue Shotwell	72
Tim Morris	14, 72, 113, 157
Tirrell Black - City of Spokane	23
Tom Bloomfield	121, 198
Vicki Wilson and Vicki & Steve Wilson - Arcadia Pt Seafood	19, 72, 91, 94, 95, 97, 98, 103, 104, 108, 110, 112, 114, 117, 119, 127, 129, 137, 138, 149, 154, 160, 162, 166, 167, 170, 183, 196

Appendix A: Comment and Response Summary

Line	WAC Title, Chapter, Section, Subsection	Commenters' Names	Comments Note: Language shown as a strikeout or underline was submitted that way as part of the comment.	Responses
1	**173-18**	Al Scalf	Jefferson County can support the rule making changes recommended for those areas identified In WAC 173-18 thru WAC 173-22	Thank you for your comment. We appreciate the time Jefferson County took to comment on the rules.
2	**173-20**	Al Scalf	Jefferson County can support the rule making changes recommended for those areas identified In WAC 173-18 thru WAC 173-22	Thank you for your comment. We appreciate the time Jefferson County took to comment on the rules.
3	**173-22**	Al Scalf	Jefferson County can support the rule making changes recommended for those areas identified In WAC 173-18 thru WAC 173-22	Thank you for your comment. We appreciate the time Jefferson County took to comment on the rules.
4	**173-22-030(4)**	Leonard Bauer	(4) "Flood plain" is synonymous with one hundred-year flood plain and means that land area susceptible to inundation ~~being inundated by stream derived waters~~ with a one percent chance of being equaled or exceeded in any given year. The limit of this area shall be based upon flood ordinance regulation maps or a reasonable method which meets the objectives of the act;	Your requested change has been made.
5	**173-22-040(4)**	Leonard Bauer	(i) Any county or city may determine that portion of a one-hundred-year-flood plain to be included in its master program as long as such portion includes, as a minimum, the floodway and the adjacent land extending landward two hundred feet therefrom.	Thank you for your comment. However, section 173-22-040 is not available for public comment under this rule making. Only sections 173-22-035, 0618, and 0678 are open for comment and changes.
6	**173-22-040(4)**	Leonard Bauer	(ii) Any city or county may also include in its master program land necessary for buffers for critical areas, as defined in chapter 36.70A RCW, that occur within shorelines of the state, as authorized under RCW 90.58.030(2)(d);	Please see response to your comment on line 5.
7	**173-26**	Al Scalf	Jefferson County can support the recommended changes to WAC 173-26-020 through WAC 173-26-201.	Thank you for your comment. We appreciate the time Jefferson County took to comment on the rules.
8	**173-26-020**	Dan O'Donnell	WAC 332-30-115 does not permit "water enjoyment" but 173-26-020 does. WA DNR uses "water oriented" where Ecology uses "water related". These differences should be resolved to make all shoreline rules consistent and more understandable.	Ecology's use of the terms "water dependent", "water-related", "water-oriented" and "water-enjoyment" are part of a broader shoreline management scheme arising from the Shoreline Management Act, and adopted through a negotiated settlement agreement in 2002 that included DNR and state resource agencies, local governments, business, environmental interests, and other stakeholders. We work with DNR to provide technical assistance to local governments to ensure that these definitions are consistently interpreted. Changes to these definitions are not within the objectives of this rule making.

Line	WAC Title, Chapter, Section, Subsection	Commenters' Names	Comments Note: Language shown as a strikeout or underline was submitted that way as part of the comment.	Responses
9	**173-26-020**	Dan O'Donnell	Please try to eliminate "mixed use development". That description has fallen out of favor since Alice Schisel left Ecology. The shoreline environments now include residential, so there is no need to invite new disputes about mixed use. It is not a valid shoreline environment.	Mixed use is a commonly used land use category, not a shoreline environment. Provisions related to mixed use development still exist and continue to be used by local governments as they update their shoreline master programs. No change is necessary.
10	**173-26-020(3)(a)**	Brian Sheldon	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 ~~agricultural~~ 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.	Amending the definition of agriculture or related definitions in the Shoreline Management Act is a policy decision affecting many state agencies and parties, and is beyond the scope of this rule process. No change.
11	**173-26-020(3)(b)**	Brian Sheldon	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.	Please see response to your comment on line 10.
12	**173-26-020(3)(c)**	Brian Sheldon	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.	Please see response to your comment on line 10.

Line	WAC Title, Chapter, Section, Subsection	Commenters' Names	Comments Note: Language shown as a strikeout or underline was submitted that way as part of the comment.	Responses
13	**173-26-020(3)(d)**	Brian Sheldon	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.	Please see response to your comment on line 10.
14	**173-26-020(6)**	Tim Morris, Dave Steel,	Please do not delete the Aquaculture definition as currently used within the rules. Aquaculture is a historical use that has been a protection mechanism of our shorelines for well over a hundred years.	The definition of "aquaculture" has been restored to WAC 173-26-241(3)(b). It is also being added to the definitions section WAC 173-26-020(6) consistent with the chapter structure, and rewritten to be more concise.
15	**173-26-020(6)**	Dean Patterson	(6) "Aquaculture" means the culture or farming of fish, shellfish, or other aquatic plants and animals. Aquaculture does not include the harvest of wild geoduck or other wild shellfish associated with the state managed wild stock geoduck shellfish fishery nor other fishing or harvesting activity of wild fishery stocks.	At Ecology's request, your suggested changes and the definition of "aquaculture" was sent to the Department of Natural Resources (DNR), which manages the wildstock geoduck fishery in Washington, for review. Ecology and DNR feel changing the definition as your suggest would be a substantive change at this point that would be beyond the scope of this rule making. No change is necessary at this time.
16	**173-26-020(8) & (9)**	Leonard Bauer	Delete definitions 8 & 9.	Definition 9 has been deleted. Definition 8 has been retained and is consistent with RCW 36.70A.
17	**173-26-020(9)**	Pat Wadsworth	Representative Kevin Van de Wege asked me to attend. He is worried about the no net loss requirement for aquaculture. Does it mean that if they wanting to expand it would be a very tenuous process to do that? Do we want to have all the shellfish beds gone because they can't function anymore because they have so many regulations on them?	Thank you for testifying at the Aberdeen public hearing on behalf of Representative Van de Wege. When commercial geoduck aquaculture is introduced into areas not previously used for aquaculture, the project will require a local conditional use permit. This provides local communities and Ecology the opportunity to address land use conflicts and ensure projects are sited consistent with the Shoreline Management Act and rules. It also allows consideration of cumulative impacts from this growing use of intertidal areas. No additional change required.
18	**173-26-020(9)**	Marian Lahav	We urge you to eliminate the proposed definition of *Critical Resource Areas* and related text throughout the Guidelines: 1)The phrase *resource areas* is likely to cause confusion since it refers to agriculture, forestry, and mining areas under GMA; 2) The existing Guidelines are clear that critical saltwater habitats and critical freshwater habitats may or may not be the same as GMA critical areas. Defining *additional shoreline and shoreland areas identified by local governments that warrant special protection necessary to achieve no net loss of ecological functions* adds unnecessary complexity. Nothing in the existing Guidelines restricts a local government from providing special protection to areas that warrant it even if they are not technically critical areas or critical saltwater or freshwater habitats, and tools exist for doing so.	Definition 9 has been deleted. Other related text has been changed back to original language.

Line	WAC Title, Chapter, Section, Subsection	Commenters' Names	Comments Note: Language shown as a strikeout or underline was submitted that way as part of the comment.	Responses
19	**173-26-020(14)**	Vickie & Steve Wilson	"No net loss of ecological function" appears throughout the rules. In the science community, "no net loss of ecological function" generally is meant as a broad-based standard applied basin-wide or region-wide but not on a site-specific basis. Our concern is that this meaning will be lost in the permitting process and inappropriately applied on a site by site basis, for example, as a rationale to limit a farm's planting & harvest area.	This comment addresses a topic beyond the scope of the proposed rule changes. The no net loss principle as used in the SMP Guidelines is applied at <u>both</u> the shoreline planning level (avoiding and minimizing reasonably anticipated impacts during the SMP update process) and again at the project review (permitting) level when more detailed information is available regarding the impacts anticipated from individual shoreline projects. See WAC 173-26-201(2)(e). WAC 173-26-241(3)(a) reflects 2002 legislation stating that where agriculture exists today, SMPs shall not significantly limit changes in agricultural use but that new agricultural uses are subject to the no net loss requirement.
20	**173-26-020(25)(b)**	Marian Lahav	We are concerned that words *as now or hereafter amended* in the new definition of *Comprehensive master program update* could be construed such that local jurisdictions undertaking an update would have to comply with new or amended regulations during the planning process. Local jurisdictions have neither the time nor the budget to accommodate a changing regulatory environment during the update process. Please clarify that the regulations in effect at the time a local jurisdiction begins the update process (in accordance with their contract with Ecology) are those with which they must comply.	It is true that updates to the SMP Guidelines may occur in the future. Such changes to the Guidelines may not apply to jurisdictions that have locally approved an SMP update recently. For example, the geoduck provisions will not apply "on the ground" in Whatcom County until after the County's next update in planned for 2018. Regulations in effect at the time a jurisdiction begins the update process apply until the updated SMP is locally adopted. SMPs do not apply retroactively.
21	**173-26-020(36)**	Marian Lahav	We strongly recommend once more that Ecology replace this atypical definition of *should* with its common meaning and usage: that a particular action ought to be taken or is recommended. Compelling the use of *should* as essentially mandatory and leaves little or no room to distinguish between goal/policy statements and regulations, both of which are necessary for a successful shoreline master program. Rather than facilitating integration with other state and local codes, this unique definition sets the stage for conflict between them. We are struggling with this in our current comprehensive SMP update process.	The use of should and shall are clearly defined in the Guidelines and are necessary to ensure SMA and rule objectives are consistently applied and state-wide interests in shorelines management are protected. This occurs at the same time the Guidelines require broad goals and objectives, but encourages local flexibility in achieving such objectives. Experience-to-date has not shown a conflict between state and local codes in this regard. No change required.
22	**173-26-020(37)**	Dan O'Donnell	This definition contains lots of weasel words such as "general characteristics of the use". "General" could be changed to "primary". With the existing wording new waterfront restaurants with water views are being permitted, even in harbor areas. The old definition had examples and it did not include restaurants.	No changes were proposed to this definition in the rule. Current wording will be retained to ensure consistency with policy of the Shoreline Management Act found in RCW 90.58.020.
23	**173-26-130(1)**	Tirrell Black	Ecology added "Ecology's written notice of final action" to this section of the rule.	The added text is required by changes made to RCW 90.58.190 by the passage of Substitute House Bill 2935, Section 38, passed in 2010. No change.

Line	WAC Title, Chapter, Section, Subsection	Commenters' Names	Comments Note: Language shown as a strikeout or underline was submitted that way as part of the comment.	Responses
24	**173-26-130(2)**	Dean Patterson	In WAC 173-26-130 these change the appeal procedures for GMA jurisdictions to reference the GMA procedures, which we support. But they also added language about Ecology's statement of final action. Such a statement is more appropriately placed in the review section of WAC 173-26-120 rather than the appeal section.	Lengthy negotiations between Ecology and the local government can occur before the SMP is finally approved by Ecology. Appeals cannot be filed until this process is complete, therefore, this issue is appropriately addressed in the appeals section. No change required.
25	**173-26-150**	Dean Patterson	In WAC 173-26-150 the draft rules added the allowance for predesignation of shorelines outside city limits for non-GMA cities, which is we support. However, the Guidelines should require both GMA and non-GMA cities to coordinate with counties on pre-designation, as required under the GMA. Shorelines need consistent planning, including cases where they may change jurisdictions. In our review of SMPs, we have found that there is almost no coordination going on - even for UGAs.	As you suggest, the GMA already requires coordination by statute. As such, changes in this rule are not necessary.
26	**173-26-191(1)(e)**	Leonard Bauer	This section quotes WAC 365-195-500 which was repealed and replaced by WAC 365-196-500, effective February 19, 2010. Commerce amended the language for clarity but the meaning has not changed. *We suggest replacing repealed language with new language from the new rule.*	Your requested change has been made.
27	**173-26-201**	Al Scalf	Jefferson County can support the recommended changes to WAC 173-26-020 through WAC 173-26-201.	Thank you for your comment. We appreciate the time Jefferson County took to comment on the rules.
28	**173-26-201**	Marian Lahav	We appreciate Ecology accepting many of the suggestions made earlier. We still urge you to delete the language prioritizing new SMP adoptions and comprehensive updates over other amendments that may be just as important and time-sensitive. Placing internal agency concerns above the public health, safety, and welfare is poor public policy.	A fundamental policy of the SMA (see RCW 90.58.020) is to "prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines. For this reason we place our highest statewide priority on the currently funded process to conduct long-overdue comprehensive SMP updates. We do however, recognize that there are legitimate reasons for local governments to prepare limited amendments. We have therefore provided direction clarifying why such amendments are appropriate, including public health, safety and welfare purposes. No change necessary.
29	**173-26-201(1)**	Bryan Harrison, Michael A. Morales	I appreciate your development of a process for less than a comprehensive shoreline master program amendments.	Thank you for your comment.
30	**173-26-201(1)**	Allen Griffen (sent by Mary Cunningham)	We understand Governor Gregoire ordered State agencies to suspend all "non-critical" rule making. It's important to continue amending the rules pertaining to "limited SMP amendments". These amendments clarify the submittal requirements and approval criteria for non-comprehensive updates. Since 2003, Everett has processed several limited amendments and will be processing more.	Thank you for your comment. We appreciate the time Everett took to comment on the rules. The final rules include the section clarifying the relationship between comprehensive updates and limited amendments.
31	**173-26-201(2)(c)**	Leonard Bauer	Provisions for the protection of critical areas ~~and critical resource areas~~ within the shoreline; and	Your requested change has been made.

Line	WAC Title, Chapter, Section, Subsection	Commenters' Names	Comments Note: Language shown as a strikeout or underline was submitted that way as part of the comment.	Responses
32	**173-26-201(2)(d)(i)**	Bruce Wishart	There are many examples of ecologically significant areas (e.g.-herring spawning beds) that are adjacent to degraded upland areas. Having said that we do not deny that natural shorelines with intact uplands are scarce and very significant---we do think that they deserve to be reserved for ecological purposes. We simply ask that, in addition to these areas, you indicate that areas with "critical ecological features" also be set aside This approach will help create consistency with rule requirements on Critical Areas [173-26-221(2)]. Currently the relationship between these sections is not well defined.	"Critical ecological features" will already be identified during the local SMP update inventory and characterization process and included in the shoreline areas that must be protected. No change required.
33	**173-26-201(2)(d)(i)**	Bruce Wishart	The proposed language in 201(d)(i) which states "and tidelands not reserved for water-dependent use or development" suggests that planners would reserve areas for development prior to reserving areas for ecological use. We urge that you delete this language.	Your requested change has been made.
34	**173-26-201(2)(d)(i)**	Dean Patterson	(d)(i): Reserve appropriate aquatic and upland areas for protecting and restoring ecological functions to control pollution and prevent damage to the natural environment and public health. In reserving areas, local governments should consider protecting areas that are ecologically intact (including areas ranging from the uplands through the aquatic zone of the area), aquatic areas that adjoin permanently protected or intact uplands, tidelands in public ownership, and tidelands not reserved for water-dependent use or development. Reserving areas for protection can take the form of using Natural environments (or their equivalent), protecting other designated areas (such as an aquatic reserve or underwater park) using the SMP use limits and regulations, or similar methods. Local governments should ensure that these areas are reserved consistent with constitutional limits.	This section addresses all shorelines of the state, and applies to both aquatic and upland areas equally. Methods for dealing with shoreline preferred uses and the form they take in local master program policies, regulations and environment designations are addressed in detail in other sections of the guidelines. No change required.
35	**173-26-201(2)(d)(ii)**	Dan O'Donnell	This section discusses basic concepts related to harbor areas. But it needs to set the policy that in cases where a harbor area and a shoreline environment overlap, as in LaConner, the DNR rules shall be followed.	Department of Natural Resources' (DNR) rules for designated harbor areas apply regardless, and will continue to apply in addition to Ecology's shoreline management rules. No change required.
36	**173-26-201(3)(c)**	Doug Peters	Change "fish and wildlife conservation areas" to "fish and wildlife habitat conservation areas"	Your requested change has been made.
37	**173-26-201(3)(c)**	Dean Patterson	(i) Shoreline and adjacent land use patterns and transportation and utility facilities, including the extent of existing structures, impervious surfaces, vegetation, and shoreline modifications in shoreline jurisdiction. Special attention should be paid to identification of ecologically intact blocks of upland vegetation, developed areas with largely intact riparian vegetation, water oriented uses and related navigation, transportation and utility facilities.	Your requested change has been made.

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38	**173-26-201(3)(c)(ii)**	Dean Patterson	Inventory item (ii) discusses habitat areas. It adequately covers upland habitat, but only references aquatic vegetation. An important fact is that aquatic habitat is not only based on vegetation. For example, forage fish spawning areas. We recommend that "native aquatic vegetation" be changed to "native aquatic habitat."	Subsection (ii) already opens with "Existing aquatic and terrestrial wildlife habitats", which includes habitats beyond those based only on vegetation. No change required.
39	**173-26-201(3)(d)(vii)**	Leonard Bauer	(vii) Water quality and quantity. Identify water quality and quantity issues relevant to master program provisions, including those that affect human health and safety. ~~Shellfish for human consumption are particularly vulnerable to poor water quality and data should be reviewed specific to this water-dependent use~~. Review data and information specific to water-dependent commercial and recreational shellfish growing areas. Identify measures to protect water quality for human health as described in WAC 173-26-231(6). At a minimum, consult with appropriate federal, state, tribal, and local agencies.	Your requested change has been made.
40	**173-26-211(2)(c)**	Leonard Bauer	(c) To facilitate consistency with land use planning, local governments planning under chapter 36.70A RCW are encouraged to illustrate shoreline designations on the comprehensive plan future land use map as described in WAC ~~365-195-300~~ 365-196-300 (2)(d).	Your requested change has been made.
41	**173-26-211(5)(a)**	Curt Puddicombe	Other than native oysters on bottom in natural densities, no aquaculture should be allowed in the natural designation. There should be an "Aquatic Natural" designation to protect our most pristine environments. Ecologically intact water areas need to be identified and given protection. Critical Salmon Habitat and Forage Fish Spawning/Habitat are priority areas that require additional consideration. Adequate buffers are essential to protect these areas from any commercial uses or development.	Under existing language, local governments already have the flexibility to create alternative environment designations such as a "Priority Aquatic" (as used in Jefferson County). The preferred use subsection (WAC 173-26-201(5)(d)) specifically states that "local governments shall" give preference and top priority to reserving "areas for protecting and restoring ecological functions". Local governments have a broad discretion to designate and protect critical areas. Local governments are already required to identify salmon and forage fish habitat during their inventory and characterization of shorelines, and protect these habitats consistent with federal and state laws. No change required. See also responses on line 45.
42	**173-26-211(5)(b)(iii)**	Leonard Bauer	Areas designated in a local comprehensive plan as ~~"rural areas of more intense development,"~~ "limited areas of more intensive development" as provided for in chapter 36.70A RCW, may be designated an alternate shoreline environment, provided it is consistent with the objectives of the Growth Management Act and this chapter. "Master planned resorts" as described in RCW 36.70A.360 may be designated an alternate shoreline environment, provided the applicable master program provisions do not allow significant ecological impacts.	Your requested change has been made.

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43	**173-26-211(5)(c)(ii)(G)**	Bruce Wishart	Similarly, we urge you to make sure, in Section 173-26-211(5)(c)(ii)(G) and (H), the proper sequence that planners should undertake in reserving these areas. In reserving Aquatic Areas for various uses, it should be clear that planners undertake reservation of ecologically significant areas under (G) before reserving lands for other uses. Subsection (H) jumbles together preferred uses, including ecological factors, making the section even more confusing	Please see response to comments on lines 44, 45 and 46.
44	**173-26-211(5)(c)(ii)(G)**	Laura Hendricks	Unless only those aquaculture operations that do not alter the ecological functions are allowed, this section is in conflict with its own language. The intensive uses and high densities of aquaculture species not normally in the nearshore do alter the ecological functions, not restore them. This section should be clarified as to what constitutes acceptable aquaculture	Subsection G has been deleted. See response on line 46.
45	**173-26-211(5)(c)(ii)(G)**	Curt Puddicombe, Laura Hendricks	The same shoreline designations used for the uplands should be used in the nearshore aquatic environment. It's in the shellfish industry's best interest to have one aquatic environment that does not protect the nearshore habitat and native species.	The six environment designations established in the guidelines represent a complete management scheme for uplands and adjacent water areas. Issues unique to aquatic environments, such as navigation, aesthetics, water quality and a water-dependant use priority justify a separate environment designation for water areas. Local governments also have the option to create more than one type of aquatic environment. Regardless, protection of nearshore habitat and native species is required. No change required.
46	**173-26-211(5)(c)(ii)(G & H)**	Marian Lahav	There is an inherent conflict between these two sections and with implementation of the policy in RCW 90.58.020. Section G requires local governments to reserve aquatic areas for protecting and restoring ecological functions. Section H requires them to reserve shoreline space for preferred uses. Given all the other protective measures (no net loss, mitigation sequence, etc.) for ecological functions in the Guidelines and the policy of fostering all reasonable and appropriate uses of the shoreline, this conflict should be resolved by eliminating Section G.	Your suggested change has been made. Ecology agrees that the subsection did not add anything not already addressed elsewhere.
47	**173-26-211(5)(c)**	Bryan Harrison	You may have strayed from the no net loss of ecological functions principle in developing a concept of previewing aesthetics in views. Much of Pacific County's shoreline development is industrial & commercial. Much of it is ugly or viewed by some as ugly. I was told "Well we need to tell you country bumpkins who might not understand that those of us that are professionals that live along Puget Sound don't appreciate the ugly blue collar industries that we have to look at and expanded that view to the shellfish industry." If aesthetics & views are considered, someone's going to find the shellfish industry ugly. I'd hate to go down that slippery slope even though I don't think that was	The No Net Loss of ecological function principle is a different concept than that which addresses aesthetics or views. Protecting the aesthetic qualities of natural shorelines of the state to the greatest extent feasible is an objective of the Shoreline Management Act (RCW 90.58.020). We consider these distinct objectives of the Shoreline Management Act. No change required.

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			Ecology's intent. But there are those that might use that.	
48	**173-26-211(5)(c)**	Dean Patterson	If aquaculture (and other in-water uses) is to be properly governed to avoid ecological impacts and use conflicts, the first step is to protect those highly functioning aquatic areas. This means that the aquatic equivalent of a Natural environment is needed.	WAC 173-26-201(2)(c), states that "master program provisions shall, to the greatest extent feasible, protect existing ecological functions and avoid new impacts to habitat and ecological functions before implementing other measures..." In addition, in WAC 173-26-201(2)(d), locals governments are directed first, to reserve appropriate areas for protecting and restoring ecological functions to control pollution and prevent damage to the natural environment. And a stated purpose of the aquatic environment is to "protect" the unique characteristics and resources of water areas. Furthermore, as noted above, local governments have the option to create more than one type of aquatic environment, especially where highly functioning areas are involved. No change required.
49	**173-26-211(5)(c)(ii)(G)**	Dean Patterson	(G) Local governments should reserve highly functioning aquatic areas for protecting and restoring ecological functions. Local governments should consider using a separate environment with associated use limits and standards; or establishing use limits and standards to protect existing identified areas such as aquatic reserves, underwater parks, etc.; and similar methods.	See earlier response on line 48.
50	**173-26-211(5)(c)**	Dan O'Donnell	This section discusses new structures in aquatic environments. After "public access", please consider adding "when that is the primary use."	Your proposed change would restrict over-water structures that accommodate secondary or other related public access such as public-viewing areas associated with waterfront restaurants or marinas. This would not be consistent with the Shoreline Management Act (RCW 90.58.020). The Act supports a broader objective for public access when impacts can be mitigated. To limit new overwater structures unless they are for only public access as a primary use, would be inconsistent with the Act's broader objective. No change required.
51	**173-26-211(5)(d)(i)**	Dean Patterson	(d)(i): Reserve appropriate aquatic and upland areas for protecting and restoring ecological functions to control pollution and prevent damage to the natural environment and public health. In reserving areas, local governments should consider protecting areas that are ecologically intact (including areas ranging from the uplands through the aquatic zone of the area), aquatic areas that	This section addresses all shorelines of the state, and applies to both aquatic and upland areas equally. Methods for dealing with shoreline preferred uses and the form they take in local master program policies, regulations and environment designations are addressed in detail in other sections of the Guidelines. No change required.

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			adjoin permanently protected or intact uplands, tidelands in public ownership, and tidelands not reserved for water-dependent use or development. Reserving areas for protection can take the form of using Natural environments (or their equivalent), protecting other designated areas (such as an aquatic reserve or underwater park) using the SMP use limits and regulations, or similar methods. Local governments should ensure that these areas are reserved consistent with constitutional limits.	
52	**173-26-211(5)(d)(iii)**	Leonard Bauer	(iii) Designation criteria. Assign a "high-intensity" environment designation to shoreline areas within incorporated municipalities, urban growth areas, and industrial or commercial ~~"rural areas of more intense development,"~~ "limited areas of more intensive development" as described by RCW 36.70A.070, if they currently support high-intensity uses related to commerce, transportation or navigation; or are suitable and planned for high-intensity water-oriented uses.	Your requested change has been made with modification to make it consistent with growth management statutes. Text now reads: "limited areas of more intensive rural development."
53	**173-26-211(5)(e)(iii)**	Leonard Bauer	(iii) Designation criteria. Assign a "shoreline residential" environment designation to shoreline areas inside urban growth areas, as defined in RCW 36.70A.110, incorporated municipalities, ~~"rural areas of more intense development,"~~ "limited areas of more intensive development" or "master planned resorts," as described in RCW 36.70A.360, if they are predominantly single-family or multifamily residential development or are planned and platted for residential development.	Your requested change has been made with modification to make it consistent with growth management statutes. Text now reads: "limited areas of more intensive rural development."
54	**173-26-221(2)(a, b, c)**	Al Scalf	Jefferson County supports the amendment which adopts the "no net loss" in place of the "at least equal to" CAO provision.	Thank you for your comment. We appreciate the time Jefferson County took to comment on the rules.
55	**173-26-221**	Doug Peters	173-26-221(2)(a) & (c) cite to WAC 365-190-080, which has been replaced by WAC 365-190-080 through -130.	Your requested change has been made to WAC 173-26-221(2)(a). The reference was removed from WAC 173-26-221(2)(c).
56	**173-26-221(2)(a)(ii)**	Sean Gaffney	Please define *"shoreland resource areas"* that warrant special protection, and provide a few examples.	The term "resource areas" has been removed to reduce confusion with growth management policies and regulations. Please see changed wording reflecting the WA Dept. of Commerce comments. We are giving local government flexibility to identify new areas for protection as new science and information comes to light; for example, the need for a new shellfish protection district or other area identified through a shoreline program inventory and characterization. Local governments have a broad discretion to designate and protect critical areas. No change required.
57	**173-26-221(2)**	Leonard Bauer	(2) Critical areas ~~and other critical resource areas.~~	Your requested change has been made.
58	**173-26-221(2)(a)**	Leonard Bauer	This section provides guidance on "fish and wildlife habitat conservation areas" under subsections addressing "critical saltwater habitat" and "critical freshwater habitat."	Thank you for your comment.

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59	**173-26-221(2)(a)**	Leonard Bauer	In addition to critical areas defined under chapter 36.70A RCW ~~and critical saltwater and freshwater habitats as described in these guidelines~~, local governments ~~should~~ may identify additional shoreline and shoreland ~~resource~~ areas that warrant special protection necessary to achieve no net loss of ecological functions during the shoreline characterization process described in WAC 173-26-201. These areas should be protected through environment designation regulations or use regulations.	Local governments have a responsibility under the Shoreline Management Act and need the flexibility to protect ecologically sensitive habitats and other features that may not fall within the bounds of their Critical Areas Ordinances. No change required.
60	**173-26-221(2)(a)(2)**	Marian Lahav	Please eliminate "*local governments should identify additional shoreline and shoreland areas identified by local governments that warrant special protection necessary to achieve no net loss of ecological functions* is unnecessary". Or, please replace *should* with *may.*	Comprehensive updates of local shoreline master programs are under way and will continue to occur between now and 2014, then every seven years from the respective date of each update's adoption. In each update process, the most current scientific and technical information must be applied in updating the local program. As a consequence, local governments must retain the authority to identify additional shoreline areas that warrant special protection necessary to achieve no net loss. No change required.
61	**173-26-221(2)(a)(ii)**	Dean Patterson	WAC 173-26-221(2)(a)(ii), on page 53, WAC 173-26-221(2)(b)(ii) on page 54, and WAC 173-26-221(2)(c) on pages 54 and 55 should not delete the requirement that shoreline master program protections for critical areas have to be at least equal to those provided by critical areas regulations. The Shoreline Management Act, in RCW 90.58.090(4), still contains this requirement and the Shoreline Master Program Guidelines should contain it as well to be consistent with the Act.	The standard (and the clear intent of the most recent legislation amending the Growth Management Act) is no net loss of ecological functions. An equivalency statement remains in the Shoreline Management Act. Ecology planning staff is available to assist local governments in interpreting these existing provisions. With this in mind, no change required.
62	**173-26-221(2)(a)(ii)**	Dean Patterson	Pursuant to RCW 36.70A.480(3), upon department approval of a shoreline master program, critical areas within shorelines of the state are protected under chapter 90.58 RCW and are not subject to the procedural and substantive requirements of RCW 36.70A, except as provided in RCW 36.70A.480(6), and except for agricultural activities as defined in RCW 90.58.065 which continue to be managed by critical areas regulations adopted under RCW 36.7A.	Considering existing statutory language at RCW 90.58.065, it is clear that updated shoreline programs will continue to apply to new (and converted) agricultural activities. No change required.
63	**173-26-221(2)(b)**	Leonard Bauer	(b) Principles. Local master programs, when addressing critical areas ~~and critical resource areas~~, shall implement the following principles:	Your requested change has been made.
64	**173-26-221(2)(b)(ii)**	Leonard Bauer	(ii) In addressing issues related to critical areas ~~and critical resource areas~~, use scientific and technical information, as described in WAC 173-26-201 (2)(a).	Your requested change has been made.
65	**173-26-221(2)(b)(iii)**	Leonard Bauer	(iii) In protecting and restoring critical areas ~~and critical resource areas~~ within shoreline jurisdiction, integrate the full spectrum of planning and regulatory measures, including the comprehensive plan, interlocal watershed plans, local development	Your requested change has been made.

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			regulations, and state, tribal, and federal programs.	
66	**173-26-221(2)(b)(iv)**	Leonard Bauer	(iv) The planning objectives of shoreline management provisions for critical areas ~~and critical resource areas~~ shall be the protection of existing ecological functions and ecosystem-wide processes and restoration of degraded ecological functions and ecosystem-wide processes. The regulatory provisions for critical areas ~~and critical resource areas~~ shall protect existing ecological functions and ecosystem-wide processes.	Your requested change has been made.
67	**173-26-221(2)(c)**	Leonard Bauer	(c) Standards. When preparing master program provisions for critical areas ~~and critical resource areas~~, local governments should implement the following standards and ((the provisions of WAC 365-190-080 and)) use scientific and technical information, as provided for in WAC 173-26-201 (2)(a).	Your requested change has been made.
68	**173-26-221(2)(c)(i)(A)**	Leonard Bauer	Wetlands - Last Bullet: ~~Significant~~ Significant vegetation removal, provided that these activities are not part of a forest practice governed under chapter 76.09 RCW and its rules;	Your requested change has been made.
69	**173-26-221(2)(c)(i)(A)**	Bryan Harrison	The word significant has been removed and now it addresses any vegetation removal even if it's de minimus. I would ask that you consider putting the word native in front of vegetation removal to not limit control of noxious invasive species. Or else allow local government to decide what is native or what is invasive.	Your requested change has been made.
70	**173-26-221(2)(c)(ii)**	Doug Peters	173-26-221(2)(c) (ii) cites to WAC 365-190-080(4), but should cite to WAC 365-190-120 for geological hazard areas, specifically.	Your requested change has been made.
71	**173-26-221(2)(c)(iii)**	Bruce Wishart	We support clarification that "critical saltwater habitat" should include only "naturally occurring beds of native shellfish species." The intent of the underlying language, to protect native species and ecologically significant areas, is clear. Without this change, it seems possible that this section might be interpreted as being in conflict with requirements discussed above. Regardless of how you proceed on this issue, we again urge you to do everything possible to maintain consistency between this section and sections which require removal of lands for ecological reasons and the need to impose new restrictions on shellfish aquaculture to avoid ecological harm.	The definition of critical saltwater habitats has been changed back to the original language that included "subsistence, commercial and recreational shellfish beds". The original language has been restored in response to substantial public comment from the WA Department of Commerce and other stakeholders directly affected by this rule. Commerce specifically expressed concerns about how the proposed language would conflict with existing Growth Management Act rules. Additional language has been added to the Principles section to remind local governments of the preferences and priorities in WAC 173-26-201(2)(d), Preferred uses. In addition, language has been added to the Aquaculture subsection (WAC 173-26-241(3)(b)) that addresses use conflicts and ecological impacts associated with commercial geoduck aquaculture as directed by RCW 43.21A.681. A conditional use permit is now required for all

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				new geoduck aquaculture.
72	**173-26-221(2)(c)(iii)**	Tim Morris, Don & Debbie Gillies, Dave Steel, Richard L Wilson, Mark Ballo, Brian Sheldon, R Bruce Olsen, Kelly Toy, Vickie & Steve Wilson, John P Lacy, Amanda Stock, Lisa Bishop, Margaret Barrette, Mark Shaffel, Peter Downey, Jim Gibbons, Sue Shotwell, Bill Dewey, Jeff Nichols, Brady Engvall	These rules should retain the fact that subsistence, commercial, and recreational shellfish beds are critical saltwater habitat. Without shellfish aquaculture there would be no ongoing water quality monitoring. The presence of these beds ensures that the waters are held to a higher level of quality.	Please see response on line 71. In addition, Ecology has considered the technical memorandum and attachments submitted by Plauche and Stock LLP on behalf of Taylor Shellfish. SEPA and permitting staff reviewed the technical documents to determine if changes were needed to the existing SEPA document for this rule making. Ecology appreciates the information but finds that no additional changes are required.
73	**173-26-221(2)(c)(iii)**	Leonard Bauer	(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 sand lance; subsistence, commercial and recreational shellfish beds, subsistence, commercial and recreational shellfish beds ~~naturally occurring beds of native shellfish species~~, mudflats, intertidal habitats with vascular plants, and areas with which priority species have a primary association.	Please see response on line 71.
74	**173-26-221(2)(c)(iii)**	John P Lacy	Your proposed changes could make all shellfish farming conflict with critical habitat. Do you really intend that result?	Please see response on line 71.

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75	**173-26-221(2)(c)(iii)**	Al Scalf	Removing "subsistence" should be carefully reviewed in view of tribal treaty rights. Removing reference to commercial and recreational shellfish beds may raise a conflict with use provisions in SMPs and CAOs, and the GMA and SMA enabling statutes. Replacing this section with the term "naturally occurring beds of native shellfish species" needs further clarification. Over the past two years legal standards have changes. The most significant is "at least equal to" replaced with "no net loss" in the GMA. The proposed rules now introduce a standard of "adverse impact". This may create confusion as to what is allowable and what is prohibited. The interrelationship of these standards needs further examination in terms of project permit decision making and assurances to project proponents who seek to invest in long term stewardship. Finally, within our CAO aquaculture lands are designated as resource lands and should be afforded more protection and conservation for long-term commercial significance than uses in other zoning districts.	Please see response on line 71 regarding the definition of critical saltwater habitats. The term 'adverse impact' already exists in the rules and we are not introducing it as a new standard. Local governments in their identification of appropriate environmental designations have the opportunity to afford more protection and conservation of aquaculture lands, as Jefferson County has proposed in their shoreline program update currently under state review. No additional changes at this time.
76	**173-26-221(2)(c)(iii)**	Mark Ballo, Eric Hall	The removed language about commercial and recreational shellfish beds was replaced with naturally occurring beds of native shellfish species. I think that needs to be fixed.	Please see response on line 71.
77	**173-26-221(2)(c)(iii)**	Sean Gaffney, Dean Patterson	We appreciate the change clarifying that commercial aquaculture is a "use" not a "habitat".	Please see response on line 71.
78	**173-26-221(2)(c)(iii)**	Bill Dewey, Eric Hall, Pat Wadsworth	The proposed rule changes remove critical water quality protections for aquaculture and place aquaculture at the end of the line when trying to balance other conflicting uses.	Please see response on line 71.
79	**173-26-221(2)(c)(iii)**	Amanda Stock, Bryan Harrison	The definition changed to substitutes naturally beds of native shellfish species. How many years does it take and introduced shellfish species propagating on its own as well as being cultured and mixing, become native or naturally occurring? I'm not sure that any of us can answer that. Without the shellfish industry Willapa Bay would not be as protected and pristine as it is today. Restoring the commercial and recreational shellfish as a preferred use is strongly support by Pacific County.	Please see response on line 71.
80	**173-26-221(2)(c)(iii)**	Bryan Harrison	Protecting associated upland native plant communities: Be mindful of the jurisdictional extent of the SMA. Don't ask Pacific County to regulate beyond 200 feet from the OHWM.	Thank you for your comment.
81	**173-26-221(2)(c)(iv)(A)**	Leonard Bauer	(iv) Critical freshwater habitats (A) Applicability. The following applies to master program provisions affecting critical freshwater habitats within shorelines of the state designated under chapter 36.70A RCW ~~together with other critical freshwater habitat areas~~, including those portions of streams, rivers, wetlands, and lakes, their associated channel migration zones, and flood plains ((designated)) ~~identified~~ designated as such ~~in the master~~	Your requested change has been made.

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			~~program~~.	
82	**173-26-241**	Al Scalf	Jefferson County can support some of the changes such as the CUP requirement and public notice provisions. However, permit timeline restrictions and the increase in local government oversight are problematic for operators looking for long-term assurance for their business as well as scarce staff resources. Clearly, a methodology to combine permit review requirements with local, state and federal review agencies must be found to efficiently process proposals while protecting the public interest.	Thank you for your comment. We appreciate the time Jefferson County took to comment on the rules. Ecology has removed the timeline restrictions based on public comment, our economic analyses associated with this rule making, and the direction of the Governor's Executive Order 10-06 to increase long-term assurance for businesses. The rule now encourages local governments to accept information from federal (Nationwide Permit 48) and state (401 Water Quality Certification) permits in partial fulfillment of local conditional use permit applications in order to increase regulatory consistency. No additional change required.
83	**173-26-241(2)(b)**	Bryan Harrison	The CUP requirement departs from the standard permitting hierarchy. Most uses in the statute are SDP exempt, those a little more impactful require a SDP, and those controversial or having large impacts require a CUP or VAR. All geoduck activity however minor or major appears to require a conditional use. Local government is not allowed to categorize geoduck aquaculture as SDP-exempt or as needing a SDP.	Many in-water uses and activities are not exempt from substantial development permits. Geoduck aquaculture in Washington state occurs within shoreline areas critical to other resource-based economies or endangered species such as Chinook salmon, and may have other impacts such as interfering with the normal public use of public waters. A conditional use permit (CUP) allows local governments flexibility in applying use regulations while still achieving the goals and objectives of the Shoreline Management Act and other federal and state policies and regulations. Therefore, requiring a CUP for commercial geoduck aquaculture is consistent with the hierarchy of Shoreline Management Act permitting. No change required.
84	**173-26-241(2)(b)(ii)**	Leonard Bauer	(D) New and expanded commercial geoduck aquaculture as described in ~~subsection (b)(ii)(B)(I) of this section~~ WAC 173-26-241(3).	Your requested change has been incorporated into new wording that reflects other rule changes. Rule now reads: (D) New commercial geoduck aquaculture as described in WAC 173-26-241(3)(b).

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85	**173-26-241(3)(a)(i)**	Al Scalf	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	Please see response to comment on line 10.
86	**173-26-241(3)(b)**	John & Linda Lentz, Laura Hendricks	There is very little "sound science" basis for the proposed changes. Has Ecology looked at nitrogen and other nutrient loadings that plague Puget Sound and the beneficial effects that bivalve aquaculture contribute in bioremediation for that problem? Has Ecology measured the carbon sequestration contribution of the industry or even considered that? Science has shown that bivalve's do an incredible job in cleaning the water of nitrogen and phosphorus themselves. The three dimensional habitat that bivalves and their culture gear create rivals eel grass beds in both species diversity and richness. They are providing not only food for foraging juvenile salmonids and other species, but also refuge from prey species. Has this habitat contribution been considered and the effect of the rule changes weighed?	Ecology is aware of the various challenges facing Puget Sound. The vast majority of research on aquaculture and bioremediation focuses on shellfish other than geoduck. There is limited information on the filtering capacity of geoduck and the potential net benefit to the local ecosystem. The temporal contribution of structure, nutrients, and refuge habitat has been considered by Ecology in development of the rule changes and final language. No additional change required.
87	**173-26-241(3)(b)(ii)**	Douglas Morrill	(3)(b)(ii)(B)(II) Please add a required 45-day notice to tribes with Usual and Accustomed fishing rights in aquaculture areas, prior to harvest & augmentation. This notice is currently required by WA DFW Aquatic Farm Registration Permits and Emerging Commercial Fishing Permits. Contact Rich Childers @ WDFW or Michael Grossman @ WA ATG for more information.	WAC 173-26-241(3)(b)(iv)(G) now specifically requires local governments to notify tribes with usual and accustomed fishing rights to a proposed geoduck aquaculture project area. We solicited input from local governments about providing a 45-day notice to tribes for proposed projects in addition to the standard 30-day public notice. While local governments and Ecology fully support getting as many eyes on a project as possible, a 45-day separate notice to the tribes would pose a significant administrative burden on local governments and not produce substantial benefits beyond that provided through the existing noticing for conditional use permits and environmental review under SEPA (State Environmental Policy Act). Now that all new geoduck aquaculture projects require conditional use permits, SEPA

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				and its associated notice to tribes will also be triggered for all new proposed projects. No additional change required.
88	**173-26-241(3)(b)(ii)**	Al Scalf	Jefferson County recognizes the often controversial nature of geoduck aquaculture and supports Ecology's efforts to ensure this industry continues to thrive in local waters while adequately protecting natural habitats and ecosystem functions. In order to fully realize these intentions, we strongly encourage Ecology to foster additional dialogue with the aquaculture industry, affected Tribes and environmental interests to ensure these issues of concern ale adequately considered and addressed prior to adoption of the WAC change	Thank you for your comment. Ecology did have additional dialogue with affected parties between the proposed rule and the final rule. We found the dialogue beneficial to crafting language that meets a broad range of interests.
89	**173-26-241(3)(b)**	Harry Branch	Shellfish cultivation on beaches impedes other important ecological processes including forage fish spawning	Ecology is aware there are impacts to important ecological processes from in-water uses. With the new rule, all new commercial geoduck aquaculture will be required to get a conditional use permit, which will need to consider the impacts to ecological functions and forage fish spawning areas. Most geoduck aquaculture occurs at tidal elevations of -2 to +3, which is below the typical spawning zones for sand lance and surf smelt (range from +5 to Extreme High Water). In some instances an operation may overlap with herring spawning areas, depending on the vegetation and landscape of the area. These concerns will be addressed during review and conditions, such as work windows, may be incorporated into a permit to minimize and avoid disturbance to spawning forage fish. No additional change required.
90	**173-26-241(3)(b)(ii)**	Sean Gaffney	Most of the provision you added addressing commercial geoduck aquaculture should apply to all forms of aquaculture.	The state legislature directed Ecology (RCW 43.21A.681) to address geoduck aquaculture, not all forms of aquaculture. We have made rule changes only where essential to ensure that the commercial geoduck aquaculture provisions of WAC 173-26-241(3)(b) fit appropriately within the Shoreline Management Act rules and shoreline master program structure. No additional change required.

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91	**173-26-241(3)(b)(ii)**	Vickie & Steve Wilson, Amanda Stock	Conditions limiting planting, harvesting, & predator netting area will severely reduce farm productivity. There is no known justification for this condition. This illustrates Ecology's intent to curtail aquaculture activities beyond establishment of best management practices. If "areal extent of impacts" refers to cumulative effects, there should first be credible evidence that there is a net negative impact as opposed to net positive impact from aquaculture.	The permit limits and conditions in the proposed rule have been changed to reflect several comments received during the public comment period. Please see the revised Aquaculture section, WAC 173-26-241(3)(b), for revised limits and conditions. Specific language directing local governments to "prohibit or limit the areal extent of impacts" has been removed. Ecology agrees that in most cases this may not be necessary to "avoid or limit impacts from geoduck aquaculture siting and operations and achieve not net loss of ecological functions". However, Ecology's intent is that the list of permit limits and conditions noted in WAC 173-26-241(3)(b) is not exclusive. Local governments will have the right and obligation to consider other permit limits and conditions in order to avoid or limit impacts and meet the goal of no net loss. Consistent with other Shoreline Master Program technical assistance provided by Ecology to local governments, Ecology intends to publish guidance on administering the new conditional use permit for commercial geoduck aquaculture which will help further frame the intent of the new rule language. No additional changes required.
92	**173-26-241(3)(b)(ii)**	Amanda Stock, Peter Downey	All research shows geoduck aquaculture impacts are short term and confined to the growing site. There is no need to limit the area that can be planted or harvested at one time. Such limits would have few or 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 SBEIS didn't address the impacts from this language.	Please See response to comment E0030r, above. The Cost/Benefit Analysis has been revised based on the final language of WAC 173-26-241(3)(b). No additional change required.
93	**173-26-241(3)(b)(ii)**	Nick Jambor	Limiting planting & harvesting area: Harvest occurs typically once every five years. I would argue disturbing one area and then leaving that area alone for another five years would be less disruptive than hopping around and disturbing smaller areas more frequently. I would suggest Ecology define what they mean by 'limiting'. SARC did not receive testimony from growers regarding this requirement.	Please see response to comment on line 91.
94	**173-26-241(3)(b)(ii)**	Vickie & Steve Wilson, Nick Jambor	Limiting the area of the site that can be planted or harvested at one time, to limit the areal extent of impacts. And, Limiting the portion covered by predator exclusion devices. In a sense now you are creating a type of buffer, and limiting protection to only part of the young geoducks. The Economist should include in this their SBEIS.	Please see response to comment on lines 91 and 96.

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95	**173-26-241(3)(b) [OTS-3376.2, pg 75, 11th bullet]**	Vickie & Steve Wilson	This condition should be eliminated. No greater limits or caveats are needed than what USACOE individual permits will allow. Predator exclusion devices are removed asap. There is no advantage to not doing so.	Please see response to comment on lines 91 and 96. One of the directives in SSHB 2220 (2007) was for the Shellfish Aquaculture Regulatory Committee (SARC) to develop recommendations for "activities that integrate all applicable existing local, state, and federal regulations". Ecology has completed this review because the committee chose to suspend this task. Given federal and state permits (Section 404/401) for new geoduck aquaculture have yet to be administered at this time and the public's concern over bird entrapment - particularly priority species such as Bald eagles (Haliaeetus leucocephalus) - Ecology feels that predator exclusion devices should be explicitly considered through local government permits. This allows local knowledge of nesting and roosting habitat for priority avian species to be considered. No additional change required.
96	**173-26-241(3)(b)(ii)**	Kim Merriman	I am concerned about the armoring and predator nets that are associated with intensive geoduck farming in the tidelands. [See comment letter photos showing dead birds under netting and an entrapped live Bald Eagle.] Some animals are trapped and drowned by incoming tides before they can be rescued by people.	Thank you for your concern for Washington's native wildlife. Ecology investigated this issue during the rule-making process. The Guidelines request local governments to write permits so the use of predator nets does not extend beyond what is necessary for protection of young geoduck or debris management. The State Environmental Policy Act (SEPA) Addendum prepared for the rule making addresses impact or harm to bald eagles (see page 9). As with other activities, harm or injury to animals should be reported to local law enforcement or the Washington Department of Fish and Wildlife. No additional change required.
97	**173-26-241(3)(b)**	Vickie & Steve Wilson, Peter Downey	Requiring BMPs to minimize turbid runoff from water jets. All studies to date have shown 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 deleted. The SBEIS failed to recognize or quantify the impacts from this language.	Consideration of best management practices (BMPs) to minimize turbid runoff may also reduce other on-site impacts from the water jets. Ecology has been conducting site visits to better understand how water jets are used in harvesting geoduck, what potential impacts could result from the jets (turbidity, habitat and sediment disturbance), and potential best management practices to minimize any impacts. Based on recent site investigations by Ecology, it seems that many geoduck operations are able to meet the water quality standards within the area of mixing granted by WAC 173-201A. No additional change required.

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98	**173-26-241(3)(b)(ii)**	Vickie & Steve Wilson, Peter Downey	There is no science to support a buffer requirement between aquaculture & sensitive habitat. 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. 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.	Based on current research and field work, Ecology does not believe it is appropriate to site new geoduck aquaculture in the midst of existing eelgrass beds. Evidence suggests that there are impacts to adjacent eelgrass beds associated with typical geoduck aquaculture operations. Current Sea Grant research is investigating geoduck aquaculture impacts on sensitive habitat, primarily eelgrass. The research is preliminary at this time, but the findings, along with additional field investigations, will be integrated into this rule, local shoreline programs as they are updated, and the permit review process as information becomes available. Efforts will be made at the state and local level to be consistent in implementing buffer or mitigation requirements. No additional change required.
99	**173-26-241(3)(b)(ii)**	Amanda Stock	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.~~	Please see response to comment on line 91. "Best available science" is a term reserved for the Growth Management Act and its rules, and is not used with the Shoreline Management Act or its rules. No change required.
100	**173-26-241(3)(b)(ii)**	Brian Allen	The buffer analysis does not factor losses of area due to the presence of critical saltwater habitat. I support management and protections for critical species and habitats – that is good resource management. The approach here needs to evaluate a project holistically, allowing concessions for *critical habitat to behave as buffers in farm plans.*	Please see response to comment on line 91. An objective of the Shoreline Management Act is to protect the public's interest in shorelines. The public's interest includes the long-term health and protection of critical saltwater habitats and their social, economic, and environmental value to Washington and all its people. Consistent with general land use planning principles and case law, shoreline users are responsible for mitigating their own impacts since they directly financially benefit from the activities that create the impacts. Commercial geoduck aquaculture is a shoreline use and thus must mitigate its own impacts consistent with other shoreline uses (see WAC 173-26-201(2)(e)), and not pass the costs onto the public. No change required.
101	**173-26-241(3)(b)(ii)**	Dean Patterson, Laura Hendricks	(3rd bullet at top of OTS-3376.2 page 75) Requiring buffers between geoduck operations and to avoid sensitive habitat features like critical saltwater habitats, and providing buffers for such features. Buffers should protect habitat features even though the species may be seasonally absent from the habitat, should account for sediment mobilization during geoduck harvest, should consider proximity	Please see response to comment on line 91.

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			of human activity, and should account for factors such as the length of kelp fronds drifting into the aquaculture area	
102	**173-26-241(3)(b)**	Bill Dewey, Peter Downey	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.	Thank you for your comment. The rule language does not preclude local governments from considering Bush or Callow Act lands in their inventory and characterization and siting geoduck aquaculture. Ecology recognizes that the quality of data regarding Bush and Callow Act lands is limited and is considering what technical assistance we may provide in enhancing the quality of the data. No change required.
103	**173-26-241(3)(b)(ii)**	John & Linda Lentz, Vickie & Steve Wilson	The proposed rule changes for geoduck aquaculture are almost all covered by COE guidance in consultation with US FWS & NMFS. This puts Ecology & local government in the position of evaluating aquaculture, duplicating other agencies with far more expertise. This is wasteful duplication. Requiring farmers to adhere to COE permits will achieve the same results without creating another two levels of bureaucracy	One of the directives in SSHB 2220 (2007) was for the Shellfish Aquaculture Regulatory Committee (SARC) to develop recommendations for "activities that integrate all applicable existing local, state, and federal regulations". Ecology has completed this review because the committee chose to suspend this task. Given federal Individual Permits for geoduck aquaculture have yet to be administered at the time of writing this, Ecology feels that local government permits are necessary to ensure local knowledge and community priorities are considered. No additional change required.
104	**173-26-241(3)(b)(ii)(B)(III)**	Vickie & Steve Wilson	"At a minimum" and "where applicable and appropriate" seem to be conflicting standards for requiring proposed limits and conditions. The proposed changes include limits and conditions for local government to consider during project review and permit writing. A checklist for "consideration" sends a different message than "At a minimum" and "shall include". Words like prohibit, limit, or require are a different directive than "consider". The following suggestion is more consistent with Ecology's stated goal: "Application reviewers may want to consider placement of tanks, pools and impervious materials directly on tidelands, and use of vehicles. We are not arguing that the above are appropriate things to consider, simply that Ecology's choice of language does not support its stated goal of providing local governments with a checklist of things to consider	Your requested change has been made. Please see new language throughout WAC 173-26-241(3)(b).

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105	**173-26-241(3)(b)**	Amanda Stock	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.	Data is available from state and federal agencies regarding contaminated sediments, known contaminated sites, and potential contaminated sites. Language has been added to the Shoreline Master Program Guidelines regarding what to include in local inventories and characterizations. The language specifically directs local governments to include data specific to aquaculture. However, there may be a need to for project proponents to perform more detailed site-specific work depending on the proposed project location. Commercial geoduck growers wishing to locate a new operation within a known contaminated site will have to work with regulatory agencies to ensure the site is appropriate for aquaculture. No change required.
106	**173-26-241(3)(b)(ii)**	Bruce Wishart	We are concerned with language about converting non-geoduck aquaculture areas to geoduck aquaculture not necessarily subject to a CUP. We're not clear what the intent was there but we'd like to continue talking about that with you.	The final rule leaves it up to local government discretion to determine if a conditional use permit is required when converting non-geoduck aquaculture to geoduck aquaculture. Conversions of this type may or may not result in more ecological impacts or use conflicts, depending on the proposed operations and activities. Because of the abundant combinations of conversions that potentially already exist and may exist in the future, and the growing body of science related to impacts from geoduck aquaculture, we believe local governments will be able to best ascertain whether there are conversions that warrant a more full and lengthy review. No additional change required.
107	**173-26-241(3)(b)(ii)**	Curt Puddicombe, Laura Hendricks	Language was added allowing non-contiguous parcels under one permit, as long as those parcels are reasonably close geographically. We request this language be deleted as it encourages the expansion of geoduck aquaculture in the nearshore and is not consistent with protecting varied shoreline environments.	Ecology is required to consider economic impacts of rules on small businesses by RCW 19.85.030. The language allowing non-contiguous parcels under one permit is to reduce the economic burden on local governments administering permit applications and on small businesses paying permit fees. No change required.
108	**173-26-241(3)(b)(ii)**	Brian Sheldon, Vickie & Steve Wilson	The CUP requires ensuring public access to public lands. Requiring public access across private property would be illegal and encourage trespass. Some people use the public access to gain access to nearby commercial shellfish beds to steal them. I oppose language that encourages public trespass of private upland or tideland.	The Shoreline Management Act and its rules do not require providing public access across existing developed private property. The rule language is consistent with existing statute and case law protecting the public's right to public lands and waters and private property rights. Protecting commercial shellfish beds from theft is a civil matter and not within the scope of this rule making. No change required.
109	**173-26-241(3)(b)(ii)**	Amanda Stock, Nick Jambor, Peter Downey	I believe SARC decided there would be a limit placed on their use, not a complete ban.	A change has been made to allow local government's discretion in regulating use of nursery tanks and pools. No additional change required.

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110	**173-26-241(3)(b)(ii)**	Vickie & Steve Wilson, Brian Allen, Margaret Barrette, Peter Downey	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.	Your comment has been addressed. There is no explicit renewal date for conditional use permits stated in the final rule. Conditional use permits for geoduck aquaculture are subject to the existing, unchanged provisions of Chapter 173-27 WAC which stipulate triggers for review of existing permits.
111	**173-26-241(3)(b)(ii)**	Brian Sheldon	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.	Your comment has been addressed. Existing commercial geoduck aquaculture operations are exempt from conditional use permits and other geoduck aquaculture provisions included in the rule. No additional change required.
112	**173-26-241(3)(b)(ii)**	Vickie & Steve Wilson	There is nothing in the rule about streamlining CUP review and ensuring renewal will not be unreasonably withheld. Each 5-year reapplication is a new appeal opportunity. Nothing in statute says CUPs have to be time limited. They can be awarded once, with provisions for expedited, periodic review if significant changes occur.	Your comment has been addressed. There is no explicit renewal date for conditional use permits stated in the final rule. Conditional use permits for geoduck aquaculture are subject to the existing, unchanged provisions of WAC 173-27-100, revisions for permits.
113	**173-26-241(3)(b)(ii)**	Tim Morris, Bill Dewey	The conditional use permit requirements for new or expansion of geoduck aquaculture will add a burden both to the county and business where these areas are used.	Ecology has retained the conditional use permit requirement to provide local governments and Ecology the ability to address cumulative environmental impacts and use conflicts associated with commercial geoduck aquaculture, but has changed the permit limits and conditions and other parts of WAC 173-26-241(3)(b) to reduce the burden on businesses, tribes and local governments. Public notice of a conditional use permit application will provide for public notice, a specific request of the legislature (see SHHB 2220 of 2007). No additional change required.
114	**173-26-241(3)(b)(ii)**	Vickie & Steve Wilson, Margaret Barrette	Why is a CUP required? Ecology argues a CUP provides consistency across counties & is consistent with SARC recommendations. The conditions placed on permits are likely to range widely across local jurisdictions. And some applicants will be required to obtain a SDP. Requiring a CUP appears to label geoduck aquaculture as development, a position counter to the AGs opinion. SARC's recommendation recognized this by allowing site-specific project review and written exemptions. Considering that 1) all new farms have to undergo federal permit review by COE, NMFS, and USF&WS, and 2) existing farms which change species, footprint, or significant operational techniques are required to notify the Corp, and 3) Ecology has its water quality and "no net loss" requirements, it's	SSHB 2220 directed the Shellfish Aquaculture Regulatory Committee (SARC) to make recommendations regarding a regulatory or permit process for commercial geoduck aquaculture. Although some of the committee members supported an exemption, an exemption was not the consensus recommendation (Ecology, January 2009). An exemption also would not require public notice of local governments, an underlying intent of SSHB 2220 which directed Ecology to form SARC and conduct this rule making. No additional change required.

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			hard to argue there's a lack of site specific oversight. The CUP is another permit requiring duplication of workload and cost placed on local governments, growers, & Ecology.	
115	**173-26-241(3)(b)(ii)**	John & Linda Lentz	The 5 year CUP won't encourage & foster a long term business model. Consider the time required to apply for a CUP to cover 30 property sites. This would require full time staffing on a small farm. Allowing 1 permit for multiple sites could find a farm at a standstill if the permit process did not proceed in a timely and predictable manner, which never happens, or the permit for the combined sites could be delayed indefinitely for an issue with just one of the parcels. The SBEIS states conditions 1, 3, 4, 5, 6, 7, & 10-15 have "non-quantifiable" costs associated with them. That is completely unacceptable and inaccurate. If Ecology has compelling reasons to impose these conditions, it should be able to define the limitations they are imposing and quantify their economic impacts for all growers.	Thank you for your comment. WAC 173-26-241(3)(b) has been changed. Existing and ongoing commercial geoduck operations do not need to get a permit. A conditional use permit is required for all new commercial geoduck aquaculture. Provisions of Chapter 173-26 WAC still apply. The proposed rule language has been altered to indicate that local jurisdictions "shall consider" the proposed limits and conditions as opposed to requiring their implementation. The Administrative Procedures Act (RCW 34.05.328(d)(e)) requires analysis of the specific directives of the rule being implemented. This means that only the cost of the conditional use permit (and the associated baseline ecological survey) are directly attributable to the rule. Any additional restrictions and the costs that they may impose would result from decisions by the local jurisdictions that issue the permits. The fact that a rule imposes disproportionate impacts on small businesses does not preclude the revision from being implemented. Alternatives have been carefully considered and many changes were implemented in response to comments such as these. No additional change required.
116	**173-26-241(3)(b)(ii)**	Brian Sheldon	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	Your comment has been addressed. The final rule leaves it up to local government discretion to determine if a conditional use permit is required when converting non-geoduck aquaculture to geoduck aquaculture. Conversions of this type may or may not result in more ecological impacts or use conflicts, depending on the proposed operations and activities. Because of the abundant combinations of conversions that potentially already exist and may exist in the future, and the growing body of science related to impacts from geoduck aquaculture, we believe local governments will be able to best ascertain whether there are conversions that warrant a more full and lengthy review.

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			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.	
117	**173-26-241(3)(b)(ii)**	Vickie & Steve Wilson	Permit fees for multiple co-located sites can be a strain, but they are nowhere near the costs on farmers of third-party appeals. Multiple sites under a single permit allows appellants to tie up a small business's future with a single appeal	Thank you for your comment. The ability to submit a permit for 'co-located' sites is at the discretion of the permittee. Individual businesses will be able to make the choice that is beneficial to them. No change required.
118	**173-26-241(3)(b)(ii)**	Dean Patterson	The section describing when a Conditional Use Permit (CUP; on p. 73) is required allows the conversion from some other form of aquaculture without CUP. We recommend that this provision be deleted. Geoduck aquaculture has dramatically different impacts from other aquaculture, due to factors ranging from nursery facilities, to in-ground gear installation, to harvest methods. Just because other aquaculture was there previously should not be the basis for avoiding a CUP.	See response to comment on line 116.
119	**173-26-241(3)(b)(ii)**	Vickie & Steve Wilson	The rule is confusing about when a CUP required and when is it discretionary: A CUP is required for new geoduck farms "in areas that have not been previously planted with geoduck", yet is discretionary when converting from non-geoduck to geoduck aquaculture. Isn't the latter an area that "has not been previously planted with geoduck"? The problem this language is trying to solve is unclear. We are concerned about the requirement of a CUP for any expansion, rather than significant expansion. For a variety of farm management reasons, different planting cycles on the same beach will result in some variation in planted area.	See response to comment on line 116.
120	**173-26-241(3)(b)(ii)**	Amanda Stock	The CUP 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.	See response to comments on lines 115 and 116.

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121	**173-26-241(3)(b)(ii)**	Brian Sheldon, Nick Jambor, Mark Shaffel, Peter Downey, Tom Bloomfield	Requiring conditional use permits plus the guidance to local jurisdictions it seems to me is overreaching.	Thank you for your comment on this section. There were many similar ones. Ecology was directed by SSHB 2220 (RCW 48.21A.681) to address geoduck aquaculture through shoreline master programs promulgated by the Shoreline Management Act. SSHB 2220 also spoke directly to a regulatory system or permit process for all current and new shellfish aquaculture projects and activities. SARC (Ecology, January 2009) recommended a conditional use permit as one option among several approaches. Ecology has chosen a conditional use permit because it ensures public notice will be provided and provides for cumulative impacts analysis. The Shoreline Management Act clearly gives local governments a land use planning and permitting role related to shoreline uses such as aquaculture. Federal or state regulations may address certain aspects of geoduck aquaculture siting and operations, but not all, and not within the context of land use conflicts at the community level. Ecology has the responsibility to ensure local shoreline programs address cumulative impacts, consider current science and knowledge, and statewide interests. In addition, the US Army Corps of Engineer's Individual Permit process, including the state's 401 Water Quality Certification, for geoduck aquaculture is still unfolding. Permit applications are still being completed and processed. No change required.
122	**173-26-241(3)(b)(ii)**	Brian Allen	I think Ecology has plenty of regulatory oversight with Section 401 Certifications and its own management process. And that the local counties should be able to determine on their own how to regulate shoreline activities.	See response on line 121.
123	**173-26-241(3)(b)**	Brian Sheldon	Please add the following to section (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.	Please see response to comment on line 10.

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124	**173-26-241(3)(b)**	Curt Puddicombe, Laura Hendricks	Aquaculture is considered development and changing it to a "use" weakens the protections. The shellfish industry would like this change. Ecology should not use the flawed and outdated Attorney General Opinion to accomplish this.	Aquaculture has always been considered a "use" in the Shoreline Management Act rules and remains so. Ecology is bound to follow the conclusions of the AGO. The AGO findings are clear that not all aquaculture is considered 'development' in all cases, and thus don't require a substantial development permit in all cases. Whether or not it is considered development, a new geoduck aquaculture project will still be required to get a conditional use permit under the new rule. The language of WAC 173-26-241(3)(b) is consistent with the AGO and other sections of the Shoreline Management Act rules. No additional change required.
125	**173-26-241(3)(b)**	Amanda Stock	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	The aquaculture subsection has been changed based on several public comments. Please see WAC 173-26-241(3)(b)(iv)(L)(III). The word 'sensitive' has explicit meaning in relationship to fish and wildlife in Washington and is not inclusive enough to provide adequate protection of endangered or threatened species. The term "priority habitats and associated species" has been used instead. No additional change required.
126	**173-26-241(3)(b)**	Bruce Wishart	Changes have been made regarding designation of preferred uses: Our goal is to ensure that local governments designate environmentally significant areas first, then designate preferred uses. There's been an attempt to clarify this language but we still think area needs some work and so we want to continue working on that section of the rule.	We don't intend any change in designation of preferred uses. Rather, the language clarifies that aquaculture is a preferred use in the aquatic area as already stated in other parts of the Guidelines. Our designation of preferred uses remains the same, including the overall preferences and priorities as described in WAC 173-26-201(2)(d). We have added a cross-reference in the siting section of the aquaculture subsection (WAC 173-26-241(3)(b)) to clarify that aquaculture must be sited consistent with WAC 173-26-201(2)(d). No change required.

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127	**173-26-241(3)(b)(ii)**	Vickie & Steve Wilson, Nick Jambor	SARC did not consider prohibiting tanks, pools and other impervious surfaces. We did discuss limiting *the number* of pools and area covered. Other impervious materials could easily be seen as something as not allowing a skiff to go dry on the intertidal sediments. This is such a vague statement that it needs to be changed or removed entirely.	Two years passed between the time the Shellfish Aquaculture Regulatory Committee (SARC) made its recommendations and the adoption of these rules. During those two years, the US Army Corps issued the Nationwide Permit 48 and the state has started the related 401 Water Quality Certification process. Through the progress made in determining permit limits and conditions related to these two processes, Ecology has revisited the impact of pools and other impervious surfaces on intertidal substrate. The language has been changed to reflect our current understanding of these impacts. Local governments are required to consider nursery tanks or holding pools and other impervious materials directly on intertidal sediments. Given the evolving technology and practices of geoduck aquaculture, it's important that local governments have flexibility to address impacts and use conflicts arising from placement of impervious surfaces on intertidal substrate. There also is specific language regarding the number of barges or vessels that can be moored or beached at any one time as well as duration limits (WAC 173-26-241(3)(b)(iv)(L)(IX)). No additional change required.
128	**173-26-241(3)(b)(ii)**	Curt Puddicombe, Laura Hendricks	Language was added to allow submittal of federal or state permit applications in partial fulfillment of local permit application requirements. Citizens should not be denied the right to local protections of their shorelines and this language should be deleted	Allowing submittal of federal or state permit application information in partial fulfillment of a local permit does not negate the public's right to notice or appeal, or detract from the local government's requirement to adequately review a project proposal and consider all the facts. No change required.
129	**173-26-241(3)(b)(ii)**	Vickie & Steve Wilson	We have no idea of the relevance of requiring harvest records. Good regulation is based on requiring the minimum of information, limits, and conditions needed to get the regulatory job done. Much of this section seems to have lost sight of that principle.	Specific language about harvest records has been removed. However, local governments have the authority to adopt application requirements in addition to what is contained in the rule and some may require this information on a case-by-case basis. Local governments are required to "minimize redundancy between federal, state and local commercial geoduck aquaculture permit application requirements." No additional change required.
130	**173-26-241(3)(b)(ii)**	Curt Puddicombe	Rule language ensures local governments are aware growers have a right to harvest once geoduck is planted, at any time. Citizens have not been heard when now our residential neighborhoods will see industrial operations move in disrupting our sleep at any time industry feels like working. This constitutes a take of property as buyers are not willing to live in an area with this kind of activity increasing. Residents have documented the problems of in the middle of the night noise, lights and smell with their local governments. Since industry is not willing to change their hours of	Case law is currently clear that growers have a right to harvest once geoduck is planted. (Please see Shoreline Hearings Board decision No. 07-021.) Because harvest must occur at low tides and generally the lowest tides are at night, case law has found that growers have a right to harvest at night. WAC 173-26-241(3)(b)((iv)(H) is clear that local governments may require limits and conditions to reduce impacts such as noise and lighting. No additional change required.

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			operation, they should not be allowed to expand their operations adjacent to residents.	
131	**173-26-241(3)(b)**	Laura Hendricks	We have seen no provisions in the rule incorporating regulations to protect 1) critical fish habitat and prey species from the known impacts to ESA listed species; 2) intertidal native species; 3) essential marine vegetation.	The Shoreline Management Act rules, and especially Chapter 173-26 WAC Part III, provide guidance to local governments for writing their shoreline management policies and regulations. Several subsections of the rules specifically speak to local government responsibility for protecting species and their habitat, including marine vegetation. These subsections apply to all shoreline uses in most cases, including commercial geoduck aquaculture. Please see WAC 173-26-241(3)(b)(i)(C), (iii)(F)(III), and (iv)(L)for some specific examples within the commercial geoduck provisions subsection. No additional change required.
132	**173-26-241(3)(b)**	Peter Downey	County staff does not have the expertise to evaluate the requirement to minimize impacts to fish and wildlife on a site by site basis. 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 drop this requirement.	State law gives local governments the primary role for land use planning and site-specific project review. This means they also have the primary role for planning for and reviewing the impacts of shoreline uses such as commercial geoduck aquaculture. State law (please see State Environmental Policy Act, Chapter 43.21C RCW, and Shoreline Management Act Chapter 90.58 RCW for two examples) also requires local governments to address environmental impacts - including impacts to fish and wildlife - as part of their land use planning and project review. Ecology does not have the authority to change local government roles and responsibilities regarding these matters nor is it within the scope of this rule making. No change required.
133	**173-26-241(3)(b)**	Margaret Barrette	County staff is 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.	Ecology currently provides technical assistance to more than 260 local governments required to have updated shoreline master programs by 2014. Ecology currently provides a handbook, trainings, regional planners with local expertise, and other resources to assist local governments. Ecology will use these resources to assist local governments with interpreting and responding to the new rules. Ecology also currently performs conditional use permit reviews as part of its responsibilities under the Shoreline Management Act. State natural resources agencies such as the Department of Fish and Wildlife are given an opportunity to review conditional use permits prior to state approval. Given there are less than 10 new potential

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				permits covering less than 10 acres at this time, we don't expect a significant workload in the foreseeable future (see CBA and SBEIS). No change required.
134	**173-26-241(3)(b)(ii)**	Brian Sheldon	I oppose limiting farm activities to only low tides. The right to farm, harvest and deliver a crop is a basic requirement and is covered in an array of right to farm legislation. For a high percentage of time a crop is simply growing so there is minimal activity on the site. When crop are planted and harvested there must no restrictions so farmers 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.	Thank you for your comment. The rule does not currently contain a provision restricting geoduck aquaculture activities to low tide. No change required.
135	**173-26-241(3)(b)**	Bruce Wishart	We were disturbed to find that monitoring and reporting requirements now seem to be optional, left to the discretion of local governments. We think that some level of monitoring and reporting should be required and spelled out in the guidelines.	Please see WAC 173-26-241(3)(b)(iv)((H)(I) for final rule language. Local governments are required to "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", unless there is a demonstrated, compelling reason against taking the action. No additional change required.
136	**173-26-241(3)(b)(ii)**	Nick Jambor	Will counties be required to establish navigation & moorage regulations for commercial & recreational vessels at all tidal stages? If someone is injured or their vessel damaged by intertidal geoduck aquaculture structures could local governments require removal of those structures?	Thank you for your comment. The Guidelines already contain existing provisions for new piers and docks, boating facilities, recreational development, rights of navigation, and extended mooring on waters of the state. We believe that any incident resulting in injuries or damage would be considered a private civil matter. No change required.
137	**173-26-241(3)(b)(ii)**	Vickie & Steve Wilson	The number of vessels moored at a site should not violate existing state or local standards. Beyond that, growers should not be limited to the number, type, or size of vessels needed to carry out the farming activity. As per best management practices, farm vessels should be beached only when necessary and for the shortest time possible. Beached vessels should avoid marine vegetation.	Ecology agrees that on-site activities, like moorage, should not violate any other existing laws or regulations. Best management practices (BMPs) can be an appropriate and effective means of ensuring that other shoreline resources and uses are protected during commercial geoduck aquaculture operations. Local governments do have the ability consider appropriate conditions of approval to avoid or limit impacts from geoduck aquaculture siting and operations and achieve no net loss of ecological functions. No change required.

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138	**173-26-241(3)(b) [OTS-3376.2, pg 75, 14 & 15th bullets]**	Vickie & Steve Wilson	This condition is a best management practice, and should be contained in a farm's management plan	It is up to the discretion of a local government whether or not to require a farm management plan as part of a new project's application packet or conditional use permit. WAC 173-26-241(3)(b)(iv)(F) specifically requires local governments to use "management practices" to address impacts associated with operations. Local governments will have the latitude to determine which management practices are used to achieve the intent of the commercial geoduck provisions. There is nothing in the rules that precludes a local government from considering a farm management plan. No change required.
139	**173-26-241(3)(b)**	Leonard Bauer	Aquaculture should not be permitted in areas where it would result in a net loss of ecological functions, adversely impact eelgrass and macro algae ~~critical areas and critical resource areas, suspend contaminated sediments that exceed state sediment standards,~~ or significantly conflict with navigation and other water-dependent uses.	Thank you for your comment. The original language has been retained. Please see WAC 173-26-241(3)(b)(i)(C).
140	**173-26-241(3)(b)**	Sean Gaffney	Replacing ~~result in net loss of ecological functions~~ with adversely impact will lend itself to argument because opponents of aquaculture will note that most forms of aquaculture do result in some level of adverse impact. Even when the impact isn't significant or it is short-lived the proposed language doesn't recognize those qualifiers. If the proposed language remains, the applicant will have to argue their proposal will result in no adverse impacts of any kind, or of providing a "demonstrated compelling reason based on the SMA". We urge you to retain the original language.	Thank you for your comment. The original language has been retained. Please see WAC 173-26-241(3)(b)(i)(C).
141	**173-26-241(3)(b)**	Peter Downey	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. Arguably even walking across a tide flat 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.	Thank you for your comment. The original language has been retained. Please see WAC 173-26-241(3)(b)(i)(B).
142	**173-26-241(3)(b)**	Peter Downey	Ecology goes on to remove the adjective "significantly" from the first sentence of paragraph 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	Thank you for your comment. The original language has been retained. Please see WAC 173-26-241(3)(b)(i)(C).

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			that will make aquaculture subservient to all other water dependent uses. Nothing in the SMA or SHB2220 supports this change.	
143	**173-26-241(3)(b)(ii)**	Nick Jambor	Limiting on-site activities during specific periods regarding forage fish: WDFW determined that forage fish actually did not use the small band of intertidal where geoduck is typically farmed. SARC grower representation agreed that they could farm within the band where forage fish typically were not found.	There is conflicting information about the presence of forage fish in relationship to geoduck aquaculture. The final rule allows local governments to review this issue on a case-by-case basis through the conditional use permitting process, and requires local governments and Ecology to consider current relevant information. Given forage fish spawning beds can move over time, addressing this issue on a case-by-case basis and using current information is the best way to ensure geoduck aquaculture activities are not impacting areas vitally important to our state's fin fishery. No change required.
144	**173-26-241(3)(b)(ii)**	Brian Sheldon	Proposing that local governments impose restrictions on lighting, noise, and normal equipment & vessel use 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. It's 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.	The commercial geoduck provisions of WAC 173-26-241(3)(b)(ii) - (iv) do not apply to existing commercial geoduck aquaculture, only new commercial geoduck aquaculture. No additional change required.
145	**173-26-241(3)(b)**	Nick Jambor, Diane Cooper	The rules are more prescriptive, more detailed and will likely be implemented and the practices outdated or the rules will be outdated before the practices are implemented. And they're certainly uninformed by the science at this point.	Thank you for your comment.

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146	**173-26-241(3)(b)**	Diane Cooper	We are concerned with the buffer requirements, survey requirements, the limiting areas for planting, harvesting and predator exclusion devices, and the use of motorized equipment. We have no idea and it's not really indicated how local governments and local planners are going to assess these limitations or what they're going to use to assess them.	Local governments are not currently precluded from using buffers or other tools to limit and condition activities as part of their conditional use or substantial development permits for commercial geoduck aquaculture. Almost half of the current 'geoduck' counties currently require a permit for geoduck aquaculture. Because Ecology reviews all conditional use permits, this will allow Ecology to bring technical expertise to bear as necessary to ensure the limits and conditions are appropriately applied by local governments, and to consider new science as it becomes available. Ecology intends to provide technical assistance to assist local governments in gaining the expertise to administer the geoduck aquaculture permits. No additional change required.
147	**173-26-241(3)(b)**	Harry Branch	Virtually all native species are considered pests by shellfish growers and treated as such by growers. Pest management methods are damaging to those species.	Thank you for your comment. An overriding tenet of the Shoreline Master Program Guidelines is the idea of no net loss of ecological functions. Managing populations of existing, native species will have to be addressed by local governments through their shoreline policies and regulations. No additional change required.
148	**173-26-241(3)(b)**	Nick Jambor	Requiring installation of property corner markers visible at low tide, and measures to minimize impacts to navigation, including recreational uses of the water over the site at high tide. SARC was unable to provide any guidance on how to mark beds. I am unaware of anything discussed during the SARC process that addressed impacts to navigation. What exactly is Ecology asking for here? Since no measures are suggested, it is impossible for the economist to even address this issue.	The rule does require local governments to consider installation of property corner markers that are visible at low tide during the most active times - planting and harvesting. Requiring property markers during the most active times of geoduck aquaculture would provide the growers and neighbors the ability to ensure activities and impacts are contained on site. Removal of the property markers during non-active periods would reduce the visual impacts and navigation hazard associated with property markers. In writing the geoduck aquaculture provisions, Ecology considered the good work of the Shellfish Aquaculture Regulatory Committee (SARC) and subsequent, more current information, including meetings related to the Nationwide Permit 48 and 401 Water Quality Certification for geoduck aquaculture. The rule language (WAC 173-26-241(3)(b)(iii)(L)(V)) reflects what will likely be required through the 401 Water Quality Certification. No additional change required.
149	**173-26-241(3)(b)**	Vickie & Steve Wilson	Farm boundaries should be surveyed prior to planting and re-established before harvesting. Visible markers are not necessary during grow-out. Growers often remove all evidence of the farm after tube removal. Visible markers are difficult to maintain unless they are off the bottom. Growers' intent should be to minimize material in the water, navigation obstructions, and visible objects.	Please see response on line 148.

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150	**173-26-241(3)(b)(ii)(B)(I)**	Curt Puddicombe	Local governments notifying property owners within 300 feet of proposed projects is inadequate. In rural environments where geoduck developments are expanding, it is a common occurrence that only one or two homes even know there is an application. This requirement should be expanded to 1,000 feet.	The 2007 legislature, through SHHB 2220, directed the Shellfish Aquaculture Regulatory Committee (SARC) to make recommendations as to public notification. The SARC did not provide specifics as to how this would be achieved. With the new requirement for a conditional use permit, local governments must provide notice to the public and tribes. The rule requires written notification (a letter) to property owners within 300 feet of a proposed project. In addition, local governments customarily post a sign at the project site and place a notice in the local paper. The new conditional use permit will also require a State Environmental Policy Act (SEPA) determination which has its own separate public notification and appeal process. Ecology will be also need to meet the public notification requirements of Chapter 173-27 WAC. No change required.
151	**173-26-241(3)(b)**	Al Schmauder, Clayton Johnson	It's hard to justify that aquaculture doesn't damage natural shoreline environments. Regulations must ensure all public uses of shorelines are maintained for the next 100 years. environments. So I'd like strong regulations that aquaculture is probably off limits unless you have very good farm [inaudible].	Ecology was directed by SSHB 2220 to address geoduck aquaculture in the shoreline master program Guidelines. The legislative intent was not a moratorium, but language that hopefully would resolve some of the use conflicts arising from this growing use of the shoreline. Local shoreline programs are designed to protect the ecological functions of Washington's shorelines through setting a community vision, long-range planning, and project specific review. This challenge to both protect the environment and plan for human activities is the one of the greatest challenges of shoreline master programs. Ecology believes that the new geoduck aquaculture provisions in WAC 173-26-241(3)(b) gives local governments and Ecology the ability to adequately consider public use and ecological protection at this time. No additional change required.
152	**173-26-241(3)(b)**	Harry Branch	Commercial shellfish growing will reduce phytoplankton and zooplankton populations, to the detriment of many other species. Analysis of just phytoplankton production is inadequate for analyzing commercial shellfish impacts.	Ecology agrees that the science is inadequate at this time to determine all impacts. Currently, very little published research on the impacts of geoduck aquaculture on Pacific Northwest phytoplankton or zooplankton populations exist. There are thousands of acres of existing shellfish aquaculture in Puget Sound. The rule amendments primarily apply to new commercial geoduck aquaculture. The small number of new sites, relative to existing sites, does not warrant additional analysis related to this rule making. No change required.

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153	**173-26-241(3)(b)(i)**	Leonard Bauer	We recommend this section that begins with (3)(b)(i) be renumbered so that every paragraph that follows can be cited precisely. The proposed organization of this detailed guidance on regulating geoduck aquaculture relies on extensive unnumbered paragraphs and two levels of bullets. It would be challenging to cite an individual paragraph or bullet in proposed WAC 173-26-241(3)(b)(II) and (III). These details become important over time in citing provisions in legal documents. See attached suggested minor edits that allow each specific provision to be cited clearly.	Your requested change has been made.
154	**173-26-241(3)(b)**	Vickie & Steve Wilson	There is no reason to impose or enforce any stricter limits than would be applied to homeowners' personal use of their tidelands. Inserting the words "significant" and "major" to the last part of the sentence so that it reads: " ... without *significant* modification of the site such as *major* grading or rock removal" addresses the concern. Limits are understandable, but without the modifiers the rule is simply not practical and opens growers to frivolous charges of violation	Please see WAC 173-26-241(3)(b)(iv)(L)(IV) for new language. "Significant" has been retained.
155	**173-26-241(3)(b)(ii)**	Peter Downey	NOAA Fisheries determined geoduck aquaculture is not coincident with forage fish spawning areas. County staff does not have the expertise and time to evaluate or enforce this requirement on a site-by-site basis. This issue is covered by other regulatory agencies and is not enforceable by counties and should be deleted.	There are aspects of geoduck operations that can impact forage fish spawning areas - vehicle access from the upland area, works and equipment using the upper beach, vessel grounding over herring spawning areas. These are issues that are appropriate for local governments to consider. A best management practices approach based on site-specific monitoring, seems an appropriate response. NOAA Fisheries' determination was based on existing aquaculture sites. The Washington Department of Fish and Wildlife's SalmonScape web mapping tool (http://wdfw.wa.gov/mapping/salmonscape/) can provide some general information on the location of known and potential forage fish spawning areas. Under the Shoreline Management Act passed by voters in 1972, local governments have the responsibility for siting and permitting aquaculture operations within their jurisdiction. This process is about the rules that implement the Act - not about the Act itself. Ecology does not have the authority to change the Shoreline Management Act. No change required.
156	**173-26-241(3)(b)(ii)(B)(I)**	Sean Gaffney	Failure to comply with permit conditions is reasonable grounds to suspend a geoduck operator's right to harvest. We again request the language be amended to " . . . A right to harvest planted geoduck under the terms and conditions of their approval."	Permit terms and conditions apply to all planting, harvesting, and other activities conducted under the permit. There is no need to single out this one provision. Please see WAC 173-27-260, 270, and 280 for local government authority to order permit holders to cease and desist or to impose a civil penalty. Please see WAC 173-27-100 for local government authority to revise a permit if there are substantive

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				changes. In addition, local governments may adopt rules to implement the Shoreline Management Act's enforcement provision. No change required.
157	**173-26-241(3)(b)**	Tim Morris, Don & Debbie Gillies, Dave Steel, John & Linda Lentz, Brian Sheldon, R Bruce Olsen, Kelly Toy, Amanda Stock, Michael Grayum (sent by Tony Forsman), Lisa Bishop, Margaret Barrette, Peter Downey, Jim Gibbons, Bill Dewey, Diane Cooper,	Many of the proposed changes go well beyond the scope of HB 2220 as well as what was discussed and agreed to by the SARC members. The recommendations that came from that stakeholders group should be followed.	Ecology values and supports the extensive and hard work of the Shellfish Aquaculture Regulatory Committee (SARC). The SARC's January 2009 legislative report was used as a primary source for crafting the rule language. The use of advisory committees is common practice at Ecology, but using an advisory committee does not relieve the agency of its responsibility to meet regulatory obligations and ensure the Shoreline Management Act rules are consistent with state statute and case law. In writing the rule, Ecology also relied on experience and research that has occurred since 2009, including our experience with recent updates to 35 local shoreline programs, Sea Grant and other research, progress in the Nationwide Permit 48 and 401 Water Quality Certification processes, and policy expertise within the public and private sectors. The SARC process was challenging in that it did not result in clear consensus on several important details related to addressing use conflicts through local shoreline programs. This left Ecology to fill in important details where SARC consensus had not been reached. Ecology believes that the rule-making process, with two preliminary informal drafts, formal proposed language, and more than a 3-month public comment period, provided a broad public opportunity for refining these necessary details. No change required.
158	**173-26-241(3)(b)**	Diane Cooper	It's critical that the state provide appropriate guidance to local jurisdiction that allows the continued existence and growth of our industry.	Thank you for your comment. Ecology intends to write both shoreline planner handbook guidance (see Ecology's Shoreline Planners Handbook at http://www.ecy.wa.gov/programs/sea/shorelines/smp/handbook/index.html) and provide direct technical assistance to local governments regarding the rule, and especially administration of conditional use permits for geoduck aquaculture. No change required.

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159	**173-26-241(3)(b)**	Brian Sheldon, Peter Downey	The proposed language is clearly intended to reduce aquaculture to an activity no better that upland development. The legislature recognized years ago that shellfish aquaculture is a beneficial use of the states waters,	Thank you for your comment. The proposed rule language did not change aquaculture's status as a preferred use of the aquatic environment nor change the hierarchical relationship between shoreline uses. Language was added to clarify the hierarchical relationship to make it easier for local governments to develop shoreline policies and planning documents. The original beneficial use language from WAC 173-26-241(3)(b) has been restored. No additional change required.
160	**173-26-241(3)(b) [OTS-3376.2, pg 75, 10th bullet]**	Vickie & Steve Wilson	This condition is so broad as to be useless. With no criteria provided, it appears its sole purpose is to enable local governments to prohibit aquaculture farms.	Under the Shoreline Management Act and other statutes, local governments do have the right to plan for and regulate aquaculture activities based on local circumstances and priorities, as long as they are consistent with federal and state regulations and policies. No change required.
161	**173-26-241(3)(b)(ii)**	Amanda Stock, Nick Jambor	Limiting alterations to the natural condition of the site, including removal of vegetation or rocks, re-grading of the natural slope and sediments or redirecting freshwater flows. This should be addressed to site preparation only. That was the intent of SARC. What happens when geoduck culture allows the re-introduction of vegetation and the County prohibits harvest since there is now vegetation of significance on this bed?	Ecology acknowledges that there will need to be some minimal alteration of a geoduck aquaculture site prior to planting, including limited removal of vegetation, rocks, and woody debris. Ecology also acknowledges the need for maintenance of a site, including removal of vegetation that has washed ashore or removing debris after a storm event. Significant alteration of a site, including re-grading the slope or redirecting a stream to make it suitable for geoduck aquaculture, may not be allowed for a new operation depending on site specific conditions. The final geoduck provisions make it clear that planted geoduck can be harvested. No additional change required.
162	**173-26-241(3)(b)(ii)**	Vickie & Steve Wilson	Proposed limitations may deny farms the ability to deal with excess vegetation. Ulva may regrow on farms due to high nitrogen levels from failing septic systems, upland livestock, or use of upland fertilizers. Growers need to control Ulva including relocating it to other areas. The limitations may deny the farm the ability to redirect heavy runoff within the farm site during planting or while tubes are in the beach. Inability to manage conditions on farms can lead to very low shellfish survival rates	Thank you for your comment. An intent of the rule amendments is to foster appropriate siting of new commercial geoduck aquaculture. Appropriate site selection should help to minimize the need to redirect stormwater run-off. If high levels of fresh water inputs are not conducive to high geoduck productivity, then sites located near freshwater outfalls should be avoided. Managing Ulva on an existing geoduck operation is a different issue than clearing or grading a site for a new operation. Ecology recognizes the need to maintain a site and manage vegetation that washes ashore. Maintenance activities should be outlined in the permit and any concerns discussed with the local government. Additional information may be found at http://www.ecy.wa.gov/programs/wq/plants/SWalgae/index.html. No additional change required.

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163	**173-26-241(3)(b)**	Amanda Stock	Deleting "significantly" before "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.	Please see WAC 173-26-241(3)(b)(i)(C). This subsection has been restored to the original language in response to public comment. No additional change required.
164	**173-26-241(3)(b)**	Dean Patterson	Aquaculture should not be permitted in areas where it would convert highly functioning aquatic areas (such as reserved aquatic areas, aquatic areas adjacent to Natural environments, and similar protected areas or highly functioning areas) to aquaculture use, adversely impact critical areas or critical resource areas, suspend contaminated sediments that exceed state sediment standards, or 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, 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), including the replacement of lost habitat areas.	Please see WAC 173-26-241(3)(b)(i)(C). This subsection has been restored to the original language in response to public comment. No additional change required.
165	**173-26-241(3)(b)**	Dave Steel, Amanda Stock, Margaret Barrette, Nick Jambor	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.	Your requested change has been made.
166	**173-26-241(3)(b)**	Brian Sheldon, R Bruce Olsen, Vickie & Steve Wilson, Amanda Stock	Eliminated is wording identifying aquaculture as an activity of statewide interest, is beneficial to the State, and is water dependent. There is no basis for these changes. These ideas have been critical to legislative recognition that shellfish areas deserve special protections. Also eliminated is wording recognizing that properly managed aquaculture results in long term over short term benefit and can protect the shoreline environment. I request this language be retained, and other language that acts to degrade this recognition be stricken.	Your requested change has been made, and the original language restored.
167	**173-26-241(3)(b)**	Harry Branch, Vickie & Steve Wilson	Compacting and biological sameness create an environment where diseases can easily spread.	Thank you for this comment. This issue is currently under investigation by Washington Sea Grant.

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168	**173-26-241(3)(b)**	Brian Sheldon	I request that this section be amended as follows: "Local government ~~should~~ shall ensure proper management of upland uses to avoid degradation of water quality of existing shellfish areas."	Please see WAC 173-26-020(35) for the definition of 'should', which requires the action unless there is a demonstrated, compelling reason against taking the action. Ecology believes that there may be circumstances where the local government may not have the authority or ability to ensure degradation, and should not be held to such a standard beyond the definition of "should". No change required.
169	**173-26-241(3)(b)(ii)(B)(III)**	Curt Puddicombe	Local governments should consider conflicts arising from siting incompatible upland uses near existing commercial geoduck aquaculture operations. This language is not specific enough to understand what an "incompatible upland use" would be. Unless this refers to industrial uses on the uplands, it would be considered a take of personal property for the benefit of one industry. We object to this language unless it is clarified and does not restrict the rights of property owners to use their properties in a responsible manner.	With this rule, new inventory requirements in the aquatic environment apply, addressing "intertidal property ownership, aquaculture operations, shellfish beds, shellfish protection districts, and areas that meet department of health shellfish water quality certification requirements". Further, existing language directs local governments to analyze "potential use conflicts" and "characterize current shoreline use patterns and projected trends to ensure appropriate uses consistent with..." the Shoreline Management Act preferred uses (WAC 173-26-201(3)(d)(ii)). This requires consideration of conflicts arising from siting incompatible upland uses near existing commercial geoduck aquaculture operations. Abundant language throughout the rule requires protection of private property rights consistent with constitutional limitations. No change required.
170	**173-26-241(3)(b)(ii)**	Vickie & Steve Wilson, Peter Downey, Nick Jambor	Prohibiting or limiting use of trucks, tractors, forklifts, and other motorized equipment below high water line. This was not recommended by SARC. Ecology does not state its reasoning but one can assume it is trying to minimize impacts. This requirement may actually increase impacts to eelgrass beds by added boat traffic and requisite anchoring.	WAC 173-26-241(3)(b) has been changed to allow more flexibility to local governments in avoiding or minimizing impacts. Access to sites will be evaluated for each proposed project to minimize impacts. No additional change required.
171	**173-26-241(3)(b)**	Peter Downey	All shellfish transfers are governed by RCW 77.60.060 and WAC 220-72-076 under WDFW authority. SARC identified this issue as not pertinent to development of this rule. County staff has no enforcement authority. This requirement adds confusion to existing regulations and provides no additional environmental benefits. It should be removed.	The purpose of the Guidelines (Chapter 173-26 WAC, Part III) is to assist local governments in writing and implementing Shoreline Master Programs. In some cases, it's helpful for local governments to have reminders in the topical subsections of the rule (e.g. aquaculture) about other existing policies or laws. Both the Growth Management Act and wetlands regulations are good examples of this. Regardless, the language has been removed and will be restated in technical assistance documents to ensure local governments are aware of Washington Department of Fish and Wildlife requirements and Ecology's intent about coordination among local, state and federal agencies. No additional change required.

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172	**173-26-241(3)(b)**	Brian Sheldon	This section 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.	Thank you for your comments. Concerns about exceeding the state water quality standard for turbidity are related to planting and harvest activities when sediments are actively disturbed for a period of time. State agencies are conducting site visits to collect data during these activities to help permit writers at the state and local level understand how the sediment is responding to the planting and harvest disturbance. Agencies are also interested in the role of sediment movement and vegetation recruitment in a waterbody. the geoduck provisions are directed towards new commercial geoduck aquaculture, not existing operations. Turbidity standards are based on a comparison between existing background conditions at the time of monitoring, so conditions resulting from natural waves and currents are taken into account and water quality standards are adjusted accordingly. No change required at this time.
173	**173-26-241(3)(f)**	Leonard Bauer	Regional and statewide needs for water-dependent and water-related industrial facilities should be carefully considered in establishing master program environment designations, use provisions, and space allocations for industrial uses and supporting facilities. Lands designated for industrial development should not include shoreline areas with severe environmental limitations, such as critical areas ~~and critical resource areas.~~	Your requested change has been made.
174	**173-26-241(3)(g)**	Leonard Bauer	In-stream structures shall provide for the protection and preservation, of ecosystem-wide processes, ecological functions, and cultural resources, including, but not limited to, fish and fish passage, wildlife and water resources, shoreline critical areas ~~and critical resource areas~~, hydrogeological processes, and natural scenic vistas.	Your requested change has been made.
175	**173-26-241(3)(h)**	Leonard Bauer	(i)(A) New mining and associated activities shall be designed and conducted to comply with the regulations of the environment designation and the provisions applicable to critical areas ~~and critical resource areas~~ where relevant.	Your requested change has been made.
176	***Other Issues***			
177		Judy Surber	WAC 173-20-340 does not list Chinese Gardens Lagoon. Will Ecology add it during this rule update?	Chinese Gardens lake/lagoon is in the City of Port Townsend, which adopted its updated shoreline master program in February 2007. Chinese Gardens Lagoon is designated natural. Please contact Port Townsend planning department for maps and other details.

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178		Amanda Stock	Ecology should add the following text to its aquaculture rules: *"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.	Your requested change has been made.
179		Al Schmauder	I'd like to see provisions where regulations prepared by jurisdictions are coordinated within the watershed of those jurisdictions. I don't think Ecology has a way to ensure local regulations are reasonable so we don't have 12 foot setbacks on one side and 25 foot on the other. Watershed councils might look at that but I think we need some horsepower to help us.	The Guidelines currently address this situation by requiring ecosystem-wide analysis and coordination amongst adjacent jurisdictions. The Guidelines also don't restrict local governments from doing additional coordination on their own initiative. No change required.
180		R Bruce Olsen	We have been trying to establish a small geoduck farm since 2006. We have spent over $25,000.00 to get to this point in the permitting process with no end in sight due to the arbitrary moratorium placed on this process by Ecology and DNR with no state law to govern the actions of this department concerning this issue.	Thank you for your comment. The Corps Individual Permit (IP) process is led by the US Army Corps of Engineers, not Ecology, although Ecology does play a role in completing 401 Water Quality Certifications. Department of Natural Resources only oversees wild geoduck harvest. Both the Corps IP and DNR's leasing are outside the scope of this rule making. Please contact Loree' Randall at 360-407-6068 with questions regarding the 401 Water Quality Certification process.
181		Al Schmauder	We need to ensure our enforcement processes are clear and meaningful.	Local governments have broad, independent police powers to enforce their shoreline master programs (SMP). Most local enforcement procedures are adopted in SMPs and municipal codes. Although the enforcement *process* is generally clear, resources to *pursue* enforcement are often lacking. Enforcing environmental regulations is usually a lower priority than enforcing criminal, public health, and public safety laws and regulations. Please see Chapter 173-27 WAC for additional information about local permitting authority and authority related to SMPs. No change required.
182		Lisa Bishop, Margaret Barrette	There is also some confusion about the Governor's executive order. We understand that all rule making is suspended. Clarification as to whether this WAC is exempt from the Governor' order is needed.	Thank you for your comment and we apologize for any confusion. Notices were sent to the Shoreline Rule listserv on November 17 and December 9, 2010, and February 1, 2011 concerning this issue. Additional news releases and other public notification were also provided by both the Governor's Office and Ecology. Please see http://www.ecy.wa.gov/laws-rules/rulemaking_suspension.html for current rule-specific information on the Governor's Executive Order 10-06.

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183		Vickie & Steve Wilson	We are looking for a process that allows for local review without requiring a permit that opens the door to third-party appeal. For example, if a proposed farm were to fit within a pre-defined set of standards (site/operations) to which regulators agreed (and the set of standards were clearly stated and were based on good policy and science), a permit per se would not be required nor would third-party appeal be allowed. This seems like an approach that (1) maintains the integrity of the review and regulatory process and (2) provides predictability and stability for small business. Under this scenario, there should be no substantive support for an appeal and thus removing it as an option should not be of concern. We do not know for certain if having a process that eliminates third-party appeal is possible, either by rule or statutory change, but we encourage Ecology to explore this option.	Thank you for your comment. Ecology did explore the issue of third party appeals and finds that the public's right to appeal government decisions is in Washington's best interest. No additional change required.
184		Laura Hendricks	There is no plan to minimize environmental damage from the introduction of massive quantities of PVC plastics into our marine waters that have not been tested for their known chemical contaminants.	Thank you for your comment. Prior to writing the proposed rule, Ecology's Environmental Assessment Program and biologists involved in aquaculture permitting reviewed the information provided by the Sierra Club and Coalition to Protect Puget Sound Habitat, and other existing literature regarding PVC (polyvinyl chloride) in marine waters. Based on existing peer-reviewed literature, Ecology found environmental and human health risks are related to the manufacturing phase of PVC. The chemicals used in the manufacturing of PVC or created as a byproduct of the manufacturing process (dioxin) are toxic and need to be handled with great care. However, PVC tubing does not pose a significant risk to human health or the environment when used for geoduck aquaculture. The release of polyvinyl chloride into drinking water was a problem with early-era PVC (pre-1977). Manufacturing processes have been modified since then to remove almost all the residual vinyl chloride that would be available for release into the environment. We recognize that some chipping of the plastic tubes used in geoduck aquaculture does occur. However, the amount is negligible when compared to the amount of plastic debris entering the Puget Sound from boating, stormwater outfalls associated with housing, tourism and public access, manufacturing and industrial plants , and other shoreline uses already allowed. As technology evolves, other types of tubes may be proposed by geoduck growers. The geoduck aquaculture provisions in WAC 173-26-241(b)(ii) -(iv) and the permit revision triggers in WAC 173-27-100 adequately provide local governments the ability to address

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				the impacts from PVC tubes today and from new technology that may be proposed. No change required.
185		Brian Sheldon	Ecology did not hold a hearing in Pacific County where the shellfish industry is the largest private employer. It is unacceptable & I formally protest this action by Ecology.	Thank you for your comment. Hearings are just one opportunity for the public to receive information and provide comments on proposed rule changes. The Shoreline Management Act (see RCW 90.58.060(2)(b)) requires Ecology to hold at least four hearings across Washington when changing Shoreline Management Act rules. Ecology strives to balance various requirements when choosing locations: Publicly owned, ADA compliant, surrounding population, religious and federal/state holidays, travel expenses, conflicting community events, etc. Ecology held hearings in Moses Lake, Everett, Lacey and Aberdeen regarding the five SMA rules open for public comment. Ecology requested input from the Shellfish Aquaculture Regulatory Committee (SARC) in June 2010 on the convenience of hearing locations. Ecology gave public notice of the hearing dates and locations through the rule listserv and web site, and through printed notices published for three weeks in 28 Washington newspapers. Notices also included other public comment opportunities other than hearings: Mail, email, and a web site with a comment submittal form. No additional response required.
186		Peggy Toepel	The Sept. 13th Open House/Public Hearing in the Everett area, which is not geographically influenced by any prospects of potential geoduck culture/harvest, would appear to have been a candidate for or omission from the public input calendar for this round of amendments. As the <u>sole</u> "public" attendee at the Open House, I had no significant information or recommendations to offer worth the investment of time, energy and expense by the Department.	Thank you for your comment. Amendments are proposed for five rules, all of which apply statewide. However inefficient hearings may be, the Shoreline Management Act (see RCW 90.58.060(2)(b)) currently requires Ecology to hold at least four across Washington. Ecology strives to balance various requirements when choosing locations: Publicly owned, ADA compliant, surrounding population, holidays, travel expenses, etc. Ecology has no control over hearing attendance. Shellfish occur in all Washington counties fronting marine waters. Aquaculture can be proposed at any time for locations and species not previously cultured. No additional response required.
187		Amanda Stock	Ecology 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.	RCW 43.21A.681(2) does state that the guidelines "must be filed for public review and comment no later than six months after delivery of the final report by the shellfish aquaculture regulatory committee…." The legislative report was completed in January 2009. However, the 2007 legislature could not have foreseen the national economic downturn and the budgetary and staffing constraints faced by state agencies in completing all their obligations. Ecology completed the rule making within a reasonable timeframe given the budgetary constraints

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				faced by the agency. No change required.
188		Sean Gaffney	Providing a high level of habitat protection and fostering preferred uses like commercial aquaculture: Under what circumstances does one trump the other? On page 16 the 1st order of priority is "*… protecting and restoring ecological functions* . . .". However it is easy to lose sight of that when, for example, the rule goes on to state that some level of intertidal clearing and grading is acceptable. The new text stating "... *this policy does not preclude reserving areas for protecting ecological functions*." should be repeated several times in the rule to make the 1st order of priority absolutely clear.	Repetition in this case will not solve the identified problem. No change required.
189		Mark Shaffel	This whole process was initiated by a small group of shoreline property owners who oppose shellfish farming because it results in people working in their view sheds. The shellfish farms they oppose are far better for the bay than are their homes, septic fields and bulkheads.	Thank you for your comment.
190		Dave Steel, John & Linda Lentz, Brian Sheldon, Amanda Stock, Margaret Barrette, Nick Jambor, Bill Dewey, Diane Cooper, Jeff Nichols	The SBEIS analyzes only 1 of 15 proposed limits and conditions on geoduck farming in any detail. It makes assumptions regarding costs of permitting that are significantly lower than the actual cost of obtaining and complying with terms and conditions of CUPs. Ecology determined that the SMA Rules impose a disproportionate impact on the State's small businesses, a ratio of cost 13.9 times higher per employee for small businesses. Ecology's proposed "mitigation" for that impact does not mitigate the impacts of the SMA Rules at all. 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. 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 proposed SMA Rules clearly should not go forward in light of the Executive Order 10-06.	Thank you for your comment. The proposed rule language has been altered to indicate that local jurisdictions shall consider the proposed limitations as opposed to requiring their implementation. This means that only the cost of the conditional use permit (and the associated baseline ecological survey) are directly attributable to the rule. Any additional restrictions and the costs that they may impose would result from decisions by the local jurisdictions that issue the permits. The fact that a rule imposes disproportionate impacts on small businesses does not preclude the revision from being implemented. Alternatives have been carefully considered and many changes were implemented in response to comments such as these. No additional change required.
191		Lisa Bishop, Margaret Barrette, Nick Jambor	The SBEIS analysis is for the *commercial geoduck* industry. I believe local governments may or may not specify that these updates to their SMP's are *only directed at geoduck aquaculture*. In fact, I would argue that many of these guidelines suggested by Ecology would easily be broadened to address all aquaculture. Without the insurance that this 'spillover' will not affect generic shellfish farming, I would respectfully request that the entire SBEIS be re-done to reflect these recommended proposed guidelines affects on all shellfish culture.	The Administrative Procedures Act (RCW 34.05.328(d)(e)) requires analysis of the specific directives of the rule being implemented. In this case, Chapter 173-26 WAC Part III provides the standards and requirements local governments must follow in writing and implementing local shoreline programs. The local governments than develop specific local policies and regulations that comply with the Shoreline Management Act and associated rules. When a rule directs local governments to make the decision on specific implementation, the impact of those decisions is

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				outside of the scope of the required economic analysis. No additional analysis required.
192		Peter Downey	Most farm contracts are written with a minimum of a ten year lease. 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. 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. The SBEIS fails to recognize or quantify these impacts. SARC considered and dismissed permit time limits as impracticable.	The language for conditional use permits has changed. Please see response to comment on line 115. The SBEIS has been revised. No additional change required.
193		Nick Jambor	Does Ecology think local governments have buffer-setting expertise? SARC members felt most local governments would not have funds to implement & enforce additional rule-making. I question whether local governments will need to develop individual rules to minimize fish and wildlife impacts.	Thank you for your comment. Ecology provides technical assistance on a wide range of issues covered in the Shoreline Master Program Guidelines (Chapter 173-26 WAC) to local governments in the form of a handbook, direct assistance from our regional planners assigned to each local jurisdiction, an online Shoreline Planners Toolbox, networking meetings, and trainings. Ecology intends to provide technical assistance to local governments on geoduck aquaculture. In addition, Ecology will review each conditional use permit and assist local governments in writing a permit. Conditional use permits are also reviewed by other stakeholders, including tribes, state natural resource agencies such as Department of Natural Resources and Department of Fish and Wildlife, who have expertise in minimizing impacts. No change required.
194		Peter Downey	Prohibiting vehicles on the beach: 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 SBEIS failed to recognize or quantify the impacts from this language prohibiting vehicles on the beach. No other use has such a prohibition.	Thank you for your comment. The revised rule language does not prohibit vehicles on the beach. Local jurisdictions should consider the use of such vehicles when approving proposed conditional use permits. No additional change required.
195		Peter Downey	Nursery systems supporting a single farm are small: Ours for our 15 acre geoduck farm requires 600 SQ ft of impervious surface (0.1 % of farm area), and is in place from May to August. This language is onerous for small farms with limited alternatives for siting them. A prohibition would negate the viability of small farms. The SBEIS failed to recognize or quantify the impacts from this language. 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.	Thank you for your comment. The revised rule language does not prohibit nursery systems. No additional change required.

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196		Tim Morris, Vicki Wilson	The small business economic impact is grossly misrepresented and should be redrafted to adequately reflect the true costs of buffers and surveys, etc.	Thank you for your comment. The rule language has been revised to indicate that local jurisdictions should consider the use of buffers in approving a conditional use permit, however, they are not mandatory. Local governments have discretion to identify appropriate limits and conditions for the site and scope of the project. Further, Ecology contacted the Pacific Coast Shellfish Growers Association for recent survey costs and used the information in the revised analysis. No additional change or analysis required.
197		Nick Jambor	The SBEIS didn't include the true cost of aquatic surveys which typically run > $6000 per parcel in Willapa Bay. I suggest Ecology contact growers who've had recent surveys for the true costs, & include that information in the SBEIS.	Thank you for your comment. Ecology followed up on your comment and contacted the Pacific Coast Shellfish Growers Association concerning survey costs and included the information provided in the revised analysis. No additional change required.
198		Tom Bloomfield	If these rules are adopted it will create a business environment that will prevent me from starting my own small farm. [Type of farm was not stated.]	Thank you for your comment. Ecology has modified the geoduck aquaculture provisions to reduce the economic impacts to small geoduck aquaculture businesses and hopefully address use conflicts leading to appeals. Local governments also have the responsibility and authority to reduce economic barriers to small businesses, and are encouraged to do so without impacting other shoreline uses or the aquatic environment upon which many shoreline uses depend. No additional changes required.
199		Kelly Toy	As a result of the shellfish settlement with the State and growers, the Jamestown S'Klallam Tribe has been planning aquaculture projects as encouraged by the agreement. We are now presented with a final draft of the rule that impedes the types of aquaculture activity previously agreed to by the State of Washington. If the proposed changes are implemented, the outcome would deviate so far from our expectations, we would need to schedule a government to government consultation as soon as practical.	Thank you for your comment. The rule language has been revised in response to the comments received from various tribes, including the Point No Point Treaty Council, Squaxin Island Tribe, and Lower Elwha Klallam Tribe. Changes include: 1) restoration of original definition of critical saltwater habitats; 2) restoration of original policy language to WAC 173-26-241(3)(b), and 3) adding a requirement for local governments to notify tribes of pending geoduck aquaculture projects. No additional changes required.
200		Al Schmauder	I'd like to see something in WAC that encourages volunteer shoreline restoration, and possibly amending the JARPA form and process to speed approval of these projects.	Thank you for your comment. Some encouragement exists in the Shoreline Management Act. RCWs 90.58.147 and 77.55.181, which take precedent over WACs, exempt certain fish and wildlife habitat improvement projects from all local permits and fees. JARPA Form item 6b already addresses "Environmental Enhancement" projects. RCW 90.58.580 provides a process to exempt shoreline restoration projects in urban growth areas from compliance with shoreline master program development standards and use regulations. No change required.

Appendix B: Copies of All Written Comments

Ecology received 37 emails or emails with attachments, and 9 letters. Copies of these documents are attached and are also located in the rule file.

JEFFERSON COUNTY
DEPARTMENT OF COMMUNITY DEVELOPMENT
621 Sheridan Street
Port Townsend, WA 98368
Al Scalf, Director

November 22, 2010

Attn: Cedar Bouta
Washington Department of Ecology - SEA Program
PO Box 47600
Olympia, WA 98504-7600

Also Sent via Email to: ShorelineRule@ecy.wa.gov

Subject: Comments on SMA Rulemaking 2010

Dear Ms. Bouta,

We appreciate this opportunity to comment on the proposed rule change to revise Chapter 173-26 of the Washington Administrative Code (WAC 173-26), the SMP Guidelines. We recognize the effort the Department has made in meeting the requirements of HB 2220 by conducting the Shellfish Aquaculture Regulatory Committee (SARC) process, and appreciate that our staff was consulted as part of that effort. We share an interest in how to best manage and regulate geoduck aquaculture because the aquaculture industry is a highly valued and important segment of our local economy. Our county is a leader in farmed shellfish production with locally grown shellfish exported throughout the country and the world.

As you may know, we have been working on a comprehensive update to our Shoreline Master Program (SMP) for several years and our *Locally Approved SMP* (LA-SMP) is currently under review by the Department. We anticipate adoption by the Department in early 2011. Our critical areas ordinance (CAO) was updated in March of 2008 to incorporate best available science as the required by the Growth Management Act (GMA). Additionally, based upon the legislative change under EHB 1653 enacted on March 18, 2010, Jefferson County is currently applying critical area standards within the shoreline jurisdiction in conjunction with the standards of our existing SMP.

Jefferson County can support the rule making changes recommended for those areas identified in WAC 173-18 thru WAC 173-22. These amendments pertain to listing of streams and lakes, and references to wetland delineations and mapping. Jefferson County can support the recommended changes to WAC 173-26-020 thru WAC 173-26-201. These amendments pertain to non-commercial geoduck aquaculture such as definitions, SMP submittals and appeal processes, description of priority species as well as removing the term "large" from the statutory definition of large woody debris.

In regards to the proposed changes to WAC 173-26-221, Jefferson County supports the amendment which adopts the No Net Loss in place of the "at least equal to CAO" provision. Jefferson County has concerns about the amendments proposed to WAC 173-26-221 redefining "critical saltwater habitats".

First, removing the term subsistence should be carefully reviewed in view of tribal treaty rights. Second, removing the reference to commercial and recreational shellfish beds may raise a conflict with use provisions provided by the SMP and CAO regulations of local jurisdictions and the enabling statutes of the SMA and the GMA. Particularly, replacing this section with the term "naturally occurring beds of native shellfish species" needs further clarification. Over the past two years, we have seen legal standards changing. The most significant has been the "at least equal to CAO" provision of the GMA, to the no net loss standard of the SMA, and now a proposal to include a standard of "adverse impact". This may create confusion as to what is allowable and what is prohibited. The interrelationship of these standards needs further examination in terms of project permit decision making and assurances to project proponents who seek to invest in long term stewardship. Finally, within the Jefferson County comprehensive plan, aquaculture lands are designated as resource lands and should be afforded more protection and conservation for long-term commercial significance than uses in other zoning districts.

Jefferson County can support some of the changes in WAC 173-26-241 such as the conditional use permit and public notice provisions. However, permit timeline restrictions and the increase in local government oversight are problematic for operators looking for long-term assurance for their business as well as scarce staff resources. Clearly, a methodology to combine permit review requirements with local, state and federal review agencies must be found to efficiently process proposals while protecting the public interest.

Jefferson County recognizes the often controversial nature of geoduck aquaculture and supports Ecology's efforts to ensure this industry continues to thrive in local waters while adequately protecting natural habitats and ecosystem functions. In order to fully realize these intentions, we strongly encourage Ecology to foster additional dialogue with the aquaculture industry, affected Tribes and environmental interests to ensure these issues of concern are adequately considered and addressed prior to adoption of the WAC changes.

Sincerely,

Al Scalf, Director

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LLP

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Amanda M. Stock

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 disproportionally 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 <u>when</u> 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 l~~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 bedsnaturally 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 areaaquatic 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

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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 rock 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 l~~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

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

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Geoduck Specific Limits or conditions proposed by the new rule	Geoduck Specific SARC Recommendations
Conditional Use Permit (CUP) Requirement	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.
Measures to ensure public access to publicly owned lands and waters will be maintained.	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.
Prohibiting or limiting the practice of placing tanks or pools or other impervious materials directly on the intertidal	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.
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.	No recommendation from SARC.
Limiting on-site activities during specific periods to minimize impacts on fish and wildlife.	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.
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.	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.

Limiting the area of the site that can be planted or harvested at one time, to limit the areal extent of impacts.	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.
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.	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.
Requiring installation of property corner markers that are visible at low tide.	Many Committee members recommend surveying and marking geoduck aquaculture sites when they are established.
Requiring buffers between geoduck operations and sensitive habitat features like critical habitats.	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.
Requiring measures to minimize impacts to fish and wildlife.	No specific recommendation from SARC.
Requiring the use of the best available methods to minimize turbid runoff from the water jets used to harvest geoducks.	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.

Establishing limits on the number of barges or vessels that can be moored or beached at the site as well as duration limits.	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.
Requiring measures to minimize impacts to navigation, including recreation uses of the water over the site at high tide.	No specific recommendation from SARC.
Requiring good housekeeping practices at geoduck aquaculture sites, including removing equipment, tools, extra materials and all wastes at the end of each working day.	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.

Ms. Bouta,

We have prepared this email memorandum as an accompaniment to the letter submitted on November 23, 2010, on behalf of Taylor Shellfish on the proposed SMA rulemaking revisions related to shellfish aquaculture activities. This letter addresses the environmental services provided by commercial shellfish farms. As noted in our November 23 letter, based on the beneficial environmental services discussed herein, Ecology should continue to classify commercial shellfish farms beds as critical saltwater habitat. We are also submitting, via separate emails, a number of articles and scientific studies that document the environmental benefits discussed below.

Scientific literature recognizes that shellfish perform critical environmental services in the ecosystem, including improving water quality, enhancing estuarine sediment, recruitment of eelgrass seeds, and formation of three-dimensional structure that provides critical habitat for several species of marine flora and fauna.

As noted by the Puget Sound Action Team:

"Shellfish are integral components of the coastal ecosystem, so much so that some ecologists view oyster beds and oyster reefs as the outstanding communities of the estuary.

"The interactions between shellfish beds and other organisms and elements of the coastal ecosystem are numerous and complex. Environmental factors, such as water temperature, salinity, food availability, substrate and predators determine the distribution, abundance and condition of different shellfish species. In similar but reverse fashion, shellfish exert a dramatic influence on the character and condition of the estuarine environment, providing three dimensional structure and habitat for plant and animal life of all kinds and playing particularly important roles in the uptake and recycling of energy and nutrients." (Puget Sound Action Team, 2003)

And as the U.S. Army Corps of Engineers noted:

"Since shellfish improve water quality and increase food production, we believe that there is generally a net increase in aquatic resource functions in estuaries or bays where shellfish are produced." (U.S. Army Corps of Engineers, 2007)

Water Quality and Nutrient Cycling

Shellfish significantly enhance water quality and clarity through the role they play as filter feeders. A single oyster, for example, filters up to 120 liters of water per day as it feeds off the phytoplankton that occurs naturally in marine waters. (For comparison, it has been estimated that a single Manila clam filters approximately 30 liters of water; a mussel up to 48 liters; and a geoduck clam up to 120 liters.)

This filtering function is particularly critical given the poor health of many marine waters. Hood Canal is a prime example of a water body currently suffering from hypoxic conditions, with historically high levels of nitrogen leading to excessive algae growth. When algae dies and decomposes, it consumes oxygen, leading to dangerously low levels of dissolved oxygen, which in turn leads to die-off of oxygen-deprived marine plants and animals. The United Nations has reported on the severity of this issue, citing a 34 percent increase in the number of dead zones in the

world's oceans. They cite human sewage contamination as one of the chief culprits, noting that the pollution can be directly linked to rising coastal populations and inadequate treatment systems.

Shellfish perform another critical environmental service through their ability to cycle nutrients in a phenomenon called "bentho-pelagic coupling." As they consume phytoplankton in the water column, including nitrogen, phosphorous and carbon, shellfish convey these and other nutrients to the benthos. Most notably, nitrogen, having passed through the shellfish in the form of feces and pseudofeces, are deposited into the sediment, making it readily available to -- and in affect fertilizing -- eelgrass and other sea grasses.

Most notably, actively growing shellfish remove nitrogen, phosphorous and other organic nutrients from the water at a higher rate than mature shellfish. In a mature state, the bivalves are generally in a state of nitrogen balance in which the organic nitrogen ingested in the food is equal to the nitrogen defecated or excreted as ammonia. (Rice, 2001). This phenomenon is particularly noteworthy in that commercial shellfish beds provide a constant source of actively growing shellfish.

Creating habitat through three dimensional structure

Shellfish provide habitat, forming reefs or complex structures that provide refuge or hard substrate for other species of marine plants and animals to colonize. These structures can be compared to the functions performed by coral in more tropical environments. Both are "biogenic," being formed by the accumulation of colonial animals, and both provide complex physical structure and surface area used by several other species as a temporary or permanent habitat. This results in enhanced species abundance, biomass and diversity compared to open mud or eelgrass dominated habitat. Shellfish provide structure for macroalgal attachment as well as mussels and barnacles, which in turn provide protection and/or food for crab, outmigrating juvenile salmon, and various species of amphipods.

As part of a programmatic effort to estimate estuarine habitat values, Ferraro and Cole (2001) conducted estuary-wide studies in Washington's Willapa Bay, and Oregon's Tillamook Bay, in 1996 and 1998. Their research determined benthic macrofauna-habitat relationships for eight intertidal habitats in Pacific Northwest estuaries which included eelgrass, *Zostera marina*, Japanese eelgrass, *Zostera japonica*, Atlantic cordgrass, *Spartina alterniflora*, mud shrimp, *Upogebia pugettensis*, ghost shrimp, *Neotrypaea californiensis*, bottom culture Pacific oyster (*Crassostrea gigas*), mud, sand; and a subtidal, unharvested habitat. On average, bottom cultured oysters provided the highest value habitat for the greatest abundance of species

Studies have shown that shellfish may also increase recruitment of floating eelgrass seeds, either as they travel as single seed, or within detached reproductive shoots. Entrapment can be facilitated by the structure provided by shellfish beds, and since eelgrass seed is a common food item for crustaceans, shellfish can provide refuge for seeds, providing for higher survival. (Wigand and Churchill 1988). By filtering seawater and increasing sediment organic content, shellfish provide optimum conditions for seed germination. Shellfish may also increase the survival of seedlings, which have very high mortality rates, by increasing light levels, nutrients, and protecting against erosion and herbivory. (Orth, Luckenbach, and Moore 1994, and Ruckelshaus 1996).

Given the variety of species and complex interactions associated with the three-dimensional structure formed by shellfish beds, they can rightfully be considered "essential fish habitat" as defined in the Magnuson Stevens Conservation and Management Act. (Coen et al 1999). Similarly, Ecology should continue to classify commercial shellfish beds as critical saltwater habitat.

Shellfish as mitigators

A growing body of research illuminates the profoundly important role shellfish play in coastal ecosystems. Shellfish, sometimes described as "ecosystem engineers," (Jones et al 1994, Lenihan, 1999) are increasingly being utilized in environmental restoration projects across the U.S., with significant public funds being committed to such efforts. In fact, the ACOE has recognized the value of shellfish through the NWP 27, which permits shellfish seeding activities for environmental restoration efforts. Community organizations and individuals across the country are teaming up with governmental agencies at the local, state and federal level to help restore shellfish communities, recognizing how critical they are to the coastal ecosystem. Shellfish are being used to restore water quality, salt marshes, seagrass beds and mangroves.

Ecosystem modeling and mesocosm studies have indicated that restoring shellfish populations to even a modest fraction of their historic abundance could improve water quality and aid in the recovery of seagrasses (Newell and Koch 2004; Ulanowicz and Tuttle 1992; Peterson and Heck 1999).

Shellfish are also being used to mitigate for shoreline erosion in some parts of the U.S. The shellfish beds can serve as a natural breakwater, stabilizing shorelines and reducing the amount of suspended sediment in the adjacent waters. This can result in improved water clarity and protection for seagrasses and other species in some areas. (Meyer et al 1997)

Examples of publicly funded shellfish restoration projects across the U.S. abound. Both NOAA and EPA have funds dedicated to such projects, which includes work in the Chesapeake, North Atlantic, South Atlantic, Gulf of Mexico, and West Coast, including projects in Washington, Oregon and California. To put this into perspective, shellfish farmers on the West Coast spend approximately $8,311,000 seeding their farms annually, not only at no cost to the taxpayer but in fact returning approximately $8,976,000 to local, state and federal treasuries. (Based on gross sales of $110,811,000 in 2005.)

Thank you for your consideration of these comments and the studies and articles that follow.

Amanda M. Stock
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206-588-4188
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(NOTE TO READER: PLEASE SEE NOTE ON FOLLOWING PAGE)

NOTE FROM ECOLOGY: *Listed below are the 44 attachments submitted with Plauche and Stock's technical memorandum (above). The numbering correlates to the number in the subject line of the email transmission of each document. Copies are located in the rule-making file and are available upon request.*

1. No attachment to email #1.
2. Environmental Impact of Intertidal juvenile Dungeness Crab habitat Enhancement: Effects on Bivalves and Crab Foraging Rate (Journal of Experimental Marine Biology and Ecology, 1995)
3. Using Transplanted Oyster (*Crassostrea virginica)* Beds to Improve Water Quality in Small Tidal creeks: A Pilot Study (Journal of Experimental Marine Biology and Ecology, 2004)
4. An Experimental Test of the Mechanism by Which Suspension Feeding Bivalves Elevate Seagrass Productivity (Marine Ecology Progress Series, August 20, 2001)
5. The Importance of Habitat Created by Molluscan Shellfish to Managed Species along the Atlantic Coast of the United States (Atlantic States Marine Fisheries Commission, 2007)
6. Cleaning the Chesapeake Bay with Oysters (source unknown, no date)
7. A comparative Evaluation of the Habitat Value of Shellfish Aquaculture Gear, Submerged Aquatic Vegetation and a Non-Vegetated Seabed (Journal of Shellfish Research, 2004)
8. U.S. Army Corps of Engineers, District Tides, Norfolk District (Spring 2008)
9. Could Mussels Heal an Ailing Quartermaster Harbor? Researchers Will Find Out (Vashon-Maury Island Beachcomber, February 3, 2010)
10. The Ecological Role of Bivalve Shellfish Aquaculture in the Estuarine Environment: A Review with Application to Oyster and Clam Culture in West Coast (USA) Estuaries (source unknown, no date)
11. Embedding Oysters, for a Cleaner Eagle Harbor (Kitsap Sun, June 3, 2006)
12. Environmental interactions of bivalve Shellfish Aquaculture (source unknown, no date)
13. Oysters and Clams Clean Up Dirty Water (Environmental Science & Technology, May 15, 2006)
14. Epibenthic Invertebrates at Two Beaches After Addition of Olympia Oysters, with Particular Reference to Prey of Juvenile Pacific Salmon (University of WA, School of Aquatic and Fishery Sciences, no date)
15. Benthic Macrofauna – Habitat Associations in Willapa Bay, Washington, USA (Estuarine Coastal and Shelf Science, 2006)
16. Fish Communities in Eelgrass, Oyster Culture, and Mud Flat Habitats of North Humboldt Bay, California – Progress Report (U.S. Fish and Wildlife Service, November 2004)
17. Shellfish and Nutrient Movement (Global Aquaculture Advocate, 2003)
18. Restoring Oyster Reefs to Recover Ecosystem Services (Socio-Economic Issues and Management Solutions, 2007)
19. New Approaches to Shellfish Protection in Puget Sound (source unknown, no date)
20. Endangered Species Act – Section 7 Programmatic Consultation Biological and Conference Opinion And Magnuson-Stevens Fishery conservation and management Act Essential Fish Habitat Consultation (NOAA, April 28, 2009)
21. Duplicate of #8
22. Nutrient Levels a Growing Worry for Shellfish Industry (The Olympian, March 6, 2007)

23. Organisms Associated with Oysters cultured in Floating Systems in Virginia, USA (Journal of Shellfish Research, 2004)
24. Oyster Grow-Out Cages Function as Artificial Reefs for Temperate Fishes (source unknown, no date)
25. Oyster Restoration Projected to Provide Significant Boost to Bay grasses While Removing Nitrogen Pollution from the Bay (Waterman's Gazette, date unknown)
26. Potential Mitigation of Juvenile Dungeness Crab Loss during Dredging through Enhancement of Intertidal Shell Habitat in Grays Harbor, WA (University of WA, School of Fisheries, September 1987)
27. Planted Oyster Shells Appear to be Perfect for Plover Nests (Chinook Observer, September 14, 2005)
28. Oysters. Food, Filters, Fish Habitat (Chesapeake Bay Foundation, no date)
29. Positive Interactions Between Suspension-Feeding Bivalves and Seagrass – A Facultative Mutualism (Marine Ecology Progress Series, April 4, 2001)
30. Duplicate of #4
31. The Impacts of Aquacultured Oysters, *Crassostrea virginica* (Gmelin, 1791) on Water Column Nitrogen and Sedimentation: Results of a Mesocosm Study (Dept of Fisheries, Animal and Veterinary Science, no date)
32. Duplicate of #29
33. Macroalgal Growth on Bivalve Aquaculture netting Enhances Nursery Habitat for Mobile Invertebrates and Juvenile Fishes (Marine Ecology Progress Series, June 6, 2007)
34. Keystone Species of the Estuary (Shellfish Ecology, July 2003)
35. R.I. Shellfish Offer Clue to Health of Chesapeake (Washington Post, May 8, 2006)
36. What Are You Eating? (Department of Biology, University of WA, no date)
37. The Role of Oysters in Habitat use of Oyster Reefs by Resident Fishes and Decapod Crustaceans (Journal of Shellfish Research, 2005)
38. Shellfish Aquaculture – In Praise of Sustainable Economies and Environments (World Aquaculture, December 2003)
39. Environmental effects of shellfish aquaculture: An Annotated Bibliography (Pacific Coast Shellfish Growers Association, October 4, 2007)
40. Incorporating Shellfish Bed Restoration into a Nitrogen TMDL Implementation Plan (source unknown, no date)
41. Summer Cutts Start the Day Off the Right Way (The Olympian, September 12, 2008)
42. Improving Marine Water Quality by Mussel Farming: A Profitable Solution for Swedish Society (Royal Swedish Academy of Sciences, March 2005)
43. The Potential for Suspension Feeding Bivalves to Increase Seagrass productivity (Journal of Experimental Marine biology and Ecology, 1999)
44. The Role of Oyster Reefs as Essential Fish habitat; A Review of Current Knowledge and Some New Perspectives (source unknown, no date)
45. How to Revive the Chesapeake Bay. Filter it With Billions and Billions of Oysters (US News & World Report, December 24, 1997 – January 5, 1998)

46. Use of Oyster Shell to Create Habitat for Juvenile Dungeness Crab in Washington Coastal Estuaries: Status and Prospects (Journal of Shellfish Research, 2000)
47. Washington State is the World's Oyster – and Manila Clam, Mussel and Geoduck, Too (Business Backgrounder, Fall 2009)

November 23, 2010

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

Re: WAC 173-26 Proposed Rule Amendment

Dear Ms. Bouta:

This letter is providing comments on Ecology's proposed amendment to WAC 173-26. I would like to state up front my unequivocal support for the comments on this rule amendment provided by the Pacific Coast Shellfish Growers Association and other shellfish growers, in particular, Taylor Shellfish.

While my full time job is managing communications and public policy for Taylor Shellfish, Diane Cooper has been Taylor's lead on this particular policy issue.

You may or may not be aware that I also have a shellfish farm of my own in Samish Bay where I primarily culture Manila clams. I also have a few geoduck planted on the farm and have thought about transitioning more portions of the farm from Manila's to geoduck.

As with terrestrial farming, shellfish farmers need that latitude to plant crops that provide the greatest rate of return. As it turns out, inexpensive cooked, frozen Manila clams from China have severely impacted the domestic market for Manila clams. As a consequence I am having trouble selling my clams and have been considering transitioning more of the farm to geoduck. The proposed rule will all but preclude me from accomplishing this as a small business. The cost and process involved in acquiring the proposed conditional use permit is a major impediment.

Relying on Diane and others more immersed in this particular issue, I had not until this weekend reviewed the minimum conditions proposed by Ecology that local governments would have to include the CUP. The 30+ acres of tidelands I own are about 2 miles from shore and out of view from shoreline homes. They were sold under the Bush Act and are by law expressly for the purpose of commercial shellfish culture. Yet here are a proposed set of regulations that will dictate amongst many things, how much area I can plant with seed, harvest, or exclude predators from at any one time. What kind of predator exclusion I can use and how many barges or vessels can be moored at my farm and for how long.

Chuckanut Shellfish Inc.
704 E. Hiawatha Blvd., Shelton, WA 98584
(360) 426-6178

I could not help while reading these details in the heart of Skagit Valley, ponder how the my terrestrial brethren growing berries would react to Ecology telling them if they could use the plastic tube protectors around blueberry plants or apple trees, how long they could leave them on, how much of their field they could plant or harvest, when and how many tractors they could have in the field and how long they could leave them there.

The tone of the rules and control being imposed by them is even more offensive in light of the Governor's two most recent Executive Orders. Geoduck farming is one of the brightest economic developments to present itself to rural Western Washington in years yet Ecology appears determined to stop it dead in its tracks. Hundreds of jobs have been created. I estimate over $4 million in annual payroll to those directly employed by it currently. These are new jobs in just the past 10+ years. Along with the jobs has been a tremendous boost to taxes and local business who supply the industry and its employees.

Geoduck are also in high demand for export markets which is an area the Governor is encouraging as well as President Obama. Yet another reason it is baffling why Ecology is so determined to restrict the growth of it.

These are comments I don't believe have been adequately represented by others and which struck me as I read the proposed rules this weekend.

Thanks for the opportunity to provide them.

Sincerely,

Bill Dewey
President

Chuckanut Shellfish Inc.
704 E. Hiawatha Blvd., Shelton, WA 98584
(360) 426-6178

Dear Ms. Bouta,
I would like to respond to the proposed rule changes as it will effect Grays Harbor shellfish growers if implemented. It is troubling that the new rules would eliminate important water quality protections for the shellfish growers and depart from Ecology's current policy. These two items have been the foundation for our continuing struggle to keep Grays Harbor safe and productive for shellfish as well as other fisheries. We have always thought of the Department of Ecology as our partner.

Over the last fifteen years the growers have joined forces with important local environmental groups to further the concept of clean water equals lasting jobs and that a clean environment is beneficial to a sustainable economy. These groups are Friends of Grays Harbor, Wildlife Forever, Surf Rider and independent citizens at large.
These groups using their own time, money and energy have succeeded in improving environmental conditions for the Stafford Creek Correctional Center; helped redesign the Links at Half Moon Bay to be more environmentally acceptable: challenged wetland degregation for a condo complex in Grayland; helped GH county develop a good Critical Area Ordinance; redesign of the Cohassett Beach shoreline development and many more issues too numerous to mention. Most of these saw considerable court expense. All these activities were in support of the long term survival of shellfish production, commercial fishing, sport fishing and the general welfare of our community.

Another troubling aspect of the new rules is the reopening of the Cosmopolis Pulp Mill. Over a long history when Weyerhaeuser ran the mill we had an ongoing problem with shellfish closures due to fecal contamination of the harbor. Each time we were closed a week or at times two weeks for the bay to clean up. The worst was in 1995 when we were closed five times that year. It was really hard on business. The new owners of the mill are scheduled to reopen this spring. They are proposing a expanded process that, in our estimation, will surely be more troublesome than Weyerhaeuser as "W" really tried to do the right thing by the growers. It is just a terrible process that is hard to control at its source. Old mill, antiquated process and new out of state ownership spells trouble. If you proceed with the new rules we will have lost our very argument for clean water and a clean environment.

For Grays Harbor it is " critical saltwater habitat" and is not a shoreline issue as we provide juvenile habitat for many species that are tied to the ocean such as dungeness crab, english sole, salmon and other related species. If we protect the shellfish beds we also protect these other important species.

Tomorrow Brady's Oysters will be pouring cement foundations for a new shellfish processing plant. This is a very expensive building designed under the Department of Health (shell fish division) rules and has but only one purpose and that is processing oysters. It is not a flexible design and without shellfish to process it is useless. That's what we are thinking about.

Each year Brady's Oysters has a clean water oyster eating event in September at our establishment. The theme is clean water and a healthy environment. We host the public and have a great time making our case for the future of a healthy environment. Citizens love it! Our future is really in your hands Treat us fairly.

Brady Engvall (shellfish grower -retired)
3714 Oyster Pl. E.
Aberdeen, WA. 98520

P.S. The Willapa - For the growers and residents of Willapa Bay shellfish and fair shoreline rules are the economy of the area. When all other types of employment go down on the Willapa there is always and has always been shellfish to depend on. That's the way it is today!

Hello Cedar,

I am submitting a public comment for your rulemaking on proposed changes to Shoreline Management Act. I want to talk specifically about changes that will affect my small business. I own and operate a shellfish aquaculture farm in Puget Sound. We started in 2003 cultivating geoduck clams in Thurston County as a Sole Proprietorship, reorganized in 2005 as an LLC and now cultivate shellfish on less than 5 acres in Puget Sound and Hood Canal. We have 2 full time and about 9 part-time employees.

Much has changed for us since we started nearly 8 years ago. I can tell you for a fact that if I were looking into starting that same Sole Proprietorship now, there is absolutely no way we could do it. The Federal Government, State of Washington, and some counties have effectively eliminated the possibility of a small operator to begin a new farm. The barriers to entry are simply too great. We have already jumped with both feet and are therefore obliged to continue as best as we are able. Regulators are responding to a vocal minority of shoreline property owners who have gentrified our rural waterways and shorelines.

I think the State of Washington has a choice to make. We are producing world-class shellfish here in Puget Sound. I do it without chemicals, hormones or feeds. This is the highest quality protein. The dollars we as a business spend in our community and on payroll are for the most part, new money coming in from outside Washington; the proceeds of an export and expanded domestic market. The commercial production of these species provide emergent habitat in the nearshore, mitigate the inputs of polluted and over-fertilized runoff in our watersheds, provide ecosystem services like denitrification, carbon sequestration. Commercial aquaculture, not wild fisheries, is going to expand and be a part of how we feed and support ourselves in the future. That expansion can either happen here or somewhere else. It's up to Washington. They can either foster, facilitate and support the sustainable and diversified growth of this industry or they can consolidate the industry into 1 or 2 large companies. These large companies, and small ones too, have and are frustrated to the point of going elsewhere to develop new projects while regulators in Washington State have done little except facilitate a grinding halt on new project and technology development for this industry in Puget Sound.

I want to comment specifically on the proposed changes to the SMA now.

- 1. My business is a water-dependent use of the shoreline. Our facility is land locked, but all of our culture activities are obviously water-dependent and that language needs to remain in the SMA. It is all we have in some cases when making the argument for our existence.
- 2. Sustainable shellfish cultivation has significant long term benefits to Washington's marine areas. The greatest threat – THE 500 LB GORILLA – to our functional estuaries is POLLUTED AND OVERFERTILIZED RUNOFF. The sustainable habitation of our watersheds is the only mechanism to the existence of this industry in the future. Without real progress in watershed development and waste/stormwater management, it is going to make all this discussion about the future of commercial shellfish aquaculture moot.
- 3. The proposed changes, by Ecology's estimates, will have a 13.9 times greater economic impact to my small business than to the one or two large companies. Let's apply some common sense here. I think we can agree that diversity is a healthy thing. The mandate of CUP or other changes,

without significant concessions for small business will effectively be the end of the "ma & pa" or small business like mine. We will be required to scale back to one or two part time employees, without benefits. How are we to innovate then? How are we to be the best stewards of our resources then? Healthy industries need diversity of size and opportunities for entry and growth.

- 4. The buffer analysis does not factor losses of area due to the presence of critical saltwater habitat. I support management and protections for critical species and habitats – that is good resource management. The approach here needs to evaluate a project holistically, allowing concessions for critical habitat to behave as buffers in farm plans.
- 5. CUP permits would be redundant for new farms. We currently need to seed Individual Section 10 permits and 401/404 authorizations from Ecology. This requires significant environmental review for siting. What is accomplished by requiring local governments to issue CUP permits except more bureaucracy?
- 6. A five year renewal period is unrealistic for geoduck aquaculture. For new farms, permitting and other processes may take 5 years – we don't know yet, we are still 3 years into ours. This species takes 6 years on average to reach market size. Lets be practical, please consider extending this to minimum 10 years. Our leases are minimum 12 year terms.
- 7. If CUP permits become a reality, PLEASE make this a process that can be incorporated or mimic existing state and federal applications.

Finally, I urge Ecology to consider emerging scientific evidence and specific, vetted conservation objectives before making subjective mandates on this industry. This industry is willing to work with regulators, we have demonstrated as much. Meet us halfway. I still don't understand how geoduck culture is so radically different from other species cultured that it requires all this special attention and process. I say this as a business that grows many species of shellfish. I hope we are still here 10 years from now; right now I wouldn't bet on it.

Thank you.

Sincerely,

Brian Allen, owner

Allen Shellfish LLC

Tumwater, WA

--
Brian Allen
V:(360) 280-7410 F:(360) 539-4644

Hello Cedar,

My name is Brian Sheldon and I would like to provide comment on the proposed amendments to the SMA WAC in regard to aquaculture. Can you please tell me where I can find a redline version of the current WAC

so I can see how the proposed changes alter current language. I've looked on the website, but can't seem to locate the actual markup draft.

I have looked over some of the draft language and in general find it offensive that the draft I did see clearly is intending to reduce aquaculture to an activity no better that upland development. The legislature recognized years ago that shellfish aquaculture is a beneficial use of the states waters, and the proposed amendments seem reduce this value to one similar to the many bulkheads and shoreline homes we see all over the country who are polluting and destroying our estuaries. Given DOEs weak stand in regard to protecting our shorelines I would think that DOE would embrace and encourage shellfish aquaculture for the simple reason that it will help hide the damage done to our shorelines by this weak state SMA policy. In our area on the North Beach Peninsula we are now seeing 1970's type shoreline development where homes are placed right into the salt marsh. When we inquire about this we are told that the applicant filled out all the forms and performed some irrelevant mitigation work. While the reason behind the HB 2220 directives were clearly focused on Geoduck cultivation, these proposed rules clearly apply to all shellfish aquaculture in the state. We have been farming shellfish in Willapa Bay for over 150 years and in that time have been the only long term significant environmental group. Well before agencies began creating a place for themselves in government, shellfish growers were battling to keep the Willapa clean. We took on every land developer and industry that threatened to destroy the bay. Part of this was because our families live here, and part of it was because as farms who rely on water quality we simple can't tolerate pollution in any form. Now I see legislation that goes well beyond the SARC recommendations, which included a great deal of NIMBY influence not backed up by any science. It's clear that personal interests of some DOE staff are reflected in this current draft of proposed changes. I don't mean to imply that DOE in general is not acting in an objective and science based decision making process, but it is clear that some individual staff at DOE have taken this opportunity to include their subjective and personal agendas into the proposed revision. This of course will leave us no choice but to assure a full review is completed of the change process because our industry didn't survive the last 150 years by allowing personal agendas to be allowed to influence rule making and it is clear that this has happened in many areas of this proposed rule revision.

I wanted to comment on the public meeting scheduled for this rule revision. For some reason DOE chose not to hold a hearing in Pacific County. The shellfish industry is the largest private employer in this county and we produce more oysters that anywhere else in Washington. We produce over 1/6 of the oysters in the United States and large amount of clams. It is unacceptable that given the relevance of shellfish aquaculture in our County that DOE chose not to hold a hearing in Pacific County and I formally protest this action on DOE's part.

Please get me a link to the actual rule markup so I can compare new language to what is proposed for deletion. I ask that this input be included into the record of this issue, and will submit more detailed comments when you get me the redline version of the rule revision.

Thank you,

Brian Sheldon
Nahcotta, WA

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 ~~agricultural~~ 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
PO Box 1039
Ocean Park, WA 98640

Ms. Cedar Bouta

November 22, 2010
Shorelines Program
Department of Ecology
Lacey, WA

Re: Update to Shoreline Guidelines on Geoduck Aquaculture

Dear Cedar:

Thank you for the opportunity to comment on the draft version of the Proposed Changes to Chapter 173-26, Geoduck Aquaculture. To begin with, we would like to stress the importance of these rules. Nearshore geoduck aquaculture is a growing practice along Puget Sound shorelines. While most growers are responsible and seek to limit damaging practices, there is potential, particularly when cumulative impacts are accessed, for this activity to cause great harm. Best management practices are not well defined and local jurisdictions are inconsistent in their oversight of this activity. Site preparation activities, such as grading of shorelines with heavy equipment, along with intrusive harvest practices have the potential to do great harm. This is why the state legislature adopted and the Governor signed HB 2220 in 2007, which directs Ecology to update the Shoreline Guidelines in this area.

Having said all that, we believe that, with reasonable restrictions in place, nearshore geoduck aquaculture can be conducted in a manner that protects the ecosystem and helps the local economy. While this rule contains many compromises, we feel that you have struck that balance to a large extent. There are a number of areas of the draft rule, however, which require revision. We have a number of suggested changes that we offer in this letter to help strengthen and clarify the language.

Shoreline Use: Aquaculture [173-26-241(3)(b)]

To begin with, we wish to indicate our strong support for 173-26-241(3)(b)(ii)(B) which requires that growers obtain a Shorelines Conditional Use Permit and, further, identifies best management practices which, where "reasonable and appropriate," should be utilized on-site. The list of management practices contains activities which were discussed, in many cases, at length in the SARC stakeholder process. While environmental interests had argued for more prescriptive standards (e.g.-defined minimum buffer widths), this subsection gives some direction to local governments when adopted CUP's to consider limiting potentially very damaging activities. It was the clear intent of the legislature that such standards be adopted (see HB 2220, section 5). While the draft language represents the minimum necessary to meet the requirements of the statute, it will signify an important step forward from our standpoint.

While the permit requirement does indicate the need for a baseline survey, which we believe to be essential to permit, it does not require specific, on-going monitoring. Unlike most shoreline development, aquaculture is an on-going activity, not a one-time event. On-going compliance monitoring, in particular, is critical from our standpoint. We urge you to require in (B)(II) on-going monitoring, at minimum, to occur during site preparation, harvest, and other activities which have the potential to cause great harm if permit conditions are not fully complied with.

We also support language regarding siting of operations in (3)(b)(ii)(A) which states that such operations should be sited where modification of the site, including rock removal and grading, is not necessary. As noted above this activity can be extremely damaging. This language combined with CUP BMP language will, hopefully, begin to curb more destructive practices of this sort.

Reservation of Ecologically Significant Areas [173-26-201(d)(i) and 173-26-211(5)(c)]

It is well understood and agreed to that planners, in developing a Shoreline Master Program, must withdraw ecologically significant shoreline areas before designating these areas for other uses. Our first concern with the proposed change in subsection 201(d)(i) is that you seem to indicate that ecologically significant shorelines are limited to those with intact upland areas. Clearly this is not

the case. There are many examples of ecologically significant areas (e.g.-herring spawning beds) that are adjacent to degraded upland areas. Having said that we do not deny that natural shorelines with intact uplands are scarce and very significant---we do think that they deserve to be reserved for ecological purposes. We simply ask that, in addition to these areas, you indicate that areas with "critical ecological features" also be set aside. This approach will help create consistency with rule requirements on Critical Areas [173-26-221(2)]. Currently the relationship between these sections is not well defined.

Secondly, the proposed language in 201(d)(i) which states "and tidelands not reserved for water-dependent use or development" suggests that planners would reserve areas for development prior to reserving areas for ecological use. We urge that you delete this language.

Similarly, we urge you to make sure, in Section 173-26-211(5)(c)(ii)(G) and (H), the proper sequence that planners should undertake in reserving these areas. In reserving Aquatic Areas for various uses, it should be clear that planners undertake reservation of ecologically significant areas under (G) before reserving lands for other uses. Subsection (H) jumbles together preferred uses, including ecological factors, making the section even more confusing.

Critical Saltwater Habitats [173-26-221(2)(c)(iii)]

We support clarification that "critical saltwater habitat" should include only "naturally occurring beds of native shellfish species." The intent of the underlying language, to protect native species and ecologically significant areas, is clear. Without this change, it seems possible that this section might be interpreted as being in conflict with requirements discussed above. Regardless of how you proceed on this issue, we again urge you to do everything possible to maintain consistency between this section and sections which require removal of lands for ecological reasons and the need to impose new restrictions on shellfish aquaculture to avoid ecological harm.

Thank you for the opportunity to comment on the proposed draft rule. As always, we stand ready to work with the Department and other stakeholders as we move forward on this issue.

Yours Sincerely,

Bruce Wishart
Policy Director
People for Puget Sound

November 22, 2010

Washington State Department of Ecology
Shorelands and Environmental Assistance Program
ATTN: Cedar Buota
PO Box 47600
Olympia, WA 98504-7600

Re: Ecology Geoduck Rulemaking for Geoduck Aquaculture—WAC 173-26-201

Dear Ms. Bouta:

I am writing on behalf of the citizens that our organizations represent in Puget Sound. We support Ecology staff in their initial aquaculture rulemaking which we feel is essential to protect Puget Sound native species and the quality of life for Washington citizens. It has been a very frustrating experience that Washington has not required the aquaculture industry to be regulated like all other industries operating in this state in order to avoid environmental impacts.

Since 2006, citizens have documented that geoduck operations are adversely impacting our native species, their habitat and the rights of citizens to enjoy the natural character of the shoreline. The intention of HB2220 was to provide science and protections for our shorelines. To our dismay, the geoduck rulemaking does not accomplish this goal and needs to be strengthened to protect our most pristine environments. The proposed geoduck rulemaking must increase protections for our ecologically intact areas, prevent our native species from being eliminated and not allow our shorelines to become industrial production zones in residential neighborhoods. While industry has led decision makers to believe that our concerns are merely about the view of PVC tubes, the truth is that it is about the destruction of the natural character of the shoreline and the native species we treasure.

Geoduck operations have not been scientifically evaluated and SeaGrant states that their preliminary scientific findings are too incomplete to incorporate. An Environmental Impact Statement should be required and the results should be an integral part of the permit process.

We feel that it is important that the state require a Conditional Use Permit that is also coordinated with a local Shoreline Development permit. The following issues should be addressed in the final geoduck rulemaking:

1. Shoreline Designations
The same shoreline designations used for the uplands, should be used in the nearshore aquatic environment. It obviously is in the shellfish industry's best interest to have one aquatic environment that does not protect the very nearshore habitat and native species we are trying to protect and preserve.

Other than native oysters on bottom in natural densities, no aquaculture should be allowed in the natural designation. Certainly, there should be an "Aquatic Natural" designation to protect our most pristine environments. Ecologically intact water areas need to be identified and given protection. In addition, Critical Salmon Habitat and Forage Fish Spawning/Habitat are priority areas that require additional consideration. Adequate buffers are essential to protect these areas from any commercial uses or development.

2. Aquaculture is considered development in counties and changing it to a "use" weakens the protections. Certainly the shellfish industry would like to see this changed and Ecology should not be using this severely flawed and outdated Attorney General Opinion to accomplish this. WAC 173-26-211.

3. "Language added that requires local governments to notify property owners within 300 feet of a proposed project is not adequate." In the rural environments where these geoduck developments are expanding, it is a common occurrence that only one or two homes even know there is an application. This requirement should be expanded to 1,000 feet.

4. "Language added to insure local governments are aware that, based on case law, growers have a right to harvest once geoduck is planted and that evening and odd hour harvesting must be allowed." Once again, citizens have not been heard when now our residential neighborhoods will see industrial operations move in disrupting our sleep at any time industry feels like working. This constitutes a take of property as buyers are not willing to live in an area with this kind of activity increasing. Residents have documented the problems of in the middle of the night noise, lights and smell with the counties they reside in. Since industry is not willing to change their hours of operation, they should not be allowed to expand their operations adjacent to residents.

5. "Language added to allow local governments to non-contiguous parcels under one permit, as long as those parcels are reasonably close geographically. We request this language be deleted as it encourages the expansion of geoduck aquaculture in the nearshore and is not consistent with protecting varied shoreline environments.

6. "Language that encourages local governments to allow submittal of federal or state permit applications in partial fulfillment of local permit application requirements." Citizens should not be denied the right to local protections of their shorelines and this language should be deleted.

7. "Language added to ensure local governments consider the conflicts that may arise from siting incompatible upland uses near existing commercial geoduck aquaculture operations." This language is not specific enough to understand what an "incompatible upland use would be. Unless this refers to industrial uses on the uplands, it would be considered a take of personal property for the benefit of one industry. We object to this language unless it is clarified and does not restrict the rights of property owners to use their properties in a responsible manner.

For your convenience, the following Youtube is being released that shows continuous video footage of the condition of Totten Inlet shorelines where geoduck feedlots have taken over the once pristine nearshore.

Puget Sound Aquaculture Industrialization-A Plea for Environmental Healing
http://www.youtube.com/watch?v=inHHrwSe34M

For many years citizens have pointed out the numerous adverse impacts of geoduck aquaculture in the intertidal. It seems almost pointless to re-iterate all of those impacts again when Ecology staff files are full of citizen comment letters. The lack of individual citizen response to geoduck rulemaking is not because of lack of interest from citizens, but the fact that most citizens feel it is a waste of time because they have not received support from state agencies up to this point.

We will look forward to seeing aquaculture rulemaking that incorporates the comments that we have provided.

Regards,

Curt Puddicombe

On behalf of:
Coalition to Protect Puget Sound Habitat
Case Inlet Shoreline Association
Protect Our Shoreline
APHETI

seablues@msn.com
206-730-0288

DAVID STEEL ROCK POINT OYSTER COMPANY 16 OCTOBER 2010

Why has the DOE strayed from the SARC recommendations and making changes that were not recommended or supported in the minority by SARC? Many of these changes will have significant negative impact upon small business and aquaculture in Puget Sound<comma> while not significantly improving the water quality or shoreline condition. You should review the SARC recommendations and remain consistent with those recommendations.

The small business economic impact statement analysis is flawed. The analysis focuses on geoduck aquaculture only<comma> yet there are many other changes under other sections which would impact small business. The analysis looked at the cost of an application<comma> but did not add in other associated costs for applying for and obtaining a â€œconditional use permitâ€• .

Rock Point Oyster Company<comma> Inc. does not grow geoduck<comma> but many of your proposed rule changes will affect our business as well. Ecology should more closely align with the intent of HB2220 and only make recommended changes provided by SARC.

Ecology proposes that subsistence<comma> commercial<comma> and recreational shellfish beds would no longer be classified as â€œcritical saltwater habitatsâ€• . The shellfish raised on Rock Point property require the highest quality of water protection and the critical saltwater habitat designation helps to ensure that water quality is maintained. Our shellfish beds are a major contributor to the Tarboo Bay estuary habitat<comma> critical for the Tarboo salmon recovery and support of many wildlife species<comma> therefore requiring a high level of protection. Shellfish farming has been a part of this habitat for 75 years and the farm is a part of the North Dabob/Tarboo Bay habitat. Farming shellfish in this area maintains a healthy shellfish population<comma> which contributes to the biodiversity and water quality of the estuary. Please restore the language designating subsistence<comma> commercial and recreational shellfish beds as â€œcritical saltwater habitatsâ€• .

Ecology proposed removing language that identifies aquaculture as an activity of â€œstatewide interestâ€• . Our farm has received important protection in the past since aquaculture has been considered important as a statewide economic base with a long history of environmental champions. Removing this language will diminish the importance of protecting my farm and make permitting more difficult in the future. Please leave the original language<comma> which acknowledges aquaculture as being of â€œstatewide interestâ€• and recognizes the benefits of aquaculture in protecting the resources and ecology of the shoreline.

Ecology proposes to add language that aquaculture is preferred when it is water dependent. Aquaculture is always dependent on the use of tidelands<comma> bays<comma> and open water areas and adding some qualification as you have will force me to prove that dependence when I go through routine

permitting processes. The WAC should clearly reflect that aquaculture is a preferred water dependent use.

Ecology proposes to expand areas where aquaculture should not be permitted and lowers the priority of aquaculture behind other uses like navigation and other water-dependent uses. This will restrict the activity on my farm and may cause me to eliminate some functions that have been standard practice for 75 years. All it will take is for a boater traveling out of their navigational comfort zone to file some claim that my shellfish racks impeded their journey across our farm. All intertidal areas are subject to navigational restrictions and must be considered when broad brushed changes are made to the rules. Please leave the original language<comma> which gives aquaculture equal standing with other water dependent uses.

futurewise
Building communities
Protecting the land

November 19, 2010

Washington State Department of Ecology
Shorelands and Environmental Assistance Program
ATTN: Cedar Buota
PO Box 47600
Olympia, WA 98504-7600

Sent by email to: ShorelineRule@ecy.wa.gov

Re: Ecology SMP Rulemaking for Geoduck Aquaculture – Aug. 2010 Draft

Dear Ms. Buota:

Thank you for the opportunity to comment on the draft shoreline master program rule changes for geoduck aquaculture and other changes. Our mission at Futurewise is to promote healthy communities and cities while protecting working farms, working forests, and shorelines for this and future generations. Futurewise has members across Washington State, including in many jurisdictions with aquaculture facilities.

We have reviewed the current draft of the proposed rules and find that many of the issues we raised in our previous letter were addressed. We thank Ecology for their hard work in dealing with these issues on this often controversial subject. We appreciate and support Ecology's efforts to research this important issue and to adopt rules to guide its appropriate management under the Shoreline Management Act. After reviewing the draft rule, we only have a few recommendations, which we provide in this letter.

Ecologically Intact Water Areas Need to be Identified and Given Protective Environment Designations

Background – Over the last two years, we have seen several proposed shoreline master programs (SMPs) that treat aquaculture as a monolithic use, and allow it in all aquatic areas at all intensities. Yet the Shoreline Management Act (SMA) and Shoreline Master Program (SMP) Guidelines intend that highly ecologically intact areas be protected from most development. Using a single Aquatic environment fails to adequately distinguish aquatic areas with important natural resources that need a high level of protection. RCW 90.58.020, provides that the policy of the Shoreline Management Act "contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the State and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto." One of the primary means of doing this for upland areas under the SMP guidelines is to establish Natural environments for the shoreline areas that are most intact, with the best ecologically functions, and are the most fragile. Protective environments, and the associated use limits provide the first step in mitigation sequencing to protect remaining ecological functions of intact areas. If aquaculture (and other in-water uses) is to be properly governed to avoid ecological impacts and use conflicts, the first step is to protect those highly functioning aquatic areas. This means that the aquatic equivalent of a Natural environment is needed.

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While an SMP might use several environments for upland areas, the SMP Guidelines recommend applying the Aquatic environment to all water areas in shoreline jurisdiction. An unintended consequence of this is that while the upland shoreland areas have multiple possible environments to distinguish between different conditions, the actual shoreline water areas that are the focus of protection in the SMA are characterized by only one environment. This is the case even though water areas can range from being heavily altered, to being ecologically intact, to being very valuable for native vegetation and protected species, just like upland areas. Furthermore, using only one environment means that all water areas are treated the same, with the same use limits and development standards. This runs counter to the principle of protecting ecological functions described in the SMA Policy. It is also contrary to the approach used for upland areas which identifies the most naturally intact and valuable areas, and protects them. This deficiency is most obvious in the case of aquaculture uses, since they are one of the few uses that make widespread use of in-water areas, with the potential to make fundamental changes to local conditions, and over the long term can make cumulative changes to regional conditions.

Recommendations – We are pleased to see two types of changes that partially address the above issue: requiring better inventory information for aquatic areas, and more reference to reserving ecologically intact aquatic areas. We had previously recommended establishing an equivalent to the Natural environment for in-water areas. The SMP Guidelines provide that Natural environments (and their equivalent) are supposed to be limited to very low intensity uses, and are supposed to limit structural changes in the environment.[1] This should also apply to the aquatic equivalent of the Natural environment. We continue to recommend that an aquatic version of Natural be included in the guidelines, for example "Natural Aquatic."

We had also proposed alternatives to using separate environments. One alternative would be that the adjacent upland environment could be used to serve as a proxy for a more detailed assessment and designation for water areas. Then the upland environments use limits and development standards would be used in the adjacent Aquatic environment. Another alternative "proxy" approach would be to extend upland environments, such as the natural and conservancy environments into the shallow water areas, and have a separate environment for deep water areas.

Any of these approaches would improve on the strategy of using a single Aquatic environment that has no distinctions in the character of water areas. If aquaculture (and geoduck aquadculture, and also other in-water uses) is to be properly governed to avoid ecological impacts and use conflicts, the first step is to protect those highly functioning aquatic areas.

While the draft rules don't include a new environment, they do emphasize protecting intact areas. We generally support the proposed changes to the guidelines, and have the following additional specific recommended changes to the inventory list and Aquatic environment management policies to more clearly state the need for better protection of intact areas.

The section that describes how to establish preferred uses (on p. 30) discusses reserving ecologically intact areas, though the sentence structure makes the statement ambiguous. We recommend the following edits for clarification (using red double underline format – single underline is rulemaker edits) and to provide examples of how such a reservation might actually be done.

> (d)(i): Reserve appropriate aquatic and upland areas for protecting and restoring ecological functions to control pollution and prevent damage to the natural environment and public health. In reserving areas, local governments should consider protecting areas that are ecologically intact (including areas ranging from the uplands through the aquatic zone of the

[1] WAC 173-26-211(5)(a).

> area), aquatic areas that adjoin permanently protected or intact uplands, tidelands in public ownership, and tidelands not reserved for water-dependent use or development. Reserving areas for protection can take the form of using Natural environments (or their equivalent), protecting other designated areas (such as an aquatic reserve or underwater park) using the SMP use limits and regulations, or similar methods. Local governments should ensure that these areas are reserved consistent with constitutional limits.

The Aquatic environment management policies section (on p. 48) added policy issues for reserving aquatic areas for ecological functions, which we strongly support. We recommend emphasizing highly functioning areas, and again recommend describing how you might actually protect such areas.

> (G) Local governments should reserve highly functioning aquatic areas for protecting and restoring ecological functions. Local governments should consider using a separate environment with associated use limits and standards; or establishing use limits and standards to protect existing identified areas such as aquatic reserves, underwater parks, etc.; and similar methods.

An important element in protecting aquatic areas is the adjacent upland vegetation, which also provides its own ecological functions. The SMP Guidelines are focused on protecting ecological functions, which are highly dependent on low levels of disturbance, and intact vegetation. The proposed rules make changes to the list of inventory items (on pp. 34-35), including making a commendable attempt to identify remaining ecologically intact areas. These instances are found in several places, but they do so in an indirect manner. We recommend that it be made clearer, because it is not possible to protect ecological functions without clearly identifying where your greatest blocks of intact areas are found. We have found this problem in some city inventories – particularly those that designate all or most developed areas with the same environment despite differences in their remaining ecological functions. If those areas with remaining ecological functions are not identified at the beginning of the update process, the use limits and regulations will fall short in protecting them. As a common, yet more extreme failure, we have seen proposed SMPs that designate areas as Shoreline Residential when they have dense intact vegetation completely filling shoreline jurisdiction, because they have heavy residential development just outside shoreline jurisdiction. These Shoreline Residential areas typically also have a buffer system allowing substantial clearing of that intact vegetation. We recommend the following edits to the land use inventory item, because the absence of development is also part of the land use pattern:

> (i) Shoreline and adjacent land use patterns and transportation and utility facilities, including the extent of existing structures, impervious surfaces, vegetation and shoreline modifications in shoreline jurisdiction. Special attention should be paid to identification of ecologically intact blocks of upland vegetation, developed areas with largely intact riparian vegetation, water-oriented uses and related navigation, transportation and utility facilities.

Inventory item (ii) discusses habitat areas. It adequately covers upland habitat, but only references aquatic *vegetation*. An important fact is that aquatic habitat is not only based on vegetation. For example, forage fish spawning areas. We recommend that "native aquatic vegetation" be changed to "native aquatic habitat."

Inventory item (xi) describes information for siting in-water uses (on p. 35). The latest draft rules dropped the bathymetry item that was in the previous draft, but the inventory should include some information about marine bottom morphology. We recommend adding back in "general tidal, sub-tidal, and deepwater locations," which would be a more easily obtained information item than bathymetry. Basic bottom morphology information is essential in establishing appropriate boating facility, aquaculture, and marine industry/commercial facility locations.

Lastly, two issues related to definitions have been largely fixed, and we support the changes. First, the draft rules clarify a very problematic issue in that commercial shellfish beds, which are a distinct human use that converts natural systems into artificial systems, is currently included in the definition of Critical Saltwater Habitat. The changes (on p. 57) clarify that it is naturally occurring native shellfish beds that are considered habitat. We strongly support this change. Second, a definition for Aquaculture has been added. We do recommend a clarification related to the difference between aquaculture and general fishing, which has come up in multiple SMPs we have reviewed (in strikeout and double underline format):

> (6) "Aquaculture" means the culture or farming of fish, shellfish, or other aquatic plants and animals. Aquaculture does not include the harvest of wild geoduck or other wild shellfish associated with the state managed wildstock ~~geoduck~~ shellfish fishery nor other fishing or harvesting activity of wild fishery stocks.

Ecologically Intact Water Areas Need Protective Use Limits and Development Standards

Background – Once ecologically intact water areas are identified, use limits and regulations are needed to protect their ecological functions as the Shoreline Management Act and the Shoreline Master Program Guidelines require.[2] Intense levels of development need to be limited in the Aquatic equivalent of Natural because of the low-intensity focus of the SMP Guidelines for ecologically intact areas. Most forms of aquaculture that modify the natural environment are almost entirely in-water uses that can cover broad areas. Often these uses are not regulated to effectively manage their impacts and they need to be properly managed to protect the functions and values of shoreline areas.

Many of the current forms of aquaculture are very intensive, and the trend is to become more intensive by practices such as developing multi-species operations using different tidal depths, or layering for different elevations in the water column, or the development of more intensive mechanization for harvest and planting. Aquaculture (including geoduck aquaculture) includes many methods and practices that significantly alter the ecological functions and natural character of the shoreline, such as:

- Significant sediment disturbance that disrupts the natural ecological processes - such as grading or alteration of the tidal bed, dredging, pressure blasting of the substrate, deep liquefaction of the tidal bed (with 'stingers' for geoduck harvest, etc.).
- Activities that alter the natural character of the site - such as clearing of animals and natural materials from the site, gravel enhancement of the tidal bed, and the introduction of feed or chemicals.
- The use of machinery that greatly intensifies the use of the site - such as using heavy equipment, or harvesting using motor driven vehicles or machines.
- The use of equipment or gear that significantly obstructs or eliminates native sea life from the tidal bed; and equipment that alters the natural character of the shoreline - such as gear that makes a solid covering on the tidal bed (films, plywood, etc.), nets and bags full of organisms blanketing the tidal bed, equipment elevated well above the tidal bed, floating equipment with above-water structural elements, walkways, or platforms.

Such practices should not be allowed in the Aquatic equivalent of the Natural environment, and adjacent to the Natural environment which are the most intact and ecologically functioning areas. Intense aquaculture operations ***replace rather than protect*** the natural "land and its vegetation and wildlife, and the waters of the State and their aquatic life" (as stated in the SMA policy) with

[2] WAC 173-26-186(8).

artificial, human-driven productions systems. The use regulations need to be protective of the most sensitive water environments. This is why the SMP Guidelines state that "[a]quaculture should not be permitted in areas where it would result in a net loss of ecological functions, adversely impact eelgrass and macroalgae, or significantly conflict with navigation and other water-dependent uses."[3] Such a loss of ecological functions will be inherent in converting natural functioning areas into intense aquaculture development.

Recommendations – The draft rules include items for jurisdictions to consider in their permit review of geoduck aquaculture that include many of the bulleted items we listed above. We support considering these issues in the permitting stage; however, we continue to recommend that aquaculture operations that modify the natural in-water environment (including geoduck aquaculture) not be allowed in the most ecologically sensitive areas. This is consistent with the Shoreline Master Program Guidelines which indicate that: "These systems require that only very low intensity uses be allowed in order to maintain the ecological functions and ecosystem-wide processes",[4] and that the preferred location for aquaculture and other resource industries is the Conservancy environment.[5] To most succinctly address this concern, we recommend the following change to the third paragraph on page 72, although please note that the extensive rulemaker edits are accepted so our edits can be easily displayed. This change would also link aquaculture to the inventory requirement to identify and reserve ecologically intact aquatic areas.

Continuing to allow intensive aquaculture uses to convert these highly functioning areas to intensive human food production systems will inherently result in a loss of ecological function. How a project can replace these lost habitat areas would seem to be much more difficult than the replacement of upland habitat. Even addressing the smaller losses of converting lower functioning areas may be very difficult. To ensure that these losses are specifically considered, we recommend that the third paragraph also address this problem. Unless the regulations address such losses at the project level, they must somehow be accounted for in the Cumulative Impact Analysis (CIA).

> Aquaculture should not be permitted in areas where it would convert highly functioning aquatic areas (such as reserved aquatic areas, aquatic areas adjacent to Natural environments, and similar protected areas or highly functioning areas) to aquaculture use, adversely impact critical areas or critical resource areas, suspend contaminated sediments that exceed state sediment standards, or 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, 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), including the replacement of lost habitat areas.

Some have argued that aquaculture must be allowed everywhere because it is a "preferred use." We agree that aquaculture, as a water-dependent use, is a preferred uses. But even water dependent uses, taking the policy of the Shoreline Management Act in RCW 90.58.020 as whole, must be sited, constructed and operated so as to protect shoreline resources.

Marine Critical Areas Need to be Avoided and Adequate Buffers Established for Them.

SMPs typically require that upland development protect adjacent critical areas - usually using buffers. However, sometimes jurisdictions do not require adequate setbacks or buffers from in-water critical saltwater habitat such as eel grass, and fish spawning areas. The draft rules include specific

[3] WAC 173-26-241(2).
[4] WAC 173-26-211(5)(a)(i).
[5] WAC 173-26-211(5)(b)(i); (ii).

requirements that jurisdictions consider the use of buffers (on p. 75) for critical saltwater habitat and other sensitive features. We support this standard, though we do believe additional guidance is needed to fully understand why it is needed. Our recommendations are shown below in strikeout and double underline:

- Requiring ~~buffers between~~ geoduck operations ~~and~~ to avoid sensitive habitat features like critical saltwater habitats, and providing buffers for such features. Buffers should protect habitat features even though the species may be seasonally absent from the habitat, should account for sediment mobilization during geoduck harvest, should consider proximity of human activity, and should account for factors such as the length of kelp fronds drifting into the aquaculture area.

Conversion to Geoduck Aquaculture From Other Aquaculture

The section describing when a Conditional Use Permit (CUP; on p. 73) is required allows the conversion from some other form of aquaculture without CUP. We recommend that this provision be deleted. Geoduck aquaculture has dramatically different impacts from other aquaculture, due to factors ranging from nursery facilities, to in-ground gear installation, to harvest methods. Just because other aquaculture was there previously should not be the basis for avoiding a CUP.

Miscellaneous Issues

In WAC 173-26-130 the draft rules change the appeal procedures for GMA jurisdictions to reference the GMA procedures, which we support. But they also added language about Ecology's statement of final action. Such a statement is more appropriately placed in the review section of WAC 173-26-120 rather than the appeal section.

In WAC 173-26-150 the draft rules added the allowance for predesignation of shorelines outside city limits for non-GMA cities, which is we support. However, the Guidelines should require both GMA and non-GMA cities to coordinate with counties on pre-designation, as required under the GMA. Shorelines need consistent planning, including cases where they may change jurisdictions. In our review of SMPs, we have found that there is almost no coordination going on - even for UGAs.

WAC 173-26-221(2)(a)(ii), on page 53, WAC 173-26-221(2)(b)(ii) on page 54, and WAC 173-26-221(2)(c) on pages 54 and 55 should not delete the requirement that shoreline master program protections for critical areas have to be at least equal to those provided by critical areas regulations. The Shoreline Management Act, in RCW 90.58.090(4), still contains this requirement and the Shoreline Master Program Guidelines should contain it as well to be consistent with the Act.

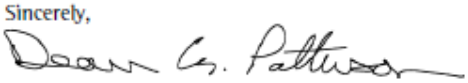
The Shoreline Management Act, in RCW 90.58.065, exempts certain agricultural activities for management under the new shoreline master programs. RCW 36.70A.480(3)(d) retains critical areas jurisdiction over these activities. We recommend that this retention of authority be recognized by WAC 173-26-221(2)(a)(ii), on page 53. We recommend the following revisions to the second paragraph of WAC 173-26-221(2)(a)(ii) (with our additions double underlined; single underline is rule maker edits).

> Pursuant to RCW 36.70A.480(3), upon department approval of a shoreline master program, critical areas within shorelines of the state are protected under chapter 90.58 RCW and are not subject to the procedural and substantive requirements of RCW 36.70A, except as provided in RCW 36.70A.480(6), and except for agricultural activities as defined in RCW 90.58.065 which continue to be managed by critical areas regulations adopted under RCW 36.7A.

Summary

The proposed rule changes go far toward providing guidance on both geoduck and standard aquaculture. However, our recommended changes will provide additional specificity to cover the remaining gaps in the rules and address other important aspects of the rules update. We thank Ecology for their work on this important subject, and for considering our comments. We strongly support the proposed changes, with our recommendations included. If you require additional information please contact me at dean@futurewise.org or 509-823-5481.

Sincerely,



Dean Patterson
Shoreline Planner
Futurewise

To: Department of Ecology – Cedar Bouta
Subject: Comment Shoreline Master Plan revisions

From: Don Gillies
6931 US Hwy. 101
South Bend, WA 98586

To Cedar Bouta,

It is with a sad heart I read the language changes proposed in the Shoreline Master Plan. Not only are the proposed changes a departure from the legislative intent of SB2200 but they are out of step with SARC recommendations. Ignoring the reasons shellfish are singled out and treated differently, with respect to Shoreline Master Plans, is a mistake in judgement and a slap in the face to knowledgeable people wanting to protect the shorelines of Washington State. Of all agencies, the Department of Ecology should know why all shellfish are protected with recognition as critical saltwater habitat, priority water dependent use designation and recognized to be of statewide significance. It is with great disappointment I see protective language related to these three items removed and/or altered in the draft rule changes. Please do the right thing and make only those changes recommended by the SARC committee. As a member of the shellfish industry I tried to follow the long drawn out SARC committee process and although I didn't agree with everything put forth I felt I could live with what came out of that process.

I fear if DOE's proposed language changes become the basis for local government's shoreline master plans it will be the demise of our family's shellfish farm. Shellfish (natural, commercial, recreational and subsistence) depend on good water quality for survival. Without the current language protecting shellfish, county shoreline master plans will systematically erode those things most important to our 150-year-old family business; water quality and conflicting use. Our family business has plans to diversify into a value added oyster product (a significant investment to say the least) and will need a modest water dependent use facility. During the development of Shoreline Master Plans, local jurisdictions could use DOE's draft rules to effectively limit reduce or deny shellfish industry expansions like this. The delays, the cost and the time it takes to fight through the permitting process now are hard enough. With DOE's proposed rule changes any shellfish business would reconsider expansion. A shellfish business is exactly the type of business you want on and near the water, we take care of it, we protect it and we watch over it. When it comes to protecting the waters along Washington's coastline shellfish growers are your allies. If your goal is to protect the waters of Washington State you are moving in the wrong direction. DOE is making rules that are detrimental to our waters while opening the door for county planning commissions to cave into development pressures. The benefits shellfish provide to the marine environment will help ecology protect the salt waters of Washington State and improve the health of estuaries in which they grow. Do you want water quality in the state to mimic Hood Canal, Bainbridge Island, Tacoma, Olympia, and Seattle? Will you sacrifice the shellfish of Washington State for another shoreline development with 150 homes, a restaurant displacing necessary support facilities, a kayaker that has to paddle around a workboat? The legislate recognizes the importance of shellfish to the state of Washington. It is special and should be treated that way.

I am aware that geoduck farming has become a hot button in Puget Sound. As an emerging industry with some issues to work out I would expect Shoreline Master Plans to address them. SB 2200 set up the SARC committee to work out these issues and it is my opinion that DOE should incorporate SARC recommendations to address these geoduck specific issues.

Let me just add that your small business economic impact statement is a joke. How can DOE call such an inadequate document official?

Don Gillies
Stony Point Oyster Co. L.L.C.
6931 US Hwy. 101
South Bend, WA 98586
360-875-9964

Hi Cedar,

These comments are based on a quick review of Chapter 173-26 WAC for out of date citations.

WAC 173-26-201 (3)(c)(ii) lists GMA critical areas incorrectly. Please change "fish and wildlife conservation areas" to "fish and wildlife habitat conservation areas". This term is correctly cited in WAC 173-26-221(2)(a).

WAC 173-26-221 cites to the old GMA WAC, which has been updated in early 2010.
Citations to WAC 365-190-080 are in the following sections, which should be changed as noted to the correct citations.

WAC 173-26-221(2)(a) & (c) cite to WAC 365-190-080, which has been replaced by WAC 365-190-080 through -130.
WAC 173-26-221(2)(c) (ii) cites to WAC 365-190-080(4), but should cite to WAC 365-190-120 for geological hazard areas, specifically.

Thanks!

Doug Peters
Senior Planner
Growth Management Services
Local Government and Infrastructure Division
WA Department of Commerce
360-725-3046
doug.peters@commerce.wa.gov
My current work schedule is Mon-Thu: 7 am - 6 pm.
Our GMA website is located at: www.commerce.wa.gov/growth

Under section (3)(b)(ii)(B)(II) there is provision for notice of the new or expanded geoduck aquaculture operation to those living within 300 feet of the aquaculture boundary prior to the issuance of a conditional use permit (CUP). I would urge the inclusion of language requiring notice be given to tribes with Usual and Accustomed fishing rights within the area of the proposed action. This is already required through the Shellfish Implementation Plan of the US v WA shellfish case<comma> whereby landowners wishing to establish aquaculture on their tidelands must obtain an Aquatic Farm Registration from WDFW<comma> or if only harvesting shellfish for commercial sale (without planting shellfish or other aquaculture activities)<comma> then they must obtain an Emerging Commercial Fishing permit<comma> also from WDFW. Both of these permits require that tribes be given at least 45 day notice of the proposed action prior to harvest/augmentation. To be consistent<comma> this new aquaculture section under shorelines master planning should make note of this requirement. For more information contact Rich Childers at WDFW or Michael Grossman with the State AG office. Thank you<comma> Doug Morrill

Cedar Bouta
Washington Department of Ecology

Re: Intertidal Geoduck Aquiculture.

I understand the Department of Ecology is re-visiting geoduck aquaculture in the intertidal zone. I believe the damage to the upper beach from this process is undeniable, given the scale and concentration of the work and the fact that so many PVC tubes and so much netting is involved. I also believe that management of supposed pests, which includes virtually all naturally occurring species, through the use of manual removal, herbicides, pesticides and shotguns, is damaging. Although work supposedly does not directly impact forage fish spawning, I believe that the proximity and placement of all these activities is undeniably impacting spawning.

Furthermore, I believe that the scale of methods of geoduck aquiculture are going to impact ecological processes in the intertidal zone, even when activities are not directly in the intertidal zone. Thurston County is correct that geoduck farming on area beaches is Shoreline Development. Any alteration of structure that impacts ecological function is development.

Taylor Shellfish has put forth a number of studies claiming that water quality, the marine food chain, water circulation and native species will not be effected by expanded shellfish cultivation. Studies also claim that increased shellfish production will remove a large percentage of the nitrogen introduced into the environment by humans. Nitrogen is suggested to be a major water quality problem by over-fertilizing algal blooms that die off and create anoxic conditions.

Nitrogen and sunlight are also the essential building blocks of life. Nitrogen is utilized by phytoplankton (primary production) which is then consumed by zooplankton and so on up the food web. This happens best in shallow water with persistent patterns of circulation, the basic estuary. In South Puget Sound we've altered three out of four estuaries (don't forget the streams). Often the entire estuary is fed through a long pipe and dissolved oxygen and other basic parameters take a dive. The problem as often as not is changes in structure to tide flats, salt march and the upper beach rather than the introduction of too many nutrients.

Shellfish don't eat nitrogen, they eat phytoplankton that has consumed nitrogen. Because phytoplankton reproduce rapidly, there is only a
temporary lag in abundance. Taylor's studies thoroughly evaluate the potential effects on phytoplankton abundance spatially, seasonally and diurnally. The limiting factor in typical system is primary production. The rationale is that by assessing the impact on primary production we can predict impacts on the entire food web.

I don't believe that's entirely true. Shellfish including mussels and geoducks that are grown commercially don't just eat phytoplankton, they eat zooplankton, from tiny protozoa that mimic phytoplankton to larger fish larvae, tiny insect-like babies that will become larger fish, crabs, barnacles and so on. Nearly all fish consume zooplankton during their larval phase and some fish continue to do so their entire lives. A single herring may consume thousands of copepods in a singled day. Larger Zooplankton are important food for forage fish and growing fish larvae. They link primary producers with larger, higher trophic level animals. Because zooplankton reproduction tends to lag phytoplankton reproduction, the reduction in nitrogen contained in phytoplankton is probably more than offset by a reduction in herbivores such as copepods. Copepods, probably the most plentiful creature on earth, are the natural control of phytoplankton.; they maintain balance in the system. The only benefit of large scale shellfish cultivation, if one can consider is a benefit, is that phytoplankton, herbivores and secondary consumers, i.e. everything, is reduced.

Shellfish cultivation on area beaches without doubt impedes a host of important ecological processes including forage fish spawning. Virtually all native species, from ghost shrimp to macro-algae to diving ducks, are considered pests. This modus operandi runs antithetical to Ecosystem Based Management, the direction we are and must be heading.

Taylor suggests that water quality in Totten Inlet has been impacted by, among other things, humans over-harvesting shellfish. Since we haven't been assessing dissolved oxygen for very long, this theory is entirely conjecture. Concerning the most basic, physical parameters, Totten Inlet like much of Puget Sound and Hood Canal is a fjord-like sound. It's perfectly natural for the water column to be stratified and anoxic below a certain depth.

Taylor could make a better case that by over-harvesting resources and altering the structure of Puget Sound through dredging, filling and destroying almost all our estuaries, we damaged the ecosystem and shellfish growers are only filling an empty niche. But this would be a very disjointed weak argument as well. The sustainability of an ecosystem comprised of three kinds of bivalves is doubtful at best. Compacting and biological sameness create an environment where diseases can easily spread. Outside influences such as acidification pose additional risks. And if any species crashes there may be nothing to replace it except bacteria and perhaps jellyfish.

We don't know the economic potential of all the fisheries that could be developed through restoration and enhancement of Puget Sound's natural ecosystems. It seems likely that rockfish, flatfish, salmon, herring, smelt and shellfish in combination would be marvelously productive. Sadly, estuarine and nearshore structure continues to suffer the woes of development. But this is no reason to allow shellfish cultivation to completely ruin what's left. "Geoduck farm" sounds so benevolent. But this isn't anything like farming. If anything we're talking about feed lots.

I have been a licensed captain in the past, operating charter, research and education vessels. I currently own a boat and am intending to offer educational cruises. I'd like to offer these cruises in South Puget Sound but I'm concerned that there will be little for customers to see. I can show them photos of scoters and other ducks and explain to them that twenty years ago this is what we would have seen. I believe that shellfish growers have shot what few ducks were remaining in their efforts toward pest management. Although they claim to not currently be doing this, the reason as explained in their latest pest management documents is that they are not permitted to. One can only assume that if the prohibition were lifted they would return to shooting ducks. Virtually all naturally occurring species are considered pests.

My family owned the oldest vineyard in the State on Stretch island. Their house and my aunt's house next door overlooked Puget Sound. Not that long ago we could net herring and smelt with a rake, filling a small boat in short time. My father caught a 46 pound lingcod virtually off his front porch. Not these days. The beach was beautiful and enjoyed by all. I don't know if it is now covered with PVC and netting. If I find out that it is, my heart will sink. It must be very sad for people who live on the waterfront to have to witness this assault.

Sincerely,

Harry Branch
239 Cushing St NW
Olympia WA 98502
(206) 943-8508
hwbranch@aol.com

Cedar Bouta
Washington Department of Ecology

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Sincerely,

Harry Branch
239 Cushing St NW
Olympia WA 98502
(206) 943-8508
hwbranch@aol.com

November 22, 2010

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

Re: WAC 173-18,20,22,26 and 27 Proposed Rule Amendment

Dear Ms. Bouta:

I am writing this letter in response to the rulemaking amendments that WDOE is proposing that pertains to shellfish aquaculture. Although interested and effected parties completed a thorough process (SARC) to evaluate and make recommendations concerning geoduck culture as requested by the legislature, the Department of Ecology seems to be using the opportunity to further an anti-aquaculture agenda. There seems to very little "Sound Science" basis for any of the proposed changes. Has Ecology looked at the nitrogen and other nutrient loadings that plague Puget Sound and the beneficial effects that bivalve aquaculture contribute in bioremediation for that problem? Has Ecology measured the carbon sequestration contribution of the industry or even considered that? The shellfish farmers of Washington have been fighting for clean waters in this state since the first pulp mills were being constructed in the 1920's. But, more recently science has shown that bivalve's do an incredible job in cleaning the water of nitrogen and phosphorus themselves. The three dimensional habitat that bivalves and their culture gear create rivals eel grass beds in both species diversity and richness. They are providing not only food for foraging juvenile salmonids and other species, but also refuge from prey species. Has this habitat contribution been considered and the effect of the rule changes weighed?

The changes to the Aquaculture Policy and Critical Saltwater Habitat language are by far the most obvious examples that Ecology is trying to write new laws for aquaculture. These changes were not even present in the previous draft for the rule change. The only group that this rule change could fit under in the proposal is "Housekeeping Amendments" which does not begin to describe a dramatic policy change such as this. This is not a rule change. The Aquaculture Policy and the Critical Saltwater Habitat language were crafted and written after a lengthy and exhaustive public process involving a complete spectrum of the public, scientists, and policy makers. To change that policy on the final draft of a "rule" change is deceitful and inappropriate especially under the guise of a housekeeping amendment. The science also backs the original language which should remain unchanged.

The rule changes that are proposed for geoduck aquaculture are almost all covered in some way by the guidance from the Army Corp of Engineers permit in consultation with US Fish and Wildlife Service and National Marine Fish Service. This is placing the Department of Ecology and the counties in a position of evaluating ecological interactions of aquaculture with the marine environment that is already being done by agencies that have far more expertise on the subject. This will cause a great amount of wasteful duplication of all agencies time and resources at a time when budgets and staffing are already straining from reduced revenues. Requiring farmers to adhere to ACOE permits will achieve the same results without creating another two levels of bureaucracy. Coincidently, they are already required to adhere to those permits.

The Small Business Economic Impact Statement proves that there is a disproportionate impact on small businesses. Most of the geoduck growers are small businesses according to the same study. I would argue that a 5 year CUP is not the type of permit that would encourage and foster a long term business model that farmers require to build a successful farm. Consider the amount of time that 30 different property sites would require to fulfill CUP permitting requirements just to get and maintain the farm sites. This would require full time staffing on a small farm. The proposal to allow combining multiple sites on one permit could find the farm at a standstill if the permit process did not proceed in a timely and predictable manner, which never happens, or the permit for the combined sites could be delayed indefinitely for an issue with just one of the parcels. Either of these scenarios would be devastating to a small business starting up that is trying to maintain cash flow and its trained staff. The study clearly states that conditions 1,3,4,5,6,7,10,11,12,13,14,and 15 have "non-quantifiable" costs associated with them. That is

completely unacceptable and inaccurate. If the Department of Ecology has compelling reasons and expectations to impose these 15 conditions on all geoduck operations, then they should be able to define the limitations they are imposing and quantify their economic impacts for both large and small growers.

This rule change does not reflect the recommendations of the SARC committee nor is it using the best available science. This rule change should at least be delayed until the ongoing science of the SHB 2220 is completed and can be applied to these rule changes.

Sincerely,
John Lentz

The proposed rule change placing shellfish aquaculture in the same category of all other uses is not congruent with either Washington State History or sound ecological science. The shellfish industry can only operate where the ecosystem conditions favor clean water, shellfish further clean the water and in fact viable commercial shellfish farms are found in the majority of healthy salmon ecosystems.

Your proposed changes make it appear that shellfish farming is contradictory to endangered species ecosystems and that is not true. Jefferson County Washington has designated their entire shoreline as critical habitat to endangered species. Jefferson County is also home to the two largest shellfish hatcheries on the West Coast and is a critical source of shellfish seed to the entire Pacific Rim Shellfish business. Given the impact of ocean acidification, oysters are no longer spawning in the wild and only hatchery seed is sustaining this industry.

Your proposed rule change as it impacts Jefferson County could make all shellfish farming in conflict with critical habitat ! Do you really intend that as the result of your proposed rule change ?

I urge you to retain the initial language that recognized the special nature of shellfish aquaculture, it is both a critical and key component of critical habitat and a use of the habitat.

Sincerely,

John P. Lacy

Hello Jeffree,

I see that DOE is proposing some changes to the guidelines?

If you recall, during our update process, we noted that Chapter 173‐20 WAC does not list Chinese Gardens Lagoon as a lake within shoreline jurisdiction. I believe it was DOE's intent to include it in the next update?

Thanks!

Judy Surber
Senior Planner/Planning Manager

City of Port Townsend
250 Madison Street, Suite 3
Port Townsend, WA 98368
360.379.5084
jsurber@cityofpt.us

November 23, 2010

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

Re: WAC 173-26 Proposed Rule Amendment

Dear Ms. Bouta:

The Jamestown S'Klallam Tribe appreciates the opportunity to provide comments on the proposed final draft Shoreline Guidelines WAC 173-26. In 2007, Department of Ecology was directed by the legislature to add language to the Shoreline Master Program Guidelines which incorporated recommendations of the Shellfish Aquaculture Regulatory Committee (SARC) to address geoduck aquaculture. We are very concerned that DOE proposed final draft contradicts many of the SARC recommendations. Many stakeholders and government representatives participated in this process for 2 years, including the Tribes, and it's very disturbing to know that time and resources appear to have been wasted on this public forum. The Jamestown Tribe will need to consider it's future participation in these forums and may find it necessary to interact at a government to government level.

Ecology's redraft of the Aquaculture Policy guidance and the redefinition of Critical Saltwater Habitats is a complete departure from current policies that protect aquaculture and shellfish habitat. Of specific concern is the proposed redefinition of critical salt water habitat to exclude subsistence, commercial and recreational shellfish beds and replace it with "naturally occurring beds of native shellfish species." The Jamestown Tribe considers its' subsistence and commercial shellfish beds as critical salt water habitat and disagrees with DOE's removal of language that designates "All public and private tidelands or bedlands suitable for shellfish harvest shall be classified as critical areas…." Many public tidelands are routinely enhanced and not entirely "naturally occurring" with clam seed of a "non-native" species from hatcheries. Would this practice remove an area as a critical salt water habitat? The proposed changes appear to be decreasing protection of shellfish habitat.

Furthermore, as a result of the shellfish settlement with the State of Washington and growers, the Jamestown S'Klallam Tribe has been planning several aquaculture projects as encouraged by the agreement. We are now presented with a final draft of the rule that impedes the types of aquaculture activity previously agreed to by the State of Washington. If the proposed changes are implemented, the outcome would deviate so far from our expectations, we would need to schedule a government to government consultation as soon as practical. Please contact me if you have any questions or concerns.

Sincerely,

Kelly Toy
Shellfish Manager
Jamestown S'Klallam Tribe
1033 Old Blyn Highway
Sequim, WA 98368
(360) 681-4641

cc: Scott Chitwood, Jamestown S'Klallam Tribe Natural Resource Director
Ron Allen, Jamestown S'Klallam Tribe Chairman
Randy Hatch, PNPTC Senior Shellfish Biologist
Randy Harder, PNPTC Executive Director
Tamara Gage, Port Gamble S'Klallam Tribe Shellfish Manager
Tony Forsman, NWIFC

Hi Karen and Ted.

I'm sending this to the two of you first. I'm still making a list of who else it should be sent to.

I am concerned about the armoring and predator nets that are associated with intensive geoduck farming in the tidelands.

The fish and wildlife that depend on these areas for survival are public resources and the geoduck farmers shouldn't be allowed to harm or kill the public resources for private gain.

Below is a prime example of one of the things I have been so concerned about w/ respect to netting/armoring stretches of beach.

Why I got so involved in the practices of "shellfish industry" to begin with is because one of the mating/breeding pair of eagles near me (you've seen their nest) got stuck a few summers ago. It, thankfully, got free when I ran out to save it. I have been afraid ever since that there isn't going to be someone around to help one that gets stuck...in every situation.

First, there's a photo of "my" stuck bird from a few years ago. I sent it on to the industry lobbyist, too. That's what prompted Mr. Gibbons to visit the same beach right afterward to try and discuss my concerns w/ him.

But look at what is in front of where they live and breed! An even more sad situation is watching the parents trying to teach their young how to "hunt" on and around the nets. I have dozens of photos showing that very thing as well.

This particular tide was out several hundred feet and was on its way in. It would have drowned the eagle within minutes had it not gotten free.

The Dept. of Ecology is in the process of evaluating their policies with respect to the geoduck/shellfish industry. They are also charged with protecting the shoreline and the near shore environment/ecosystems. To me, this issue cannot be ignored. It is ALL the publics' resources that are at issue. That means the waterfront property owners, the recreational users, those not even aware of such industry on "their" public shorelines, and the industry's interest to expand.

I have also asked the WDFW what their policy is w/ respect to protecting the habitat in front of and around breeding/foraging areas. It seems clear to me, this particular nest (in this location) is to be protected from such things.

If you want to see their response to me about the policies with respect to active eagle nests and what the regulations are for protecting them, please let me know. I have sent the email exchanges and web links from WDFW to Gordon White (DOE).

These next three photos are really distressing. This happened about a week ago on the shoreline of Totten Inlet. The woman who took them, because she stumbled upon them while walking with her grandson, was shaken by what she and he saw.

IMG_0742.JPG

Kim L. Merriman

360-866-6077

Kim@KimMerrimanArt.com
www.KimMerrimanArt.com

"WALK GENTLY ON THE EARTH, AS IF THE FUTURE DEPENDS ON IT. IT DOES!"

SIERRA CLUB
FOUNDED 1892

Cascade Chapter
180 Nickerson St, Ste 202
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www.cascade.sierraclub.org

November 22, 2010

Washington State Department of Ecology
Shorelands and Environmental Assistance Program
Attn: Ms. Cedar Bouta
P.O. Box 47600
Lacey, Wa 98504-7600

Re: Proposed Changes to Chapter 173-26, Shoreline Management Act
Geoduck Rulemaking

The Sierra Club appreciates the amount of work Ecology staff has done to provide initial aquaculture rulemaking. There is no doubt that the trend toward industrial shellfish aquaculture requires rulemaking to protect our Washington shoreline habitat and native species. Since there has never been a state regulatory framework for aquaculture that provides environmental protections, it is important that a permit is required with adequate conditions. Please accept our comments on the proposed Changes to Chapter 173-26, Shoreline Management Act.

We are pleased to see the following language changes that increase shoreline protection:

1. Page 34: Description of species is broadened beyond "priority species."
2. Page 36: "Large" is dropped from woody debris definition. Wood debris of all sizes is vital to these systems.
3. Page 30: Language added to provide for more ecologically intact shorelines areas from the water through the upland area.

On the other hand, we find that the language added for aquaculture needs to be strengthened to be consistent with increased shoreline protections and the intent of HB2220.

While decision makers have gained a great deal of knowledge regarding the environmental and social impacts of geoduck operations since 2007 when HB2220 passed, a complete scientific analysis has not been conducted to assess the impacts to the nearshore. The preliminary SeaGrant science is only looking at three issues which are a fraction of the impacts that have been observed. In fact, there has been no attempt to assess the environmental impacts of the total operation from clearing the nearshore to harvesting. An Environmental Impact Statement should be required that scientifically

examines the entire geoduck aquaculture operation and that information should be used as a basis for permit conditions.

The proposed changes to Chapter 173-26, Shoreline Management Act allows counties to site geoduck aquaculture as if it was a given fact that industrial geoduck aquaculture should be expanded in our shorelines. If the same type of protections were required for industrial aquaculture that are being required for upland development, geoduck aquaculture would never been approved in the first place. Developers cannot just create "innovative" ways to build more residential houses or commercial buildings without scrutiny and compliance with land use, building codes and standards. Industrial aquaculture that directly impacts the nearshore should be held to the same measure.

The industrial practices that are now being used by some growers like oyster grow bags and extensive netting over tidelands should be examined and addressed in the permits.

Addendum To 2003 Proposed Shoreline Master Program Guidelines Rule Amendment Supplemental Final Environmental Impact Statement
http://www.ecy.wa.gov/pubs/1006017.pdf

It is clear from reading this Final Environmental Impact Statement that Ecology has predicated their geoduck rulemaking on the notion that standards can be established over time as geoduck aquaculture expands. This flawed approach does not take into account that the shellfish industry is picking off the most pristine habitat rich sites that are limited and cannot be replaced. It also does not acknowledge that once these sites are approved, they are grandfathered and are "forever" sites. Industry has already argued at the SARC meetings that once a site is approved, new regulations do not apply to them.

Best Management Practices did not work in the past and will only work in the future if the standard practices are not destructive. While Shellfish Industry Best Management Practices may be workable for the other types of aquaculture, they will not stop the destructive practices that are an integral part of intertidal geoduck aquaculture. So which geoduck aquaculture practice do you improve? Do you only let industry clear some of the natural debris and vegetation, do you only let them eliminate a certain percentage of the organisms essential for salmon, do you allow them to just alter these priority habitats to a certain degree and what percentage of birds, natural shellfish, sand dollars, moon snails, crabs do you let them eliminate? How much toxic/leaching PVC marine debris do you allow in Puget Sound? If you are enforcing "no net loss," the answer would be no to all of the above.

Geoduck feedlots are the one industrial activity in the nearshore that directly "disturbs" more ecological functions than any normal upland activity that is regulated. While the following statement may apply to historical types of aquaculture (oysters, clams), it certainly does not apply to "innovative" geoduck aquaculture: "Most negative environmental impacts associated with aquaculture stem from poor planning, inappropriate

site selection and management procedures, as well a lack of attention to environmental protections (Lucas & Southgate, 2000)"(Page 5-EIS). The methods used are well planned and allowed, their site selection is generally the best sandy/gravel sites that are forage fish or designated critical salmon habitat, their procedures alter the entire site and native species populations and decision makers have allowed Best Management Practices to override environmental protections.

We also disagree with the following statement on Page 5 of the EIS that states:

"There are a handful of areas of uncertainty, including:"

- Potential effects on eelgrass, forage fish habitat and essential fish habitat;
- Possible impacts to benthic invertebrates;
- Potential effects on water quality;
- Cumulative impacts, potential for expansion, and carrying capacity; and
- Resolution of conflicting shoreline uses, including aesthetic concerns and marine debris.

This list of impacts does not begin to acknowledge the numerous impacts to the substrate, native habitat, native species or shoreline processes. To simplify the adverse impacts of geoduck aquaculture puts our native species at risk and impedes the recovery of Puget Sound.

Specific Objections to Proposed WAC

1. Ecologically Intact Water Areas Should Be Identified and Given Protective Environmental Designations

A single Aquatic environment will not protect the important natural resources that require a high level of protection. RCW 90.58.020, provides that the policy of the Shoreline Management Act "contemplates protecting against adverse impacts to the public health, the land and its vegetation and wildlife, and the waters of the State and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto."

Separate environments in the aquatic environments should relate to the upland designations. At a minimum, an aquatic equivalent of a Natural environment should be an integral part of these guidelines and be afforded the greatest protection from commercial uses. The SMP guidelines state that Natural environments (and their equivalent) are supposed to be limited to very low intensity. Geoduck operations, oysters in grow bags and clams with netting do not fit this definition and should not be allowed in this environment. Aquaculture practices are becoming more intensive and many of the current practices significantly alter the ecological functions and natural character of the shoreline.

Buffers have not been mentioned but should be an integral component when aquaculture is allowed. Critical Salmon Habitat and Forage Fish Habitat are priority habitats and buffers are critical to protect these areas.

2. The term "uses" replaces "development" to make the paragraph consistent throughout and to ensure the language applies to aquaculture in all cases per Attorney General Opinion 2007 No. 1. WAC 173-26-211

This Attorney General Opinion was based on limited industry data, has not incorporated any new information or science findings, is not consistent with recovery efforts and should not be used for future decisions. Aquaculture is already considered development in several counties that are trying to protect their shoreline areas from adverse impacts as required by the Shoreline Management Act. To change this paragraph merely accommodates shellfish industry demands to ease regulations.

3. New sections added to Aquatic Designation regarding reserve areas for protecting and restoring ecological functions. Language added to clarify that local government should ensure adequate shoreline space for projected water-dependent uses such as aquaculture. WAC 173-26-211

Unless only those aquaculture operations that do not alter the ecological functions are allowed, this section is in conflict with its own language. The intensive uses and high densities of aquaculture species not normally in the nearshore do alter the ecological functions, not restore them. This section should be clarified as to what constitutes acceptable aquaculture.

WAC 173-26-241: Aquaculture use provisions revised

4. Language added that allow local governments to non-contiguous parcels under one permit, as long as those parcels are reasonably close geographically.

This language assumes that all sites are the same and encourages leasing nearshore for expansion. If protection of the nearshore is an objective, this should not be encouraged.

5. Language that encourages local governments to allow submittal of federal or state permit applications in partial fulfillment of local permit application requirements.

Protection of the nearshore and restoration efforts will be impeded if local governments are not responsible for rigorous standards for industrial uses of the nearshore in their respective area.

HB2220—Initiated for Science and Protection of the Environment

Citizens requested Rep Lantz to sponsor a bill for two purposes: To initiate intertidal geoduck research to quantify impacts and to require regulation that would limit the expansion of intertidal geoduck feedlots until it was proven that this activity was

consistent with the environmental protections required by the Shoreline Management Act.

HB2220 Requirements
According to HB2220, Sec 5: "The department of ecology shall develop by rule, guidelines for the appropriate siting and operation of geoduck aquaculture operations to be included in any master program under this section."
According to HB2220, Sec 4: "The shellfish aquaculture regulatory committee is established to, consistent with this section, serve as an advisory body to the department of ecology on regulatory processes and approvals for all current and new shellfish aquaculture activities, and the activities conducted pursuant to RCW 90.58.060, as the activities relate to shellfish. The shellfish aquaculture regulatory committee is advisory in nature, and no vote or action of the committee may overrule existing statutes, regulations, or local ordinances."

According to HB2220, Sec 1: "The sea grant program at the University of Washington shall, consistent with this section, commission a series of scientific research studies that examines the possible effects, including the cumulative effects, of the current prevalent geoduck aquaculture techniques and practices on the natural environment in and around Puget Sound, including the Strait of Juan de Fuca."

Important Impacts of Geoduck Operations That Have Not Been Addressed

1. Marine Plastic Pollution
According to Section 4 (2) (i): The shellfish regulatory committee shall develop recommendations as to--- Methods for quantifying and reducing marine litter. These recommendations were not made according to this section.

2. Marine Chemical/Toxic Pollution
There is no plan to minimize environmental damage from the introduction of massive quantities of PVC plastics into our marine waters that have not been tested for their known chemical contaminants.

3. Fish Habitat and Prey Impacts
We have seen no provisions in the language to incorporate environmental protections needed to protect critical fish habitat and prey species from the known impacts to ESA listed species. The preliminary SeaGrant results presented at the June 2, 2010 SARC meeting demonstrated significant impacts to prey base of ESA listed salmon and eelgrass. According to Glenn Van Blaricom's June 2 SARC presentation, the most abundant category of tube worm population (ESA listed species prey) remained severely suppressed after 6 months and there has been no extended study to determine density or recovery time.

4. Native Species
We see no protections from any state agency for Puget Sound native species intertidal invertebrate life such as sand dollars, sea stars, moon snails, ghost shrimp, mud shrimp, barnacles, cockles, native blue mussels and crabs. No protections were discussed for vertebrate animals such as perch, flatfish, sculpin, shorebirds and waterfowl. According to the new industry terrestrial based "Pest Management Strategic Plan for Bivalves in Oregon and Washington," these animals that are treasured by citizens and are an integral part of the food web will be removed/destroyed or harassed. Since at the present time the aquaculture industry is exempt from regulations that protect these species, each acre of geoduck farming allows the removal/destruction of these species. The wholesale elimination of our native species is not consistent with the intent of the Shoreline Management Act or the Public Trust Doctrine.

There are no protections for other essential marine vegetation from geoduck operations. The following marine vegetation that industry has categorized as "weeds" in the shellfish industry Pest Management document are not adequately protected: Algae, Japanese eelgrass (fish habitat per WDF&W) and Native eelgrass.

For more information on the elimination of our native species by the shellfish industry, the following link has been provided for your convenience:

http://washington.sierraclub.org/tatoosh/Aquaculture/OR-WAbivalvePMSP.pdf

5. Water Quality Certification
According to our last request, Ecology has not conducted or published results of water quality tests during and after geoduck harvesting. We still do not have any information on water quality certification for geoduck aquaculture. Improving water quality is one of the most discussed Puget Sound goals and it is imperative that the siltation from these operations meet EPA water quality standards. Independent water quality testing results should be made available so informed comments and decisions can be made.

6. Siting
Ecology does not have adequate data to determine the impact of geoduck aquaculture on the nearshore. To our knowledge there is no analysis of existing geoduck aquaculture sites in relation to an inventory of sand/gravel sites in Puget Sound or the requested location or number of sand/gravel expansion sites by industry. Industry on numerous occasions stated there are only a limited number of suitable sand/gravel sites that will accommodate geoduck aquaculture substrate requirements. Ecology should be protecting these limited sand/gravel sites which are located beneath coastal feeder bluffs that are priority habitats for ESA listed species spawning habitats. The adverse environmental impact of allowing these limited priority habitats to be altered by geoduck aquaculture is contrary to Puget Sound and salmon recovery plans

It was stated by Ecology staff in the June 2 SARC meeting that permit conditions for geoduck aquaculture are analogous to gravel mining or deep water dredging. We do agree that geoduck aquaculture should be categorized as an industrial extraction operation that does not belong in residential areas, near designated critical salmon habitat, forage fish areas or areas with marine vegetation/eelgrass.

The following information should be reviewed by decision makers to insure a balanced perspective as they develop regulations to protect our nearshore from industrial aquaculture impacts:

Sierra Club Website
http://washington.sierraclub.org/tatoosh/Aquaculture/index.asp

The following YouTubes were provided to Sierra Club by concerned South Sound Sierra Club members:

YouTube—I Am The Puget Sound & Industrial Aquaculture
http://www.youtube.com/watch?v=crsiWqypsDE

YouTube—I Am The Puget Sound Pest—The Sequel
http://www.youtube.com/watch?v=nlh047aEG5w

While it is apparent that there is a great deal of pressure to legitimize geoduck operations as a new "fishery," Ecology's role should not be compromised. We support Ecology's efforts to adopt aquaculture rulemaking as long as the conditions protect our valuable natural resources. The use of a conditional use permit should be encouraged along with a shoreline development permit at the County level. Allowing an industrial activity like geoduck aquaculture to expand without clear regulations when the impacts have never been fully evaluated, puts native species that are already in decline at risk.

We would like to discuss the plans for moving the aquaculture rulemaking forward at your earliest convenience. If you have any questions, please do not hesitate to contact me.

Sincerely,
Laura Hendricks, Chair
Shorelines and Aquaculture Campaign
Sierra Club, Cascade Chapter
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November 3, 2010

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

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

Background on Section 221(2) Critical Areas

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

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

> **WAC 173-26-221(2)(a) Applicability.** Pursuant to the provisions of RCW 90.58.090(4) as amended by chapter 321, Laws of 2003 (ESHB 1933), **shoreline master programs must provide for management of critical areas designated as such pursuant to *[GMA]*** RCW 36.70A.170 (1)(d) and required to be protected pursuant to RCW 36.70A.060(2) that are located within the shorelines of the state…
> **The provisions of this section and subsection (3)** of this section, flood hazard reduction, **shall be applied to critical areas within the shorelines of the state.** RCW 36.70A.030 defines critical areas as:
> *""Critical areas" include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable waters; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas."*
> The provisions of WAC 365-190-080 *[GMA rules],* to the extent standards for certain types of critical areas are not provided by this section and subsection (3) of this section flood hazard reduction, and to the extent consistent with these guidelines are also applicable to and provide further definition of critical area categories and management policies.

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

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

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

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

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

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

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

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

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

Retain GMA Designation Criteria for "Critical Saltwater Habitats"

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

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

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

Suggested Changes

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

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

Commerce Suggested Amendments to WAC 173-26

WAC 173-26-020

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

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

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

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

WAC 173-26-221

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

(a) **Applicability.** Pursuant to the provisions of RCW 90.58.090(4) and 36.70A.480(3) as amended by chapter ((~~321~~)) 107, Laws of ((~~2003 (ESHB 1933)~~)) 2010 (EHB 1653), shoreline master programs must provide for management of critical areas designated as such pursuant to RCW 36.70A.170 (1)(d) ((~~and required to be protected pursuant to RCW 36.70A.060(2) that are~~)) located within the shorelines of the state with policies and regulations that:

(i) Are consistent with the specific provisions of this subsection (2) critical areas and subsection (3) of this section flood hazard reduction, and these guidelines; and

~~(ii)~~ Provide a level of protection to critical areas within the shoreline area that ((~~is at least equal to that provided by the local government's critical area regulations adopted pursuant to the Growth Management Act for comparable areas other than shorelines.~~

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

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

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

""Critical areas" include the following areas and ecosystems:

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

This section provides guidance on "fish and wildlife habitat conservation areas" under subsections addressing "critical saltwater habitat" and "critical freshwater habitat."

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

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

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

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

(i) Shoreline master programs shall adhere to the standards established in the following sections, unless it is demonstrated through scientific and technical information as provided in RCW 90.58.100(1) and as described in WAC 173-26-201 (2)(a) that an alternative approach provides better resource protection.

(ii) In addressing issues related to critical areas ~~and critical resource areas~~, use scientific and technical information, as described in WAC 173-26-201 (2)(a). The role of ecology in reviewing master program provisions for critical areas in shorelines of the state will be based on the Shoreline Management Act and these guidelines (~~and a comparison with requirements in currently adopted~~

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

(iii) In protecting and restoring critical areas ~~and critical resource areas~~ within shoreline jurisdiction, integrate the full spectrum of planning and regulatory measures, including the comprehensive plan, interlocal watershed plans, local development regulations, and state, tribal, and federal programs.

(iv) The planning objectives of shoreline management provisions for critical areas ~~and critical resource areas~~ shall be the protection of existing ecological functions and ecosystem-wide processes and restoration of degraded ecological functions and ecosystem-wide processes. The regulatory provisions for critical areas ~~and critical resource areas~~ shall protect existing ecological functions and ecosystem-wide processes.

(v) Promote human uses and values that are compatible with the other objectives of this section, such as public access and aesthetic values, provided ((they do not significantly adversely)) that impacts to ecological functions are first avoided, and any unavoidable impacts are mitigated.

(c) **Standards.** When preparing master program provisions for critical areas ~~and critical resource areas~~, local governments should implement the following standards and ((~~the provisions of WAC 365-190-080 and~~)) use scientific and technical information, as provided for in WAC 173-26-201 (2)(a).

(i) Wetlands.

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

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

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

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

(iii) **Critical saltwater habitats.**

(A) Applicability. Critical saltwater habitats include all kelp beds, eelgrass beds, spawning and holding areas for forage fish, such as herring, smelt and sandlance; subsistence, commercial and recreational shellfish beds, ~~subsistence, commercial and recreational shellfish beds naturally occurring beds of native shellfish species.~~ mudflats, intertidal habitats with vascular plants, and areas with which priority species have a primary association.

(iv) **Critical freshwater habitats.**

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

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

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

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

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

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

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

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

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

Commerce Suggested Minor Edits to WAC 173-22 and WAC 173-26
We suggest the following minor edits for clarity and consistency with other existing rules.

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

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

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

> (4) Optional shoreland areas.
>
> (i) Any county or city may determine that portion of a one-hundred-year-flood plain to be included in its master program as long as such portion includes, as a minimum, the floodway and the adjacent land extending landward two hundred feet therefrom.
>
> (ii) Any city or county may also include in its master program land necessary for buffers for critical areas, as defined in chapter 36.70A RCW, that occur within shorelines of the state, as authorized under RCW 90.58.030(2)(d).

WAC 173-26-191(1)(e)
In this section the guidelines quote Department of Commerce WAC 365-*195*-500. This rule was repealed and has been replaced by WAC 365-*196*-500, which was effective February 19, 2010. Commerce amended the language for clarity but the meaning has not changed. We suggest simply replacing the repealed language with the new language as follows.

> (e) **Consistency with comprehensive planning and other development regulations.** Shoreline management is most effective and efficient when accomplished within the context of comprehensive planning. For cities and counties planning under the Growth Management Act, chapter 36.70A RCW requires mutual and internal consistency between the comprehensive plan elements and implementing development regulations (including master programs). The requirement for consistency is amplified in WAC 365-~~195~~ 196-500:
>
> ~~*"Each comprehensive plan shall be an internally consistent document and all elements shall be consistent with the future land use map. This means that each part of the plan should be integrated with all other parts and that all should be capable of implementation together. Internal consistency involves at least two aspects:*~~
>
> ~~*(1) Ability of physical aspects of the plan to coexist on the available land.*~~
>
> ~~*(2) Ability of the plan to provide that adequate public facilities are available when the impacts of development occur (concurrency).*~~
>
> ~~*Each plan should provide mechanisms for ongoing review of its implementation and adjustment of its terms whenever internal conflicts become apparent."*~~

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

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

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

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

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

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

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

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

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

Suggested revisions match current Growth Management Act terminology.

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

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

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

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

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

WAC 173-26-211(5)(e)(iii) "Shoreline residential" environment designation criteria
Suggested revisions match current Growth Management Act terminology and planning concepts.

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

WAC 173-26-241(2)(b)(ii)
Suggested revision makes this internal reference consistent with others throughout the guidelines.

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

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

~~(i)~~ Local government should ensure proper management of upland uses to avoid degradation of water quality of existing shellfish areas.
~~ii) Additional provisions for commercial geoduck aquaculture.~~
~~(A)~~ (i) Siting considerations for commercial geoduck aquaculture.
Commercial geoduck aquaculture should be located where water quality meets department of health certification requirements, and sediments, topography, land and water access support geoduck aquaculture operations without modification of the site such as grading or rock removal.
~~(B)~~ (ii) Conditional use permit requirements for commercial geoduck aquaculture.
~~(I)~~ (A) Conditional use permits are required for any new commercial geoduck aquaculture in areas that have not been previously planted with geoduck, including the expansion of existing geoduck aquaculture planting area beyond that previously used for commercial geoduck aquaculture. In addition, a conditional use permit is required when changes to existing commercial geoduck aquaculture operations result in a new significant adverse impact.
(B) Where the applicant proposes to convert existing nongeoduck aquaculture to geoduck aquaculture, the requirement for a conditional use permit is at the discretion of local government, unless the area of planting is new or being expanded as described above.
(C) A single conditional use permit may be submitted for multiple sites within an inlet, bay or other defined feature, provided the sites are all under control of the same applicant and within the same shoreline permitting jurisdiction.
(D) Conditional use permits shall be effective for five years unless extended for one year pursuant to WAC 173-27-090(2). Any subsequent plantings beyond this time frame shall require a new conditional use permit.

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

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

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

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

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

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

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

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

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

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

~~(I) And, if not contained in the provided federal or state permit documents or comparable information.~~

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

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

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

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

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

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

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

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

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

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

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

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

materials directly on the intertidal sediments.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Leonard Bauer, AICP
Managing Director
Growth Management Services

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

Appendix A: GMA designation criteria and SMP guidelines

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

WAC 365-190-130 Fish and wildlife habitat conservation areas.[1]	**WAC 173-26-221(2)(c)**
(2) Fish and wildlife habitat conservation areas that must be considered for classification and designation include: (a) Areas where endangered, threatened, and sensitive species have a primary association; (c) Commercial and recreational shellfish areas; (d) Kelp and eelgrass beds; herring, smelt, and other forage fish spawning areas; (f) Waters of the state; (4) Sources and methods. (c) Shellfish areas. All public and private tidelands or bedlands suitable for shellfish harvest shall be classified as critical areas. Counties and cities should consider both commercial and recreational shellfish areas. Counties and cities should consider the Washington state department of health classification of commercial and recreational shellfish growing areas to determine the existing condition of these areas. Further consideration should be given to the vulnerability of these areas to contamination. Shellfish protection districts established pursuant to chapter 90.72 RCW shall be included in the classification of critical shellfish areas. (d) Kelp and eelgrass beds; herring, smelt and other forage fish spawning areas. Counties and cities must classify kelp and eelgrass beds, identified by the Washington state department of natural resources and the department of ecology. Though not an inclusive inventory, locations of kelp and eelgrass beds are compiled in the Washington coastal atlas published by the department of ecology. Herring, smelt and other forage fish spawning times and locations are outlined in WAC 220-110-240 through 220-110-271. (f) Waters of the state. (i) Waters of the state are defined in RCW 90.48.020 and include lakes, rivers, ponds, streams, inland waters, underground waters, salt waters, and all other surface waters and water courses in Washington.	**(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; mudflats, intertidal habitats with vascular plants, and areas with which priority species have a primary association. (B) **Principles.** All public and private tidelands or bedlands suitable for shellfish harvest shall be classified as critical areas. Local governments should consider both commercial and recreational shellfish areas. Local governments should review the Washington department of health classification of commercial and recreational shellfish growing areas to determine the existing condition of these areas. Further consideration should be given to the vulnerability of these areas to contamination or potential for recovery. Shellfish protection districts established pursuant to chapter 90.72 RCW shall be included in the classification of critical shellfish areas. Local governments shall classify kelp and eelgrass beds identified by the department of natural resources' aquatic resources division, the department, and affected Indian tribes as critical saltwater habitats. (iv) **Critical freshwater habitats** (A) **Applicability.** The following applies to master program provisions affecting critical freshwater habitats, including those portions of streams, rivers, wetlands, and lakes, their associated channel migration zones, and flood plains designated as such.

Note the only difference in the SMP "applicability" section for saltwater critical habitat areas is Ecology added "mudflats, and intertidal habitats with vascular plants." This was added in response to a comment on the guidelines during initial rule-making *(see Appendix B)*.

[1] Formerly codified as WC 365-190-080

Appendix B: Historical Background on Section 221(2)

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

220(2) Critical areas

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

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

220(2)

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

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

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

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

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

220(2)

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

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

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

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

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

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

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

Clallam County
Part Three. Aquatic and Wildlife Habitat Conservation Areas
27.12.310 Classification and Ddesignation.
(1) Classification. The following classifications shall be used in designating aquatic and wildlife habitat conservation areas:
(a) Aquatic Habitat Conservation Areas. Includes those streams, lakes, marine waters and their associated wetlands and floodplains defined as shorelines of the State in the Shoreline Management Act of 1971 and the Clallam County Shoreline Master Program, which are also categorized as "shorelands" under Chapter 90.58 RCW, Shoreline Management Act, as now or hereafter amended, and those streams, lakes and wetlands which meet the criteria for Type 1 – 5 waters as defined herein....

(2) Designation. All lands and shorelands classified as aquatic and wildlife habitat conservation areas are hereby designated as aquatic and wildlife habitat conservation areas. These areas shall be mapped whenever possible. These maps shall be advisory and used by the Administrator and/or review authority to provide guidance in determining applicability of the standards to a property. Sites which include aquatic and wildlife habitat conservation areas which are not mapped shall be subject to the provisions of this section and chapter. The Administrator shall provide maps in a critical areas resource map portfolio as guidance in identifying the presence of aquatic and wildlife habitat conservation areas. These maps may be based on the following information sources:
(a) Department of Wildlife Non-Game and Priority Habitat and Species Data Bases;
(b) Department of Wildlife Washington Rivers Information System Data Base;
(c) Washington State Department of Health Commercial and Recreational Shellfish Area Inventory;

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

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

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

4. Streams.
5. Saltwater Shorelines, and Lakes 20 Acres and Greater in Surface Area.
6. Lakes, ponds, streams, and rivers planted with game fish by a governmental or tribal entity.
7. State Department of Natural Resources natural area preserves and natural resource conservation areas.
8. Areas with which Federal or State endangered, threatened and sensitive species of fish and wildlife have a primary association. Those species known to be found in Mason County are listed in Table 1. Table 1. Species of Importance that may occur in Mason County
Species
Bull Trout
Puget Sound Chinook
Hood Canal Summer Chum

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

Jefferson County
18.22.200 Classification/Designation.
(3) Designation. The following are designated as Fish and Wildlife Habitat Conservation Areas (FWHCAs):
(a) Areas with which endangered, threatened, and sensitive species listed by the federal or state government have a primary association.
(i) Federally designated and threatened species ...
(ii) State endangered, threatened, and sensitive species ...
(d) Commercial and recreational shellfish areas, including designated Shellfish Habitat Conservation Areas (note: shellfish aquaculture activities within all public and private tidelands and bed lands suitable for shellfish harvest are allowed uses; such activities include but are not limited to bed marking, preparation, planting, cultivation, and harvest).

Island County
17.02.050.C. Fish and Wildlife Habitat Conservation Areas.
1. Designation. The following are designated as Fish and Wildlife Habitat Conservation Areas:
a) Areas with which endangered, threatened, and sensitive species listed by the federal or state government have a primary association.
b) Streams.
c) Commercial and recreational shellfish beds.
d) Kelp and eelgrass beds.
e) Herring and smelt spawning areas.
f) State natural area preserves.
g) State natural resource conservation areas

Pacific County
Section 6. Shellfish, Kelp, Eelgrass, Herring and Smelt Spawning Areas Regulations.
A. Purpose. The purpose of this section is to ensure the protection of shellfish, kelp, eelgrass, herring, and smelt spawning areas by regulating incompatible upland land uses and development, and by controlling associated no-point pollution impacts.
B. Identification. Shellfish, kelp, eelgrass, herring, and smelt spawning critical areas are those public and private saltwater tidelands or beds that are devoted to the process of growing, farming, or cultivating shellfish, including commercial clam and oyster grounds, oyster and mussel raft areas,

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

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

Skagit County
14.24.500 Fish and Wildlife Habitat Conservation Area Designations.
(2) Habitat Conservation Areas are designated by definition in SCC 14.04 and are referenced as follows:
(a) An area with which anadromous fish, endangered, threatened or sensitive species have a primaryassociation and/or their habitat such as those designated and mapped by the Washington State Department of Fish and Wildlife, Priority Habitats and Species Program.
(b) A water of the State as defined under WAC 222-16-030.
(c) Any public or private tidelands available for shellfish harvest, kelp or eelgrass beds, herring or smelt spawning areas such as those designated in the Priority Habitats and Species Map of Skagit County. For commercial and recreational shellfish areas, this includes but may not be limited to those areas identified in the Lower Skagit River Basin Water Quality Study (November 1993), the Padilla Bay/Bay View Watershed Nonpoint Action Plan (May 1995) and the Samish Bay Watershed Nonpoint Action Plan and Final Closure Response Strategy (December1995).
(d) A Critical Biological Area as designated and mapped by the Department of Ecology Coastal Zone Atlas dated June 1978 and/or the maps.
(e) Designated species and habitats of local importance pursuant to SCC 14.24.500.
(f) Naturally occurring ponds under 20 acres and their submerged aquatic beds that provide fish or wildlife habitat.
(g) Lakes, ponds, streams, and rivers planted with game fish by a government or Tribal entity;
(h) Areas with which anadromous fish species have a primary association; and
(i) State Natural Area Preserves and Natural Resource Conservation Areas.

Ms. Cedar Bouta and Ecology staff,

Ecology's proposed changes to the Shoreline Master Program are very concerning in the complete disregard of the importance of Aquaculture to our state. Our state has something like no other state in the country has and that is Puget Sound, our Coastal Shorelines and Bays. One of the things that makes our Shorelines so important to our state is that our waters (at least in some areas) are still clean enough to produce healthy and nutritious farmed shellfish. In fact Washington produces more farmed shellfish than any other state. We need to protect and preserve this asset for all the people of our state. Aquaculture has an overall benefit to the water quality by the filtering abilities of the shellfish which helps offset the increasing amounts of nitrogen flowing into the Sound and Bays from upland development and storm water drainage. Aquaculture also has an economic benefit to our rural communities in providing jobs. Historically our state was built on the use of our tidelands for farming shellfish and producing food and jobs.

- Aquaculture areas need to be protected in the SMP and is of "Statewide Interest".
- Aquaculture should be the preferred use for the SMP because it actually benefits Puget Sound and it's shoreline and provides habitat.
- Language should be restored designating subsistence, commercial and recreational shellfish beds as "critical saltwater habitats.
- Aquaculture requires and is always dependent on the use of the water area and the WAC should define it as so.
- A huge effort went into the SARC recommendations which Ecology should use in the SMP to reflect the intent of HB 2220.
- The economic impact of these changes would be devastating to all shellfish farmers and would also negatively affect communities and the state.

I am a first generation Shellfish farmer in Southern Puget Sound and a 6th generation descendant to the pioneers that settled here. My hope is that my children and their children will be able to continue to enjoy the rich bounty of shellfish that brought my ancestors to this area. We are depending on the Department of Ecology to do the right thing to prioritize and protect our ability to continue sustainably farm shellfish in our waters of the state in their SMP.

Linda Lentz
Chelsea Farms LLC
6438 Young Rd NW
Olympia Wa 98502
360-866-8059
360-866-4003 fax

LISA BISHOP LITTLE SKOOKUM SHELLFISH GROWERS 23 NOV 2010

Dear Ms Bouta:
We are a family owned shellfish farm that has been in operation for 127 years. Our family has been living on this same piece of property that entire time, enjoying the beautiful habitat, sharing it with countless wildlife, while using the same as a commercial revenue source. As John Dodge stated in the Olympian June 15, 2009, we are careful stewards of a special property since 1883. We have been watching the SARC process and now see the Shoreline Guidelines changes proposed by the Department of Ecology. The changes are not consistent with the intent of the legislature or SARC. These changes are not appropriate. Shellfish is special, a preferred use for Puget Sound. Without aquaculture in Puget Sound the marine ecosystem would collapse as we have seen in the Chesapeake and many other major urbanized estuaries. Shellfish growth aids other species (vascular plants, algae, forage fish, etc). They filter feed, cleaning out the bay. The proposed changes remove important water quality protections, endangering the shellfish, finfish, and human usage of Puget Sound. Small businesses would be hurt by the changes proposed. We currently have 27 employees with a payroll of about $1 million. Our farm is small compared to other growers in our area. The economic impact statement is flawed. The analysis focused only on geoduck aquaculture, a species we do not cultivate. We would like the original language from the SARC recommendations and HB2220 retained, acknowledging aquaculture as being of statewide interest, recognizing the benefits of aquaculture in protecting the resources and ecology of the shoreline<comma> and giving aquaculture equal standing with other water dependent uses. There is also some confusion about the Governor's executive order. We understand that all rulemaking is suspended. Clarification as to whether this WAC is exempt from the Governor' order is needed. Sincerely, Lisa Bishop, Brett Bishop, Manager, Little Skookum Shellfish Growers

MARGARET BARRETTE PACIFIC COAST SHELLFISH GROWERS 23 NOV 2010

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 rational 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 rational, 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 â€œOn 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

MARINA LAHAV CITY OF VANCOUVER 23 NOVEMBER 2010

The City of Vancouver appreciates the extent to which the Department of Ecology has incorporated our earlier suggestions into the current version of the proposed rule and the current opportunity to review and offer comments on the revised proposal.

1. WAC 173-26-020(9) and WAC 173-26-221(2)(a)(2)

We urge you to eliminate the proposed definition of *Critical Resource Areas*, new requirement, and related text (*…and critical resource areas…*) throughout the Guidelines.

a. The phrase *resource areas* is likely to cause confusion since it refers to agriculture, forestry, and mining areas under GMA.
b. The existing Guidelines are clear that critical saltwater habitats and critical freshwater habitats may or may not be the same as GMA critical areas.
c. Defining *additional shoreline and shoreland areas identified by local governments that warrant special protection necessary to achieve no net loss of ecological functions* adds unnecessary complexity. Nothing in the existing Guidelines restricts a local government from providing special protection to areas that warrant it even if they are not technically critical areas or critical saltwater or freshwater habitats, and tools exist for doing so.
d. Likewise, the new requirement at WAC 173-26-221(2)(a)(2), *…local governments should identify additional shoreline and shoreland areas identified by local governments that warrant special protection necessary to achieve no net loss of ecological functions* is unnecessary. Please eliminate it or replace *should* with *may*.

2. WAC 173-26-020(36)

We strongly recommend once more that Ecology replace this atypical definition of *should* with its common meaning and usage: that a particular action ought to be taken or is recommended. Compelling the use of *should* as essentially mandatory leaves little or no room to distinguish between goal/policy statements and regulations, both of which are necessary for a successful shoreline master program. Rather than facilitating integration with other state and local codes, this unique definition sets the stage for conflict between them. We are struggling with this in our current comprehensive SMP update process.

3. WAC 173-26-020(25)(b)

We are concerned that words *…as now or hereafter amended* in the new definition of *Comprehensive master program update* could be construed such that local jurisdictions undertaking an update would have to comply with new or amended regulations during the planning process. Local jurisdictions have neither the time nor the budget to accommodate a changing regulatory environment during the update process. Please clarify that the regulations in effect at the time a local jurisdiction begins the update process (in accordance with their contract with Ecology) are those with which they must comply.

4. WAC 173-26-201

Again, we appreciate Ecology accepting many of the suggestions made earlier. We still urge you to delete the language prioritizing new SMP adoptions and comprehensive updates over other amendments that may be just as important and time-sensitive. Placing internal agency concerns above the public health, safety, and welfare is poor public policy.

5. WAC 173-26-211(5)(c)(ii)(G) and (H)

There is an inherent conflict between these two sections and with implementation of the policy in RCW 90.58.020. Section G requires local governments to reserve aquatic areas for protecting and restoring ecological functions. Section H requires them to reserve shoreline space for preferred uses. Given all the other protective measures (no net loss, mitigation sequence, etc.) for ecological functions in the Guidelines and the policy of fostering all reasonable and appropriate uses of the shoreline, this conflict should be resolved by eliminating Section G.

Thank you again for your positive response to our earlier comments and for this opportunity to review and comment on the updated proposal. Please feel free to contact me at marian.lahav@ci.vancovuer.wa.us or (360) 487-7949 with any questions or if I can be of assistance.

Dear Ms. Bouta

I would like to reply the WAC 173-26 Proposed Rule Amendment. At the open house meeting held at Grays Harbor Community College we talked about the WAC as it was

rewritten. I told you of my concerns that it reads as though shellfish aquaculture is to be discouraged and is not a beneficial shoreline use. You all assured us that was not DOE's intent. We cannot rely on your intent, the language concerning Critical Saltwater Habitats needs to be fixed. After rereading the proposed changes I still feel there is some dirty politics being played here, what a shame. The language "subsistence, commercial and recreational shellfish beds" needs to be classified as Critical saltwater Habitats. Shellfish raised for human consumption require a high level of water quality protection that the Critical Saltwater Habitat designation would help insure.

The Small Business Economic Impact Statement concluded that the proposed changes have a disproportionate impact on small businesses, which we are. The costs of extra permits and the time spent acquiring these is detrimental during the best of times, I think we can agree that these are not the best of economic times.

Thank you for the opportunity to comment on the WAC 173-26 Proposed Rule Amendment.

Sincerely,

Mark Ballo

Operations Manager

Bradys Oysters Inc.

3714 Oyster PL

Aberdeen, WA 98520

On behalf of Everett Shorelines Coalition, here are two brief comments, regarding
a) the proposed amendments, and
b) the Public Involvement process

1) Proposed Changes, other than geoduck-related provisions

These updates offer useful clarifications, and reconciliation of overlapping requirments per state Regulatory
and Rules codes: directly for local government in terms of time and effort and expense for SMP preparation,
and also for SMP reviewers and eventual end users. We support their adoption.

2) Open House and Public Hearing

This particular set of proposed amendments appears to have been the sort of circumstance anticipated in RCW 90.58.060 (2) (b), which allows DOE the discretion to adjust the number and location of public Open House presentations with public input opportunities, when proposed changes involve little direct public
impact, or geographically narrow applicability, such that hearings statewide are unlikely to draw a significantly broader sample of public recommendations or concerns than a smaller number of public input venues. The Sept. 13th Open House/Public Hearing in the Everett area, which is not geographically influenced by any prospects of potential geoduck culture/harvest, would appear to have been a candidate for omission from the public input calendar for this round of amendments.
As the sole "public" attendee at the Open House, I had no significant information or recommendations to offer worth the investment of time, energy and expense by the Department.

Peggy Toepel
Pres., Everett Shorelines Coalition, P.O. Box 13288, Everett, WA, 98206

Dear Ms. Bouta:

I would like to comment on the proposed changes to the State Shoreline Guidelines as proposed by the Department of Ecology.

We have been trying to establish a small geoduck farm on the east side of Hood Head Island, which was given approval by DNR in late December 2006. This project has been held up by the same agency that approved it for the past four years. Our company consists of 9 upland homeowners and the size of our proposed farm will probably be less than 1 acre after following all the rules and regulations by the Corp of Engineers. The farm is to be rotationally planted and harvested to reduce impact on the environment.

As a very small business that would employ people during planting and harvesting we find the hurdles to our starting this farm to be completely overwhelming. Currently, we have spent over $25,000.00 to get to this point in the permitting process with no end in sight due to the arbitrary moratorium placed on this process by both the Department of Ecology and DNR with no state law to govern the actions of this department concerning this issue. Your new regulations will add an additional burden and more dollars to this already long and expensive process. Which leads me to the conclusion that the State of Washington does not really want these farms or their beneficial affects or need any revenue from the operations of these farms.

It is totally illogical to propose that shellfish beds are not critical saltwater habitat or for that matter not water dependent. I have never seen a dry geoduck bed or a dry shellfish bed of any kind. Look to Virginia for a little guidance in regards to shellfish. That state has a program that is giving hundreds of thousands of dollars of materials and equipment to their boatman to plant as many shellfish as possible to help clean up Chesapeake Bay and you know what, it is working. I guess the Washington State Department of Ecology has a better idea of how to filter and clean the waters in

Puget Sound and improve water quality for the raising of food for human consumption. I don't know of anything more critical than this. How much is Ecology's plan going to cost an already bankrupt state? Shellfish farming is always "WATER DEPENDENT".

Another proposed change removes language that identifies aquaculture as a "statewide interest". With a three billion dollar shortfall in the states budget I would think that everything would be of statewide interest. The removal of this language would put aquaculture at a disadvantage to all other forms of use which would eventually reduce the amount of growers willing to risk capital to establish new or improve existing shellfish farms and do away with job creation in this field. According to a statement that was made to the governor by Taylor United recently, one third of the shellfish they grow are exported to the Far East. This makes shellfish of statewide and national importance by reducing our trade deficit. The last I looked the national debt was approaching 14 Trillion Dollars.

I think it is pretty clear in some of the comments made during the open forum concerning geoducks held by the Department of Natural Resources that having a commercial use (i.e. docks for boats) to shade the bottom, kill eel grass and dump untreated sewage is of more importance than a bed of water filtering shellfish is absurd. It is vital that aquaculture should have equal standing to commercial activities from an economic, biodiversity and even common sense point of view.

Department of Ecology's rules should be more aligned with the scope and intent of the governing body of the state of Washington as listed in HB 2220 and follow the recommendations put forth by SARC. To write rules that are not supported in law invites challenges to those rules.

To summarize the proposed rules put small aquaculture farms like ours at risk of not being viable at all. I have never seen so many permits, fees, charges, studies and licenses to do anything in my life. If you want to kill aquaculture in the state of Washington or limit it to major corporations only, you are going about it in the right way. I would urge you to rewrite these proposed rules so that a level playing field can be established.

Sincerely,

R Bruce Olsen
Member
So Happy Farms, LLC

November 9, 2010

Ms. Cedar Bouta
WA Department of Ecology
PO Box 47600, Olympia WA, 98504-7600
ShorelineRule@ecy.wa.gov

Re: WAC 173-26; Proposed Rule Amendment (primarily within sections 221 and 241).

Dear Ms. Bouta:

As a citizen who assisted in formulating the original Pacific county's shoreline management rules for Willapa Bay in the 1970's and as a shellfish grower and strong supporter of shoreline zoning, I have considerable trouble with the direction the proposed changes to the state guidelines with respect to aquaculture has taken. It would seem, the Department of Ecology (DOE) has gone far beyond what was addressed during the lengthy discussions with the stakeholders and these new guidelines are quite at variance with what was formed and thought to have been agreed upon during those sessions. In general, this surprise update with respect to shellfish farming essentially downgraded the importance of growing shellfish as an activity on the intertidal. The most obvious action was the recommended removal of public and private tidelands suitable for growing shellfish from critical area status. This modification would be against the scientific and historical precedent and could serve to further increase the many negative impacts to the marine environment.

To began with I am concerned by the Department of Ecology's guidelines forcing a secondary position for shellfish culture relative to other shoreline uses. Viewed from a scientific position the agency demonstrates what only can be considered a lack of credible knowledge of the most basic ecological relationships of the marine shoreline. There seems to be a response by both shore side dwellers and DOE to relegate shellfish farming to an unfavorable environmental status while maintaining and condoning the destructive anthropogenic activities along the shore. It has often been pointed out in regards to survival of young salmon, for example, the essential near shore food chain habitats have in many cases been degraded by human activity and specifically those related to buildings and dwellings near the shore. Ironically it is not unexpected that much of the hostility toward shellfish growers by those same shoreline owners enamored by what they perceive as clean serves to cover up their own deleterious impacts on the marine environment. These residences, business, etc., not only impose long term negative impacts to the vital near shore habitats by building structures such as bulkheads, etc. but from the constant contamination resulting in the runoff from drives, gutters, lawns, etc. Those still on septic systems, even it they happen to be functioning as intended still contribute the nutrients via ground water to cause high levels leading to over fertilizing by nitrogen and phosphate. Our marine species in this important marine area are being lost both physically and by pollution. The creation of sterile nonproductive esthetic beaches or rocky shores often devoid of marine life due to the lack of a diverse habitat and acceptable conditions for growth, feeding and security is slowly destroying much of the marine habitat. Shellfish, instead of being seen as a threat (as a visual affront for example) should be seen as a means of correcting or mitigating the long term damage shore owners are inflecting upon the entire marine ecosystem. That is not the case and DOE seems just as supportive of this naive position as the people along the shore.

A second consideration missed by the oversimplified proposed changes to the Shoreline Guidelines is the fact that all types of shellfish aquaculture are implicated in these onerous recommendations. Shellfish are an unsurpassed nutrient source for humans and demand the highest quality growing conditions. Granted, the intent of the guidelines may have been influenced by the shoreline owners in part to cover their continued self serving abuse of the near shore environment but all type of shellfish farming is wrongly implicated. This is achieved in one misguided section removing the status of shellfish culture from necessary protection of high quality water and habitat. Shellfish create and maintain a quality niche important to the entire habitat. Until those in the department responsible for recognizing the critical role shellfish play in the overall health of the intertidal have an understanding of these interactions they should step back from the formulation of proposals. In addition, it should be an embarrassment to those supposedly overseeing this rewrite as much as it is an affront to those in the shellfish industry and the science community.

A third aspect touched upon by the above is the critical role aquaculture plays in the production of a human food source. I started to write comment to this subject then read the article in the Bellingham Herald by Billy Frank Jr. chairman of the Northwest Indian Fisheries Commission. He says it best.

Title: Remember Where Our Food Comes From:

"The mud and the water have always been a source of food. But when we start to see shorelines and rivers not as

places where we get our food, but where we can make money developing property for the best views and highest value, we dishonor the importance of our surroundings. When pollution has gotten so bad that we can't fish or harvest shellfish from our home waters, we start depending on food from other sources, sometimes thousands of miles away. Folks down on the Gulf Coast are going through that right now."

"'Many people have started to recognize the importance of local food. They are called "localvores," and I think they're on the right track. I didn't know it, but I've always been a localvore. We look for food that comes from where we live. In this place, where rivers run from glaciers and meet the saltwater on great tide flats, salmon and oysters are about as local as it gets. To have these foods we must protect the environment from where they come. That means protecting habitat by fighting for better shoreline development standards and protecting water quality from failing septic systems and lawn fertilizers."

"Treaty tribal and non-Indian shellfish producers are on the front line of monitoring and protecting water quality in Puget Sound and along the coast. We can measure the health of these waters by the health of the shellfish that live there. Healthy water produces healthy shellfish, and healthy shellfish is good food for all of us. The problem comes when we stop connecting our food to the place where it comes from. Salmon and shellfish don't come from the grocery store. They come from nature. Our lands and waters are naturally productive, just like salmon and shellfish. All they need is a little help to let them do what they do. We should be celebrating the fact that we can still produce and harvest salmon and shellfish in western Washington."

"Everything is connected. What happens in one part of the environment affects other parts as well. Salmon and shellfish are measuring sticks for the health of our ocean and Puget Sound. While we salmon and shellfish managers can control much of what happens on the water, state and local governments need to do a better job of managing what's happening onshore." - Billy Frank Jr.

Intertidal Oyster bed on Willapa Bay

The most disconcerting aspect of these proposed guidelines as alluded to in the above, cannot be over emphasized. DOE has imposed a blatant disregard for the importance of shellfish in creating habitat, increasing biodiversity and species abundance and improving conditions for other marine species. They ignore the science defining how different shellfish species contribute to the richness of the near shore of their bay or sound. This is the travesty of DOE's embarrassing proposal. The cultured shellfish aid in balancing the level of nutrients and minerals and in filtration of water for light penetration. If one were to carefully look at the oyster clusters in the above image numerous species of plants and animals

would be found relative to the barren intertidal in other areas. Then, if careful search were to be made with a microscope an additional assemblage even more numerous would be observed. Here is a place where various organisms can establish attachment or protective cover. Many of these animals and plants form an important segment of the food chain. In their many beneficial roles, shellfish can even aid in the protection and nutrient supply of rooted plants such as eelgrass as can be seen in the above scene. Stabilization of the sand and silt allow the germination and rooting in what would otherwise be very transitory sedimentary layers constantly undergoing natural aggradation or degradation. The growing of shellfish has proven over the past century to be not only sustainable economically but also with regard to maintenance of environmental quality while playing a critical role in the diversity and balance of other marine species. Shellfish create, promote and maintain habitat essential to the health of the marine environment. This is not present on a clean beach of sand or rock and are not part of a bulkheaded shoreline which probably blocks off a once preferred productive near shore habitat.

I am really surprised at the naive and dangerous judgment as projected in these proposed guidelines by DOE regarding aquaculture. To propose removal of shellfish culture areas from the current protected documented scientific status and even go so far as to infer they are detrimental to the surrounding critical habitat is very problematic. It seems the product of an agency unqualified to perform such a task on a unilateral basis. If that were not enough, by essentially promoting certain shore type activities over shellfish culture DOE also takes a further step to downgrade the water quality, biodiversity and species abundance of the state's marine near shore areas.

Sincerely,

Richard L. Wilson, Ph.D.*
President, Bay Center Farms
www.baycenterfarms.com

CC via email:

Brian Hatfield <hatfield_br@leg.wa.gov>
Dean Takko <takko.dean@leg.wa.gov>
Brian Blake <blake.brian@leg.wa.gov>
Various industry personnel, etc.

* Present association in: Pacific Coast Shellfish Growers Association (Board Member), Audubon Society, Olympic Natural Resources Center (advisory board member appointed by Governor), Union of Concerned Scientists, Sierra Club, Nature Conservancy, Conservation International (EcoTrust), Sigma Xi.

Pierce County
Department of Planning and Land Services
CHUCK KLEEBERG
Director

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November 2, 2010

Ms. Cedar Bouta
Washington State Department of Ecology
Shorelands and Environmental Assistance Program
PO Box 47600
Olympia, WA 98504-7600

RE: Comments on Proposed Rule Changes to Chapter 173-26

Dear Ms. Bouta:

Thank you for giving Pierce County the opportunity to comment on the August 14, 2010, Draft Summary of Proposed Changes to Chapter 173-26, Shoreline Management Act, Geoduck Aquaculture. We appreciate some of the changes you have made (such as clarifying that commercial aquaculture is a "use" and not a "habitat") while recognizing that some of the language we expressed concerns over remains the same. We have no new comments on this latest version but, we wish to reiterate some of our earlier comments.

1. The current document still focuses its discussion on commercial geoduck aquaculture with a separate section titled: "Additional provisions for commercial geoduck aquaculture" devoted to the subject. We realize that geoduck aquaculture is the source of much interest but, we feel the provisions provided should not be specific to geoduck but, should also apply to other forms of aquaculture. As two examples, the following are included within the "Additional Provisions" section:

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

   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.

These two provisions are as important to non-geoduck aquaculture as they are to geoduck. Making them specific to just one type of aquaculture gives the impression that they are unimportant to other types of aquaculture. Since the rule is being revised, we feel it would be prudent to make the provisions applicable to all aquaculture.

2. The draft rule continues to include the following (emphasis added):

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.

As expressed in our previous set of comments, we are concerned this language will be misinterpreted by the grower to mean they have some sort of absolute right to harvest irrespective of their permit conditions. As we noted, once all approvals are granted, a geoduck operator has the right to harvest just as a developer has the right to construct a land-based project. However, failure to comply with the conditions of approval is reasonable grounds to suspend a geoduck operator's right to harvest just as it would be reasonable grounds to suspend the developer's right to construct their project.

We request again that the language be revised to:

… commercial geoduck operators have a right to harvest planted geoduck under the terms and conditions of their approval".

3. The document continues to propose the following language:
Aquaculture should not be permitted in areas where it would ~~((result in a net loss of ecological functions,))~~ adversely impact ~~((eelgrass and macroalgae))~~ critical areas or critical resource areas, suspend contaminated sediments that exceed state sediment standards, or ((significantly)) conflict with navigation and other water-dependent uses…or significantly impact the aesthetic qualities of the shoreline.

We remain concerned that "Adversely Impact" will lend itself to argument because opponents of aquaculture will note that most forms of aquaculture do result in some level of adverse impact. Even when there is agreement amongst all parties that the impact isn't significant or that it is short-lived, the proposed language doesn't recognize those qualifiers. In contrast, the existing, struck-out language does acknowledge those qualifiers when it references "net loss of ecological function". If the proposed language remains, the applicant is put in the position of having to argue (and the local jurisdiction to agree) that their proposed project results in no adverse impacts of any kind (which may not be possible) or of providing a "demonstrated, compelling reason, based on policy of the Shoreline Management Act" as to why their project should be allowed even though it results in adverse impacts.

We urge you to retain the original language:

"(shouldn't be permitted)…in areas where it would result in a net loss of ecological functions, eelgrass and macroalgae."

4. The document continues to reference *shoreland resource areas:*
In addition to critical areas defined under Chapter 36.70A RCW and critical saltwater and freshwater habitats as described in these guidelines, local governments should identify additional shoreline and shoreland resource areas that warrant special protection necessary to achieve no net loss of ecological.

To aid local governments in identifying such areas, it would be most helpful if you would include a few examples of what a shoreline resource area may be. We don't find the term defined anywhere.

In closing, please consider the concern expressed in our earlier review letter; that local jurisdictions are having a difficult time trying to reconcile two prominent themes in the Shoreline Management Act: the need to provide a high level of habitat protection and the need to provide for preferred uses such as commercial aquaculture. Under what circumstances does one trump the other? Without clear direction, this question is likely to be resolved in the court system at much cost to the citizens of Pierce County and both proponents and opponents of commercial geoduck aquaculture.

Page 16 of the rule identifies the first order of priority to be "*...protecting and restoring ecological functions…*". However, it is easy to lose sight of that when, for example, the document then goes on to acknowledge that some level of clearing and grading within the intertidal is acceptable. New section 173-26-211 (5) (c) (ii) (E) does help address this apparent inconsistency when it notes that "*This policy* (classifying areas appropriate for geoduck aquaculture) *does not preclude reserving…areas for protecting…ecological functions.*" We feel it would be additionally helpful to repeat this qualifier a few times throughout the document to make the first order of priority absolutely clear.

We urge you to consider these clarifications when drafting the proposed changes to Chapter 173-26, Shoreline Management Act. Such clarification will avoid unnecessary and unproductive conflicts and be of clear benefit to citizens, local jurisdictions, and businesses. Pierce County staff is available to discuss the concerns raised in this letter. If you feel a meeting is necessary or you would like to discuss our concerns, please contact David Risvold at 253.798.7036.

Sincerely,

Sean Gaffney
Supervisor, Long Range Planning

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c. Pat McCarthy, Pierce County Executive
Chuck Kleeberg, Director, Planning and Land Services
Kim Van Zwalenburg, Shoreline Planner, Department of Ecology
Vicki Diamond, Supervisor, Planning and Land Services
Mike Kruger, Legislative Analyst, County Council
David Risvold, Environmental Biologist, Resource Management

Dear Madam/Sir,

I would like to submit comments on the portions of the rule changes.

Please do not delete the Aquaculture definition as currently used within the rules. Aquaculture is a historical use that has been a protection mechanism of our shorelines for well over a hundred years.

The conditional use permit requirements for new or expansion of geoduck aquaculture will add a burden both to the county and business where these areas are used.

These rules should retain the fact that subsistence, commercial, and recreational shellfish beds are critical saltwater habitat. The presence of these beds ensure that the waters are held to a higher level of quality.

Many of the proposed changes go well beyond the scope of HB 2220 as well as what was discussed and agreed to by the SARC members. The recommendations that came from that stakeholders group should be followed.

The small business economic impact is grossly misrepresented and should be redrafted to adequately reflect the true costs of buffers and survey's etc…

Thank you for your time.

Best regards,
Tim W Morris

Ms. Bouta,

A small comment on the proposed rules. On page 16 of OTS-3376.2 it has the additional text *Ecology's written notice of final action*. Having just been through that part here at the City of Spokane -- The City was responsible for publishing the notice of final action; maybe you have made that change also in the WAC and I missed it. A small point but important since it establishes the appeal period.

Good Luck with your project,

Tirrell Black
Planner
City of Spokane Planning Services
808 W. Spokane Falls Blvd.
Spokane WA 99201-3329
509-625-6185
tblack@spokanecity.org
www.spokaneplanning.org

Dear Cedar,

As you may know, tribal representatives and NWIFC staff was closely involved in the SARC rule making process for the past two years. Those who have participated in the process have expressed both a positive and negative experience working through the issues. Although the Committee did not reach a full consensus, the tribal participants felt that a fair balance was struck by the SARC Committee's final report suggesting rule-making language for DOE to consider.

However, we are concerned about subsequent DOE action to strip nearly all the language proposed by the SARC Committee. Not only did the language change contradict the consensus made by the committee, the changes were announced without any prior notification to SARC Committee members.

Specific reasons for our objections are as follows;

The proposed changes are contrary to the direction given by HB2220, which was to have SARC guide the process and propose agreeable language in the DOE rule-making process. Two years work by the SARC Committee was disregarded by the subsequent DOE action.

Some significant protections to aquaculture, which was in the existing language, have been removed in the new DOE proposed language. The explanation given was to bring the language more in line with existing language for other uses. These other uses include bulkheads, piers, etc. which have never proven to be of any environmental benefit. Aquaculture, if regulated and sited properly to avoid impacts to critical habitat, forage fish and juvenile salmon species, may well have more benefits than those activities mentioned before. We believe this new language does not reflect the effort to balance aquaculture activity and salmon habitat protection, which is a desired goal of the tribes.

Since this language would have the most impact on the siting of new farms, tribes would be disproportionally impacted. Though the proposed changes would also impact existing aquaculture activities, since the siting of new activities would be affected, this language would disproportionally impact tribal opportunities. Some tribes expect to increase shellfish aquaculture activities in light of a court settlement that provide funds to recover lost opportunities on specific shellfish grower properties.

The NWIFC and its member tribes are concerned with action taken by DOE to strip the original language, without advance notice or consultation with SARC Committee members. It also calls into question whether it is reasonable for tribes to enter into public forums when DOE ultimately ignores the work of the committee. Tribes may choose to enter into direct governmental consultations when DOE seeks tribal input on issues like SARC and other processes.

We hope that this clarifies the tribal position. Please do not hesitate to call David Fyfe, NWIFC Shellfish Biologist, or Tony Forsman, NWIFC Policy Analyst for Shellfish and Wildlife if you have any questions or concerns.

Sincerely,

Mike Grayum, Executive Director
Northwest Indian Fisheries Commission

Geoduck Clams

ARCADIA POINT SEAFOOD

On Totten Inlet, Puget Sound

November 23, 2010

Ms. Cedar Bouta
Washington State Department of Ecology
Shorelands and Environmental Assistance Program
PO Box 47600
Olympia, WA 98504-7600

Dear Ms. Bouta:

Thank you for the opportunity to comment on the Department of Ecology's proposed rule changes to WAC 173-26, specifically regarding shellfish aquaculture.

We provide the following background to set context for our specific comments. Arcadia Point Seafood is a small, family owned, shellfish farming business. We have been in business since 2000, growing geoduck clams since 2003. We lease tidelands from private parties and we were a "successful offerer" for the Department of Natural Resources' geoduck lease program that currently is on-hold. We have four full-time, salaried, employees to whom we pay a living wage. We provide benefits in the form of annual leave, sick leave, and medical/dental coverage. For peak planting and harvesting times, we hire temporary workers to whom we pay an hourly wage well above minimum wage (our goal is to pay at least 40% higher than minimum wage).

By training, Steve is a fisheries biologist (finfish/salmonid specialist) and Vicki has a doctorate in measurement/statistics (social sciences) with 36 years in state government, some of that in regulatory agencies. We came to the shellfish business with a clear conviction that what we do, and what our industry as a whole does, provides a net benefit to the state – environmentally, economically, and culturally.

Our comments focus on WAC 173-26-241(3)(b)(ii) – Additional provisions for commercial geoduck aquaculture, with special emphasis on the impact to our small business. Several other sections of the proposed rule also concern us. However, those concerns are addressed by comments from the Pacific Coast Shellfish Growers Association (PCSGA). We want to be clear that we strongly support the positions of PCSGA regarding the need to maintain original rule language on the following:

- Critical saltwater habitats [WAC 173-26-221(2)(c)(iii)]; specifically to ensure that "subsistence, commercial and recreational shellfish beds" are included and important water quality protections maintained, and
- Aquaculture preamble/policy language [WAC 173-26-241(3)(b)]; specifically to ensure that the messages of statewide interest, long-term benefits, water-dependency, and preferred uses are

maintained, as well as recognition that conflicts with navigation and other water-dependent uses need to be substantive in order to rise to a level of concern."[1]

As noted by Ecology[2], the current 2004 guideline rule is the result of a negotiated settlement among interested parties—negotiated rule making is a much more rigorous process than the agency-public comment process currently underway. It took a lot for the various parties to agree on the existing language and in the absence of an extreme, compelling reason for change, deference should be given to that process and the language should remain as the negotiators intended it.

The matrix in Attachment A is used to present our specific comments regarding WAC 173-26-241(3)(b)(ii) – Additional provisions for commercial geoduck aquaculture. Overall, we are extremely concerned and disheartened by the fact that at this stage of the process, these provisions demonstrate a profound lack of understanding of both the business side of farming and the operational aspects of farming. If Ecology is trying to send a message that small business does not belong in the shellfish aquaculture business, these rules effectively deliver that message. In farming, the risks of loss due to unforeseen circumstances are already high; compounding them through unreasoned, non-science-based limits or prohibitions that do not reflect solid public policy is inexcusable.

With respect to the matrix:

- A shorthand method is used to convey the financial harm our business could incur if these rules were implemented as now written. We use a scale of 1 to 5, where 5 denotes the potential for extreme negative financial impact and 1 denotes that there may be a financial impact but productivity should not be limited. Some proposed rules receive a low rating because the particular issue is not relevant to our operation and we have no experience with it. However, that same rule may be extremely critical to another grower. Around a general norm-of-practice, there will be variations among growers due to a variety of factors (e.g., location, beach type, weather conditions).
- With a few exceptions, we make very limited comments in the matrix. Greater detail is provided when we are using the rule to demonstrate a particular point or principle, e.g., about duplication, or lack of understanding of the business side of farming.
- Also noted is whether the Small Business Economic Impact Statement (SBEIS) addresses the disproportionate impact on small business of the proposed rule.

With respect to the Small Business Economic Impact Statement (SBEIS):

- Notwithstanding the caveats written into the report, the fact that it attempts to draw any conclusion at all about disproportionate impacts is beyond words--an analysis focused mainly on one of a long list of proposed permit requirements and limits/conditions does not warrant such a

[1] RCW 90.58.020, Shoreline Management Act of 1971, Legislative findings-State policy enunciated-Use preference: The legislature noted, by its carefully wording, that limited reduction of rights of the public in navigable waters is allowable; public rights are protected generally, but not necessarily specifically in each and every instance.

[2] Preliminary Cost-Benefit and Least Burdensome Alternative Analyses, Department of Ecology, Publication No. 10-06-020, July 2010, page 3; Small Business Economic Impact Statement, Department of Ecology, Publication No. 10-06-019, July 2010, page 3.

stretch.[3] Equally troubling is the fact that the report did not even go near the issue of cumulative impacts of several of these proposed rules interacting with each other.

- Statements regarding growers' likely reactions to buffer limits are also troubling in that the statements indicate a lack of understanding farming limitations, particularly for small growers. That we see this same lack of understanding on both the policy side (i.e., in the proposed rules themselves) and the economic side is unnerving to the "regulatee".[4]
- The mitigation actions (to mitigate the disproportionate impact on small business) that are most emphasized by Ecology include:
    - Allowing multiple parcels to be permitted under one permit
        As discussed in the matrix, there is an enormous downside to exercising this option. Given that a segment of the anti-aquaculture community has a clearly stated strategy of appealing every farm application, this bundling option simply makes the appeal process more cost-effective for the third-party appealer.
    - Allowing submittal of federal or state permit applications in partial fulfillment of requirements
        It is unclear to us that the proposed language supports this statement and will actually achieve the goal of reducing redundancy and duplication of effort (on everyone's part – regulator and regulatee)
    - Ensuring that a grower gets to harvest what he/she plants
        While we appreciate the language change to ensure that a grower can harvest what he/she plants, the 5-year conditional use permit is what created the problem to start with. So, in essence, Ecology is attempting to solve a problem it created.

All in all, we would be hard pressed to say that the proposed mitigation actions will have any appreciable impact on the potential financial hit to small business of the proposed rules (taken individually and collectively).

The Department of Ecology has two levels of guidance for local governments regarding shoreline management—"Big G" guidance in the form of formal rules and "little g" guidance in the form of technical assistance. Given that the latter is more flexible and easily changed, it seems to be the more responsive venue for meeting Ecology's goal of an "adaptive approach" to "...allow local jurisdictions and Ecology to consider new research and monitoring results ..." and revise limits and conditions accordingly[5]. In this spirit, we believe that the Siting, Conditional Use Permit, and Limits and Conditions sections of WAC 173-26-241(3)(b)(ii) need significant additional work and should not go forward as presented.

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[3] In addition, it appears that the analysis of the one limit/condition (i.e., buffers) contains either math errors or lacks sufficient clarity to follow the calculations.

[4] For example: In the analysis of the impact of buffers, the statement is made that, in response to buffers, "...it is more likely that growers would simply increase the initial size of their parcel or slightly increase their planting density". Believe me, if there were more plantable area on a parcel it would be planted, not sitting in reserve; and, increasing planting densities beyond those currently shown to maximize survival defies logic. This quote is from the Preliminary Cost-Benefit and Least Burdensome Alternative Analyses, Department of Ecology, Publication No. 10-06-020, July 2010, page 11; from which the SBEIS is derived.

[5] Quotes taken from: Addendum to 2003 Proposed Shoreline Master Program Guidelines Rule Amendment, Supplemental Final Environmental Impact Statement, Department of Ecology, Publication No. 10-06-017, July 2010, page 6.

We are also concerned for the non-geoduck branches of our industry and the unintended consequences if the rules (e.g., siting, conditional use permits, limits and conditions) developed for geoduck aquaculture become the fall-back for local planners and get applied indiscriminately across other shellfish aquaculture and other physical locations (e.g., Willapa) where they may be totally inappropriate. At a minimum, we believe Ecology needs to clarify and reinforce that these rules are geoduck-specific, site-specific, and not intended nor appropriate for other applications.

All industry needs some degree of oversight, ours included. However, the oversight / regulation must be pragmatic, implemented to address a substantive science or state policy issue (not perceived or speculative problem), non-duplicative of existing avenues for addressing the problem, and based on a clear understanding of the business being regulated. Our concern with many of Ecology's proposed rule changes is that they are inconsistent with these principles and, at times, clearly out-of-proportion to a perceived problem. Frankly, many of the proposals are so extreme that it is hard to understand the motivations behind them.

Sincerely,

Vicki M Wilson

Steven M. Wilson

Vicki and Steve Wilson
Owners, Arcadia Point Seafood
240 SE Arcadia Point Road
Shelton, WA 98584
360.426.4367 (phone)
360.432.9610 (fax)

P.S. We hope that Ecology will take advantage of the opportunity presented by the Governor's recent Executive Order to suspend rule making. The current rules are unworkable, process and "small p" politics appear to have trumped any vestige of good public policy, and the Governor has made it clear she wants small business to focus on its core and get the economy moving again. You have an out, take it.

Attachment A: Comments on Department of Ecology's Proposed Rule Changes to WAC 173-26-241(3)(b)(ii)

Subsection of WAC 173-26-241(3)(b)(ii)	Comments
(A) Siting	**Level of financial impact to our business = 3** There is no reason to impose or enforce any stricter limits than would be applied to homeowners' personal use of their tidelands. Inserting the words "significant" and "major" to the last part of the sentence so that it reads: "…without *significant* modification of the site such as *major* grading or rock removal" addresses the concern. Limits are understandable, but without the modifiers the rule is simply not practical and opens growers to frivolous charges of violation. **Addressed in Ecology's SBEIS? No.**
(B)(I) Conditional Use Permit (CUP), Required	**Level of financial impact to our business = 5+** We have several concerns with this section. Our primary concern involves the question of why a permit is required at the local level. Ecology supports its position by arguing that requiring a conditional use permit (1) helps the industry by providing some level of consistency across counties, both in terms of the specific permit required and in terms of Ecology having review power and (2) is consistent with SARC recommendations. The consistency argument is somewhat dampened by the fact that limits and conditions placed on the permits are likely to range widely across local jurisdictions, even with Ecology review. And, in some circumstances, an applicant may find he/she has to complete a substantial development permit as well as the state-mandated conditional use permit. More importantly, requiring a conditional use permit appears, by implication, to label geoduck aquaculture as development, a position counter to that of the Attorney General's 2007 opinion that geoduck aquaculture does not, in all cases, qualify as development. SARC's consensus recommendation seems to recognize this point by allowing local governments to review applications on a site-specific basis and, as one option, provide a written exemption determination. Considering that (1) all new farms have to undergo extensive federal permitting by the Corps of Engineers on a site-specific basis, including a detailed description of farming methods as well as a biological evaluation involving consultation with U.S. Fish and Wildlife and National Marine Fisheries, with resulting conservation measures, and (2) that existing farms which change species, footprint, or significant operational techniques are required to notify the Corp of the change and deal with any subsequent review processes deemed necessary, and (3) that state Ecology will likely have its own set of water quality and "no net loss" conditions and limitations for site-specific certification, it is hard to argue that there is a lack of site-specific review and oversight, and easy to argue that requiring yet another permit lays the groundwork for an enormous amount of unnecessary duplication, as well as unnecessary workload and cost, being placed on local governments and growers.

Attachment A: Comments on Department of Ecology's Proposed Rule Changes to WAC 173-26-241(3)(b)(ii)

Subsection of WAC 173-26-241(3)(b)(ii)	Comments
	If the CUP requirement remains, the following are our concerns: • Adjusting the five-year permit to allow for harvesting is a welcome addition and addresses the issue of being able to harvest what one plants. Nonetheless, this rule is a good example of lack of understanding of the business side of farming, especially for a small business. As a small business, we need to build infrastructure and know that costs are recoverable over more than one cycle of planting. With a crop that takes 5 to 6 years to achieve market size, it is critical that a small business with limited acreage be able to count on *that acreage* for future cycles of planting. As you know, you do not just pick up and find suitable geoduck substrate somewhere else to fill a gap in your planting cycle. Planting gaps can be devastating for the long-term viability of a small business. The ability to get to know a site and rely on repeated plantings at that site is what enables us to make needed investments, including good equipment that allows us to be "least intrusive"(e.g., diesel harvest motors with hospital grade mufflers) and trained staff that know how to leave the smallest environmental impact (e.g., identify herring spawn). And, when needed, it is also what enables us to have the support of financial institutions. We work with our Lessors to develop long-term relationships for these very reasons; a state requirement of a 5-year permit undermines our ability to develop these relationships and sustain our business. • There is nothing in the language to ensure streamlined procedures or timely review of a CUP reapplication. Nor is there language to ensure that renewal will not be unreasonably withheld. In addition, each subsequent 5-year reapplication presents another opportunity for appeal. A segment of the anti-aquaculture community has made it clear that their main strategy to kill the industry is to appeal each farm application to the fullest extent possible. This will be an extreme hardship for the industry as a whole; it will be especially difficult for smaller businesses that cannot financially weather permitting delays and resultant gaps in planting cycles, not to mention the crush of costs associated with appeals. There is nothing in statute that says a CUP has to be time limited. It can be awarded once, with provisions for expedited, periodic review if significant changes occur. • The language regarding when a CUP is required and when it is discretionary is confusing. For example, a CUP is required for any new geoduck farm "in areas that have not been previously planted with geoduck", yet is discretionary when converting an area from non-geoduck shellfish aquaculture to geoduck. Isn't the latter an area that "has not been previously planted with geoduck"? The problem this language is trying to solve is unclear. Additionally, we are concerned about the language requiring a CUP for *any* expansion, rather than a *significant* expansion –for a variety of farm management reasons, different planting cycles on the same beach will result in some variation in planted area. • We appreciate that Ecology has tried to lessen the burden of permitting by allowing a single permit for multiple sites. While the permit application fees for multiple, co-located ,sites can be a strain, they are no where near the costs imposed on farms by third-party appeals of farm permits. By having multiple sites under a single permit application, a third-party can tie up a small business's future with a single appeal fee (giving the third-party even less incentive than it would otherwise have for deciding whether their appeal has merit or not). **Addressed in Ecology's SBEIS? No - addressed negligibly but not substantively**
(B)(II) Conditional Use Permits, Review and Approval	We have several concerns with this section. • Ecology encourages local governments to develop a permit application that *mirrors* federal or state applications in order to reduce redundancy. The word "mirrors" gives us little hope that redundancy will be substantially reduced. More

Attachment A: Comments on Department of Ecology's Proposed Rule Changes to WAC 173-26-241(3)(b)(ii)

Subsection of WAC 173-26-241(3)(b)(ii)	Comments
	importantly, based on our comments above, we believe counties should have the option to not require another permit, but rather review what has been submitted to other permitting agencies in lieu of another set of paperwork. To do otherwise places an enormous cost burden on small business and on local governments, e.g., diverting staff or contracting resources to develop and maintain expertise in best-available-science for a very narrow part of their regulatory "book of business". • We have no idea of the relevance, other than curiosity, of requiring harvest records. In and of itself, this is a very minor point, but it exemplifies a larger issue. Good regulation is based on requiring the absolute minimum amount of information and limits/conditions needed to get the regulatory job done. Much of this section seems to have lost sight of that principle. • The requirement to ensure public access to public lands/waters is unclear; we assume this does not imply violating private property rights but a clarification would be helpful. **Addressed in Ecology's SBEIS? No**
(B)(III) Conditional Use Permits, Limits and Conditions – Preamble to the 15 bulleted "limits and conditions" statements	• "At a minimum" and "where applicable and appropriate" seem to be conflicting standards for requiring proposed limits and conditions. More importantly, as described during public hearings and as noted in Ecology's Addendum[1], "The proposed rule changes include limits and conditions for local government *to consider* during project review and permit writing." (italics added) A checklist for "consideration" sends quite a different message than "At a minimum .. shall include", even when modified by "where applicable and appropriate". Moreover, starting each bullet point with words like prohibit, limit, or require is clearly a different directive than saying "consider". For example, the following wording is more consistent with Ecology's stated goal: Application reviewers may want to consider the following: • Placement of tanks or pools or other impervious materials directly on the intertidal sediments; • Use of trucks … [Note: We are not arguing that the above are appropriate things to consider, simply that Ecology's choice of language does not support its stated goal of providing local governments with a checklist of things to consider.] • The principle of "no net loss of ecological function" appears throughout the proposed rules. Although we note our concern here, it is equally relevant elsewhere. Within the science community, "no net loss of ecological function" generally is meant as a broad-based standard applied basin-wide or region-wide but not on a site-specific basis. Our concern is that this meaning will be lost in the permitting process and inappropriately applied on a site by site basis, for example, as a rationale to limit a farm's planting/harvest area. [1] Addendum to 2003 Proposed Shoreline Master Program Guidelines Rule Amendment, Supplemental Final Environmental Impact Statement, Department of Ecology, Publication No. 10-06-017, July 2010, page 5. **Addressed in Ecology's SBEIS? No**

Attachment A: Comments on Department of Ecology's Proposed Rule Changes to WAC 173-26-241(3)(b)(ii)

Subsection of WAC 173-26-241(3)(b)(ii)	Comments
(B)(III) Conditional Use Permits, Limits and Conditions – 15 specific limits and conditions	The following 15 limits and conditions are numbered according to their order in the rule. A scale of 1 to 5 is used to convey the financial harm our business could incur if these limits / conditions were implemented as now written. 5 denotes the potential for extreme negative financial impact; 1 denotes that there may be a financial impact but productivity should not be limited.
1. Prohibiting or limiting the practice of placing tanks or pools or other impervious materials directly on the intertidal sediments.	**Level of financial impact for our business = 5** This is a good example of not understanding basic farming needs and hatchery operations/capacity, and the implications for small business. There are few hatcheries producing seed; those hatcheries have limited space and thus capacity for holding seed. As a result, a small grower needs to take seed when it is available, regardless of whether his/her beach is ready to plant, otherwise he/she may end up with no seed at all for an entire planting season. With limited acreage, one year with no planting can prove financially disastrous with effects rippling throughout the infrastructure of the business. In the extreme, it can result in losing a lease when unable to guarantee one's ability to plant within a specific time. The goal in our farming is to maximize survival, while minimizing environmental and aesthetic concerns. As a rule, larger seed equals higher survival; *short-te*rm grow-out in nursery trays is the only cost-effective, viable method for small growers to achieve that size. Higher survival in planted tubes leads to lower planting costs and higher yields; which in turn necessitates less replanting of the beach and shorter total length of time for tubes and other predator exclusion devices to be present. It is particularly unnerving that Ecology would even consider an outright prohibition; reasonable limits may be workable but an outright prohibition is beyond reason. **Addressed in Ecology's SBEIS? No**
2. 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.	**Level of financial impact for our business = 1** No comment because we do not use motorized vehicles on the beach. HOWEVER, there are other small growers for whom this is a major issue. **Addressed in Ecology's SBEIS? No**
3. Limiting on-site activities during specific periods to minimize impacts on fish and wildlife.	**Level of financial impact for our business = 5** Creates risk that local governments may unilaterally impose restrictions on farm operations for reasons that may have no basis in fact or science. Issue is thoroughly addressed in the site-specific federal Corps permitting process, which includes consultations with US Fish and Wildlife and National Marine Fisheries., and the resulting conservation measures attached to the federal permit. **Addressed in Ecology's SBEIS? No**

Attachment A: Comments on Department of Ecology's Proposed Rule Changes to WAC 173-26-241(3)(b)(ii)

Subsection of WAC 173-26-241(3)(b)(ii)	Comments
4. 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.	**Level of financial impact for our business = 4** May deny the farm the ability to deal with excess vegetation. Ulva may occur in dense quantities over the intertidal beaches of farm sites due to high nitrogen levels from failing septic systems, upland livestock, or use of upland fertilizers. Growers need to control the abundance of Ulva, including the option to relocate the vegetation to other areas. May also deny the farm the ability to redirect heavy runoff within the farm site during planting or while tubes are in the beach. Development of upland drainages increases acute runoff events. Inability to manage conditions such as these on the farm site can lead to very low survival rates. **Addressed in Ecology's SBEIS? No**
5. Limiting the area of the site that can be planted or harvested at one time, to limit the areal extent of impacts.	**Level of financial impact to our business = 5+** Extreme limit / condition that will severely reduce the productivity of a farm. There is no known justification or science for this condition. This limitation illustrates Ecology's intent to curtail aquaculture activities beyond establishment of best management practices. If "areal extent of impacts" refers to cumulative effects, there should first be credible evidence that there is a net negative impact as opposed to net positive impact from aquaculture. **Addressed in Ecology's SBEIS? No**
6. Limiting the portion of a site that can be covered by predator exclusion devices at any one time.	**Level of financial impact for our business = 5+** Extreme limit / condition that will severely reduce the productivity of a farm. There is no known justification or science for this condition. This limitation illustrates Ecology's intent to curtail aquaculture activities beyond establishment of best management practices. When area netting is needed for tube containment, the proposal will limit the ability of the grower to keep materials within the farm boundaries. **Addressed in Ecology's SBEIS? No**
7. 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.	**Level of financial impact for our business = 1** Agree. **Addressed in Ecology's SBEIS? No**

Attachment A: Comments on Department of Ecology's Proposed Rule Changes to WAC 173-26-241(3)(b)(ii)

Subsection of WAC 173-26-241(3)(b)(ii)	Comments
8. Requiring installation of property corner markers that are visible at low tide.	**Level of financial impact for our business = 1** The farm site boundaries should be surveyed prior to initial planting and re-established before harvesting. Visible markers are not necessary during grow-out. A grower often will remove all evidence of an existing farm after tubes are removed; the only indication of the farm being an abundance of geoducks. Visible markers are difficult to maintain unless they are off the bottom, and the intent of the grower should be to keep any farm materials out of the water column and out of the way of navigation. Neighboring tideland owners often prefer to see no evidence of makers on the beach. **Addressed in Ecology's SBEIS? No**
9. Requiring buffers between geoduck operations and sensitive habitat features like critical saltwater habitats.	**Level of financial impact for our business = 5** To date, there are no credibly defined, science based standards for buffers. Some proposed buffers would make small farms unplantable. Creates risk that local governments may unilaterally impose restrictions on farm operations for reasons that may have no basis in fact or science. **Addressed in Ecology's SBEIS? Yes (but have concerns about calculations)**
10. Requiring measures to minimize impacts to fish and wildlife.	**Level of financial impact for our business = 5** This condition is so broad as to be useless. With no criteria provided, it appears that the sole purpose is to enable the county to prohibit a farm from operating. Creates risk that local governments may unilaterally impose restrictions on farm operations for reasons that may have no basis in fact or science. **Addressed in Ecology's SBEIS? No**
11. 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.	**Level of financial impact for our business = 2** Condition should eliminate the reference to "minimal adverse ecological effects". No greater limits or caveats are needed than what will be approved under the Army Corps individual permit. As per best management practices, predator exclusion devices are removed asap; there is no advantage to not doing so. **Addressed in Ecology's SBEIS? No**
12. Requiring the use of the best available methods to minimize turbid runoff from the water jets used to harvest geoducks.	**Level of financial impact for our business = 2** Condition will increase harvest costs but is unlikely to lower farm productivity. Farm management plans by definition incorporate "best available" techniques. There may not be a better, cost-effective, method than those currently used. Conditions should not be arbitrarily imposed without evidence of need or likelihood of success. **Addressed in Ecology's SBEIS? No**

Attachment A: Comments on Department of Ecology's Proposed Rule Changes to WAC 173-26-241(3)(b)(ii)

Subsection of WAC 173-26-241(3)(b)(ii)	Comments
13. Establishing limits on the number of barges or vessels that can be moored or beached at the site as well as duration limits.	**Level of financial impact for our business = 1** Condition may increase operation costs but is not likely to lower farm productivity. The number of vessels moored at a site should not violate existing state or local standards. Beyond that, growers should not be limited to the number, type, or size of vessels needed to carry out the farming activity. As per best management practices, farm vessels should be beached only when necessary and for the shortest time possible. Beached vessels should avoid marine vegetation. **Addressed in Ecology's SBEIS? No**
14. Requiring measures to minimize impacts to navigation, including recreational uses of the water over the site at high tide.	**Level of financial impact for our business = 1** This condition is a best management practice, and should be contained in a farm's management plan. **Addressed in Ecology's SBEIS? No**
15. Requiring good housekeeping practices at geoduck aquaculture sites, including removing equipment, tools, extra materials and all wastes at the end of each working day.	**Level of financial impact for our business = 1** This condition is a best management practice, and should be contained in a farm's management plan. **Addressed in Ecology's SBEIS? No**

SBEIS = Small Business Economic Impact Statement, Department of Ecology, Publication No. 10-06-019, July 2010.

Dear Ms. Bouta:

On November 23, 2010 we submitted our comments on the Department of Ecology's proposed rule changes to WAC 173-26, specifically regarding shellfish aquaculture. In reviewing our submitted comments, we are not sure that we made one of our major concerns sufficiently clear. We realize that you may not be able to accept this clarification because it is after the close of the public comment period. Nonetheless, we are submitting it for consideration, if possible.

In our comments regarding the Conditional Use Permit, we note that a segment of the anti-aquaculture community has made it clear that their main strategy to kill the industry is to appeal each farm application to the fullest extent possible. We note in our comments that this third-party appeal strategy presents an extreme hardship for the industry as a whole, and we explain how it is particularly devastating for small business (e.g., direct legal and administrative costs as well as costs associated with delayed planting).

In discussing the above, we are not sure that we clearly and strongly stated our desired outcome. Although we may not have the right terminology, we are looking for a process that allows for local review without requiring a permit that opens the door to third-party appeal. For example, *if a proposed farm were to fit within a pre-defined set of standards (site/operations) to which regulators agreed (and the set of standards were clearly stated and were based on good policy and science), a permit per se would not be required nor would third-party appeal be allowed*. This seems like an approach that (1) maintains the integrity of the review and regulatory process and (2) provides predictability and stability for small business. Under this scenario, there should be no substantive support for an appeal and thus removing it as an option should not be of concern. We do not know for certain if having a process that eliminates third-party appeal is possible, either by rule or statutory change, but we encourage Ecology to explore this option.

Thank you for this opportunity to clarify our earlier comments.

Sincerely,

Vicki and Steve Wilson
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360.426.4367 (phone)
360.432.9610 (fax)
wilson99aps@aol.com

L0002

PO Box 544
La Conner, WA 98257
November 1, 2010

Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

Re: Water Enjoyment – Shoreline Rules

After all these years it is time for DoE and DNR to rationalize the rules governing uses in harbor areas and in aquatic environments. WAC 332-30-115 does not permit water enjoyment, but WAC 173-26-020 does. DNR uses "water-oriented", where DoE uses "water related". These differences should be resolved in order to make all shoreline rules consistent and more understandable to the average citizen.

WAC 173-26-020(37) defines "water enjoyment", but it contains a lot of "weasel" words such as "general characteristic of the use". "General" could be changed to "primary". The problem is that, under the existing wording, new waterfront restaurants with water views are being permitted, even in a harbor area. The old definition had examples, and it did not include restaurants, even lunch counters.

WAC 173-26-201(2)(d)(ii) discusses basic concepts related to harbor areas, but it needs to set the policy that, in those cases where a harbor area and a shoreline environment overlap, as in La Conner, the DNR rules shall be followed.

WAC 173-26-211(5)(c)(ii)(A) discusses new structures in an aquatic environment. After "public access", please consider adding: "(when that is the primary use)".

Please try to eliminate the term "mixed use development". That description has fallen out of favor since Alice Schisel left DoE. The shoreline environments now include residential, so there is no need to invite new disputes about mixed use. It is not a valid shoreline environment.

Sincerely,

Dan O'Donnell

Dan O'Donnell
(360) 466 3057

L0006

REC
19 NOV 2010
DGB

November 18, 2010

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

Re: WAC 173-26 Proposed Rule Amendment

Dear Ms. Bouta:

I would like to reply to the proposed final draft Shoreline Guidelines WAC 173-26. To put it nicely, the draft aquaculture rule has gone way beyond both the legislative direction given to Ecology in SHB 2220 and the recommendations put forward by the Shellfish Aquaculture Regulatory Committee (SARC). To put it more bluntly, when I factor in Ecology's "complicity" in the Pierce County Interim Ordinance (which was overturned in Thurston County Court) with this proposed rule change I can't help but think that the Department of Ecology wants to remove shellfish aquaculture from state waters. As things now stand, I have very little trust that the Department of Ecology will act on sound science and what is right versus responding to public and political pressure.

The most eye catching and bothersome change is Ecology's redraft of the Aquaculture Policy guidance and the redefinition of Critical Saltwater Habitats. Someone in Ecology has basically decided to ignore the legislature and, more importantly, what's best for the environment and is attempting to set their own agenda by using the power of Ecology to make rules. Additionally, 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. Such changes if enacted will work to eliminate shellfish aquaculture from the most productive shorelines of Washington State. Interestingly, and disturbingly so, the language included in this final draft was never included in the draft rules. It just appeared. Such a radical change without prior notice is an untrustworthy and deceptive way to operate a state agency.

Let me conclude with a comment by Dick Wilson of Bay Center Farms who I think has captured the most objectionable part of the proposed rule change. In his letter to you he stated that:

"The most disconcerting aspect of these proposed guidelines as alluded to in the above cannot be over emphasized. DOE has imposed a blatant disregard for the importance of shellfish in creating habitat, increasing biodiversity and species abundance, and improving conditions for other marine species. They ignore the science defining how different shellfish species contribute to the richness of the near shore of their bay or sound. This is the travesty of DOE's embarrassing proposal."

I would urge you to read his letter in its entirety. Twice. I would also urge you to scrap the proposed rule and begin anew.

Sincerely,

Jim Gibbons
President

Seattle Shellfish LLC
2101 4th Ave E • Suite 201 • Olympia, WA 98506 • (360) 236-0462 • Fax (360) 236-0471

L0003

Mark Schaffel
Northwest Shellfish Co., Inc.
6812 Munson Rd., SW
Olympia, WA 98512
360.866.2643

Nov. 1, 2010

Ms. Cedar Bouta
WA Dept. of Ecology- SEA Program
P.O. Box 47600
Olympia, WA 98504-7600

Dear Ms. Bouta,

Thank you for this opportunity to comment on the proposed final draft Shoreline Guidelines WAC 173-26.

In general, your proposed draft both shocks and appalls me. It seems to ignore the direction and intent of both SHB 2220 and of the SARC recommendations. It also signifies a radical change in state policy regarding the importance of shellfish aquaculture as a sustainable economic practice and as a force for promoting clean, healthy estuarine ecosystems. The proposal put forth by your department would greatly hinder shellfish aquaculture in this state. It would be particularly hard on small farms.

There are many specific flaws with your proposed document. I have read the letter submitted by Peter Downey (dated Oct. 25, 2010) and agree with all his specific points. It boggles my mind that recreation would have a higher priority than farming on private tidelands. Are you suggesting that importing Jet Skis and blasting around the bay is better than growing food in a sustainable manner?

You propose that commercial shellfish should not be deemed "critical saltwater habitat". It IS critical salt water habitat, and should be deemed as such. Any visit to a shellfish farm will verify that. My farms are teeming with life, all of it important to the ecosystem. The shellfish I grow both filter the water and provide substrate for marine organisms.

Shellfish farmers provide important manpower in the fight to protect and clean our marine waters. Find a bay with commercial shellfish farms, and you will find a clean bay with staunch advocates. Your proposed guidelines would make it much harder for present shellfish farms to continue or to grow. Your proposed guidelines would make it almost impossible for a small new farm to start up. We need more farms. We need more people who can make a living from the bays. Shellfish farming jobs can't be shipped overseas.

REC 20005
17 NOV 2010
DOE

DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT
129 North Second Street
Yakima, Washington 98901
Phone: (509) 575-6113 • Fax (509) 576-6792

Michael Morales, Director

Gordon White
Program Manager
Shorelands and Environmental Assistance Program
WA State Department of Ecology
P.O. Box 47600
Olympia WA 98504-7600

Date: November 9, 2010

Subject: Request for Comments: Shoreline Management Rules.

Dear Mr. White,

At this point in time the City of Yakima has yet to adopt updated Shoreline Master Program regulations and is currently regulating under its adopted September 5, 1974, Master Program. The City anticipates that it will complete the required update of its regulations following resolution of the appeals filed against Yakima County's Shoreline Master Program and/or prior to the December 1, 2013, update deadline. The City of Yakima Planning Department has reviewed the proposed changes to the five Shoreline Management Act (RCW 90.58) rules identified in your September 24, 2010, letter and finds no issue with either its adopted or future Shoreline Master Program regulations.

Sincerely,

Michael Morales /gc
Michael A. Morales
SEPA Responsible Official/Shoreline Administrator

L0001

October 8, 2010
Cedar Bouta
Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

Dear Cedar Bouta,

I would like to take this opportunity to comment regarding Washington Department of Ecology Proposed Shoreline Guidelines on Shellfish Aquaculture.

I will preface this letter by saying I was one of the persons invited to participate in SARC. I am a grower and processor of shellfish working in the Willapa Bay watershed. My company, Ekone Oyster Co. employs 47 full time employees. Ekone Oyster Co. works year round and feels that we provide living wage jobs in an area of the state that has severe unemployment.

One of the most difficult changes that Ecology has proposed are the rule changes that deal with the language regarding Aquaculture. It appears that Ecology has proposed to strike "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". At the time this language was developed the State obviously felt that these activities were of STATEWIDE INTEREST. I would like to ask what has changed that Ecology needs to strike this language and replace it with some very different language. Quoting from the new proposed language, "Aquaculture should not be permitted in areas where it would adversely impact critical areas or critical resource areas, suspend sediments that exceed state sediment standards, or conflict with navigation and other water dependent uses". I can see this new language putting aquaculture behind commercial and recreational navigation, ports, docks, bulkheads, and even wading. Surely something that is and has been of STATEWIDE INTEREST will no longer be of interest to anyone except those trying to farm aquatic species. Let us not lose the lesson of the Chesapeake, where surrounding States are scrambling to restore the benefits of shellfish Aquaculture. Washington State still has a vibrant shellfish industry which serves not only the industry, but is helping prevent our aquatic waterways from going eutrophic. a

Even within the framework of the existing language, I would argue that Ecology can make rules that would allow for the "proper management" of these aquatic activities.

Regarding conditional use permits, I believe Ecology's Small Business Economic Impact Statement is flawed. Ecology used the cost of filing the permit as the true cost. Typically with all the requirements that must be met when filling out a CUP permit, this forces that cost up. I b

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would suggest Ecology re-do the Economic Impact Statement and contact a number of small and large companies that actually have filed conditional use permits to get an accurate cost.

Within the specific additions to these conditional use permits, Ecology has strayed from my understanding of where SARC was able to agree.

a. Prohibiting the placement of tanks or pools. **SARC determined that there was less than 1 acre that was currently covered by these structures. I believe SARC decided that there would be a limit placed on their usage, not a complete ban.**
b. Limiting on-site activities during specific periods regarding forage fish: the experts from WDFW determined that forage fish actually did not use the small band of intertidal where geoduck is typically farmed. **SARC grower representation agreed that they could farm within the band where forage fish typically were not found.**
c. Limiting area of a site that can be planted or harvested at one time: Harvest occurs typically once every five years. I would argue disturbing one area and then leaving that area alone for another five years would be less disruptive than hopping around and disturbing smaller areas more frequently. I would suggest Ecology define what they mean by 'limiting'. **SARC did not receive testimony from growers regarding this requirement.**
d. Requiring installation of property corner markers that are visible at low tide. **SARC discussed this, and felt within reason this can be accomplished.** Actually marking the corners may be doable without a great cost, but the *Economic Impact Statement failed to realize the cost of aquatic surveys which typically run from $6000.00 and up per parcel in Willapa Bay. I would suggest Ecology contact a* number of Puget Sound growers who have had recent surveys, as to the true cost of an aquatic survey. This information should be included within the Economic Impact Statement.
e. Requiring buffers, requiring measures to minimize impacts to fish and wildlife. Does Ecology expect every County to become an expert in deciding how large a buffer may be necessary? SARC members did question who would pay for the cost of mandates that Ecology creates. **SARC members also felt that most counties would not have funds for implementation or enforcement of additional rule-making.** I would question whether each County will need to develop individual rules to minimize impacts to fish and wildlife.

If Ecology truly feels individual rules are necessary, who better than Ecology to provide guidelines to the counties regarding buffer size and provide a list of measures that would minimize impacts. To misunderstand that our small rural counties have the expertise or the financial wherewithal to create these rules will lead to very poor language that will no doubt be challenged within our judicial system.

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f. Establish limits on barges or vessels moored. Will the counties also be required to establish and provide similar limits to other commercial and recreational vessels that are moored?

g. Require measures to minimize impacts to navigation, including recreational uses of the water over the site at high tide. So if someone is kayaking or swimming over geoduck tubes, and they scratch their kayak, or cut a foot could a county require tubes to be pulled? **To my knowledge impacts to commercial and recreational navigation were not discussed by SARC.**

It appears to me that Ecology has taken a list of items that were discussed through the SARC process and now has given the Counties the charge of figuring out what SARC could not come to consensus on. I would argue that this is exactly what the Governor and Legislature did not intend for Ecology to do with the SARC process.

I would like to thank you in advance for taking my comments and look forward to your reply.

Nick Jambor
President/ Ekone Oyster Co
SARC Member

Nick Jambor

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L0007

November 20, 2010
Cedar Bouta
Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

Dear Cedar Bouta,

I would like to take this opportunity to comment regarding Washington Department of Ecology Analysis of Compliance Costs for Washington Businesses.

As stated no "business" is required to comply with any direct requirement of these Guidelines. The Guidelines are directed at local governments who are updating their SMP's. Obviously those local governments will then require "business" to comply with their requirements. This letter assumes that those local governments will add language to their updated SMP's that reflect Ecology's Guidelines, and small and large business will be impacted.

This analysis is for the commercial geoduck industry. In the words of Ecology, *"Unfortunately, this industry is highly regional and falls under the umbrella of generic shellfish farming (NAICS code 112512).*

It is directly due to the above statement that I will address my comment.
I believe that local governments may or may not specify that these updates to their SMP's are only directed at geoduck aquaculture. In fact, I would argue that many of these guidelines suggested by Ecology would easily be broadened to address all aquaculture.

Without the insurance that this 'spillover' will not affect generic shellfish farming, I would respectfully request that the entire SBEIS be re-done to reflect these recommended proposed guidelines affects on all shellfish culture.

Once again thank you for taking my comments.

Nick Jambor/President Ekone Oyster Co.

Nick Jambor

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L0008

November 20, 2010
Cedar Bouta
Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

Dear Cedar Bouta,

I would like to take this opportunity to address the guidelines that Ecology is proposing to provide to County Governments as they update their SMP's. I would like to apologize for my hurried approach to writing this letter. With the Governor's Executive Order 10-06, I assumed that these comments would not be necessary. I now feel compelled to have my comments become part of the public record, but also feel pressured since not only am I trying to run a small business successfully, but feel it necessary to address policy proposed by Ecology.

I will try to address those Guidelines that seem the most troubling to my company.

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

SARC did not consider prohibiting this practice. We did discuss limiting the number of pools and area covered. Other impervious materials could easily be seen as something as not allowing a skiff to go dry on the intertidal sediments. This is such a vague statement that it needs to be changed or removed entirely.

2. **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.**

This could easily spill over into other culture methods. There are mechanical methods of harvesting hard shell clams which may actually have a softer touch than hand digging. My concern is that this guidance needs to mention geoduck in every point, so that Counties do not misunderstand your intent.

3. **Limiting alterations to the natural condition of the site, including removal of vegetation or rocks, re-grading of the natural slope and sediments or redirecting freshwater flows.**

This should be addressed to site preparation only. That was the intent of SARC. What happens when geoduck culture allows the re-introduction of vegetation and the County prohibits harvest since there is now vegetation of significance on this bed?

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

In a sense now you are creating a type of buffer, which at the very least the Economist should include in their SBEIS.

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

Ecology might as well say you can only plant a certain percentage of your acreage. From my observations of geoduck farming, all young ducks need to be protected at time of planting. So this could be calculated the same as the economist calculated buffer areas. What portion of a site then would need to be known to make those calculations?

6. **Requiring installation of property corner markers that are visible at low tide. Great idea, though practically impossible to accomplish.**

SARC was unable to provide any guidance on how to mark beds. Do you want to use impervious concrete tiles, bright plastic discs, non-permanent stakes like we use in Willapa? So when a storm removes the marker you will have more debris and possibly the costs of a new survey. Once tubes and netting are removed, do you really want to be seeing bright orange markers at low tide?

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

So first off, if your markers are only visible at low tide, how does the navigator know where they are? Second, at what stage of high tide do you refer? Typical mean high tide? Top of the tide? An incoming tide? What about during a high low tide? I am unaware of anything discussed during the SARC process that addressed impacts to navigation. What exactly is Ecology asking for here? Since no measures are suggested, it is impossible for the economist to even address this issue.

Thank you once again for allowing me to provide comments.

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L0004

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… a

> 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 tideflat 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.

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,

Peter Downey
Puget Sound Alternate Member of SARC
President, Discovery Bay Shellfish Inc.
2023 E. Sims Way #235
Port Townsend, WA 98368
(360) 385-3691

cc. Mr. Ted Sturdevent –Director of Washington Department of Ecology
Mr. David Sullivan - Jefferson County Board of County Commissioners
Mr. John Austin – Jefferson County Board of County Commissioners
Mr. Phil Johnson - Jefferson County Board of County Commissioners
Representative Kevin Van De Wege
Representative Lynn Kessler
Representative Elect Steve Tharinger
Mr. Alan Bogner, Office of Regulatory Assistance
Governor Christine Gregoire

L0009

November 20, 2010

Ms. Cedar Bouta
Washington State Department of Ecology- SEA Program
P.O. Box 47600
Olympia, WA. 98504-7600

Re: WAC 173-26 Proposed Rule Amendment

Dear Ms. Bouta,

I would like to comment on the proposed rule changes to the *Shoreline Guidelines* WAC 173-26. I'm very concerned that the Department of Ecology (DOE) has disregarded the recommendations given by the Shellfish Aquaculture Regulatory Committee (SARC). I find it hard to believe that after a long history of Shellfish Aquaculture in Washington State that the DOE would turn their back on scientific research and local shellfish farmers.

The removal of certain language in the RCW that specifically protects shellfish aquaculture would ultimately put shellfish farmers out of business. Changing the definition of Critical Saltwater Habitat from "…"subsistence, commercial and recreational shellfish beds" to "…naturally occurring beds of native shellfish species.", is a direct threat to the future of the industry. In addition, changing the definition of aquaculture from "…dependent on the use of the water area", to "*when* it is a water dependent use" also threatens the industry. These changes proposed by DOE not only directly threaten the future of the shellfish industry, but also the small businesses that rely on the income generated from that industry.

My family came to Washington State in 1970 to farm shellfish in the last pristine estuary in the world. We were taught hard work and how to make a decent living. After my brother and I both graduated from WWU with BS degrees we returned to the shellfish Industry. My brother owns his own shellfish company in Willapa Bay. I have a degree in Marine Biology and manage a shellfish farm for The Nisqually Tribe in Puget Sound. I believe we were both blessed by growing up in such surroundings. People who aren't exposed to their environment tend to have a disassociation with that environment. DOE rule changes confirm that belief.

The state of Washington is a leader in shellfish production. This is an achievement that every citizen should be proud of, especially our leaders in state government. Other states that have a shellfish industry are proud of that fact and do what they can to promote and protect shellfish aquaculture. If DOE continues with the rule changes, the people of the Northwest will no longer have local fresh seafood.

Please reconsider the DOE rule changes and act on the recommendations given by SARC.

I would like to quote Billy Frank a prominent leader and Elder of the Nisqually Tribe

"Treaty Tribal and non-tribal shellfish producers are on the front line of monitoring and protecting water quality in Puget Sound and along the coast. We can measure the health of these waters by the health of the shellfish that live there. Healthy water produces healthy shellfish, and healthy shellfish is good food for all of us."

Sincerely,

Sue Shotwell
Shellfish Biologist

Appendix C: Transcripts from Public Hearings

Ecology is required by RCW 90.58.060 to hold at least four hearings when adopting guidelines. Four Open Houses/Hearings were held across the state in September 2010.

- Moses Lake, September 8
- Everett, September 13
- Olympia, September 14
- Aberdeen, September 15

Only two members of the public attended the Moses Lake hearing, and neither gave testimony. Transcripts from the other hearings are attached. Ecology received 14 testimonies.

DEPARTMENT OF ECOLOGY

SHORELANDS AND ENVIRONMENTAL ASSISTANCE PROGRAM

SHORELINE MANAGEMENT ACT RULE MAKING 2010

EVERETT STATION

BEV POSTON, HEARING OFFICER

SEPTEMBER 13, 2010

Anna Hirsch, Transcriptionist
Flygare & Associates, Inc.
1715 South 324th Place, Suite 250
Federal Way, WA 98003

MS. POSTON: Let the record show that it is 7:44pm on Monday, September 13th, 2010 and this hearing is being held at the Everett Station Weyerhaeuser Room located at 3201 Smith Avenue in

Everett, Washington.

This hearing is about the proposed updates to the Shoreline Management Act Rules, Washington Administrative Code 173-18, 173-20, 173-22, 173-26 and 173-27. Legal ads of the public comment period in hearings were published on or around the following dates, August 18th, August 25th, September 1st and September 8th in the following papers, Idaho Lewiston Morning Tribune, Aberdeen Daily World, Bellingham Herald, Bremerton/Kitsap Sun, Centralia Chronicle, Ellensburg Daily Record, Everett Daily Herald, Kennewick/Tri City Herald, Longview Daily News, Moses Lake/Columbia Basin Herald, The Olympia, Port Angeles/Peninsula Daily News, Seattle Times, Skagit Valley Herald, Spokane Spokesman Review, Tacoma News Tribune, Vancouver Columbian, Walla Walla Union Bulletin, Wenatchee World, Yakima Herald Republic, Goldendale Sentinel, Stevenson/Skamania County Pioneer and The White Salmon Enterprise.

Ecology also placed information about the comment period on the rules, updates and hearings on their website and on their agency public involvement calendar. A rule proposal notice was emailed on August 17th, 2010 to a list serve made up of local government planners in shellfish and environmental interests. Ecology also sent emails or letters in August 2010 to legislators and tribes interested in geoducks.

Okay, at this time we have one person who indicated he would like to provide testimony. And if you would read your name and your address into the record your may begin.

Testimony of Bill Dewey

So I'm Bill Dewey, with Taylor Shellfish Company. And my home address is 704 E. Hiawatha Boulevard Shelton. So I -- besides working for Taylor Shellfish Company I also have a shellfish farm of my own in Sammish Bay and while I grow predominantly Manila clams I have a few geoduck planted on my farm as well and -- and at some point in time I may wish to expand that -- that geoduck farming. So these rules affect me personally as well as the company I work for.

So I'll -- I'll touch on just three general points of concern that Taylor's and others in the industry have on the proposed rules. And defer specific comments to a written testimony that we'll submit at a later time.

So first off, we're concerned that some of the proposed changes that are applicable to all aquaculture represent a significant departure from Ecology's current policy. And removing -- also these changes in policy remove critical water quality protections for aquaculture and they also place aquaculture at the end of the line when trying to balance other conflicting uses.

So the -- the critical water quality or the -- the, excuse me, the critical habitat designation is something that I rely on as I work statewide on water quality issues for shellfish. It's a big part of the rationale for why we're able to get local jurisdictions to restore water quality in our shellfish growing

areas is the fact that it's designated as critical saltwater habitat.

So as -- secondly, changes that Ecology proposes with these regulations go well beyond what the SARC recommendations were to the legislature regarding regulations for geoduck farming. I feel that there -- there that SARC deliberation went on for two years it was a difficult debate and in the end resulted in some balanced recommendations that in and of themselves were going to be significant to the industry and have an impact. And that, you know, that was -- those were hard decisions in and of themselves and -- and these new rules seem to go well beyond those SARC recommendations and that's disappointing for the growers.

And then thirdly, we feel that Ecology should not proceed with the rules given that the small business economic impact statement concluded that the rule has a disproportionate impact on small businesses and the mitigation proposed is inadequate.

So those are our -- our three general concerns and -- and again we'll provide more specific comments in -- in written testimony.

MS. POSTON: Okay, thank you. Okay. If you would like to email or send written comments they can be postmarked or emailed no later than five p.m. on October 18th, 2010. Please mail your comments to Cedar Buta, Washington Department of Ecology SEA, Post Office Box 476, excuse me, 46 -- no it's 47600, Olympia, Washington 98504-7600. Email comments should be sent to the following address, shorlinerule, all one word, at ecy.wa.gov.

All the testimony received at any of the four public hearings along with any written comments received by the end of the comment period, October 18th, will be part of the official record of this proposed rule revision. Whether a comment is presented orally or in writing they will all receive equal mate and -- equal weight in the decision making process.

After the comment period Ecology staff will review all comments submitted and prepare a document called the Response To Comment Summary. People who give testimony or submitted comments will be notified when the responsiveness summary is available.

Adoption of the rule updates are currently scheduled for December 14th. If the proposed rule amendments are adopted that day and filed with the code advisor the the rule will go into effect 31 days later which is about mid January.

So on behalf of Ecology thank you so much for coming. I appreciate your cooperation and courtesy. This hearing is adjourned at 7:50p.m. Thank you. I run a tight ship.

*****

(End of Hearing)

IN RE: Department Of Ecology
Shorelands And Environmental Assistance Program
Shoreline Management Act Rule Making 2010

HELD: September 13, 2010 - Everett Station

AFFIDAVIT

I, Anna Hirsch do certify that the recordings provided to us of the Department Of Ecology Public Hearing, held in Everett, Washington was transcribed by me to the best of my ability.

_____

Anna Hirsch,
Transcriptionist

DEPARTMENT OF ECOLOGY

SHORELANDS AND ENVIRONMENTAL ASSISTANCE PROGRAM

SHORELINE MANAGEMENT ACT RULE MAKING 2010

DEPARTMENT OF ECOLOGY AUDITORIUM

BEV POSTON, HEARING OFFICER

SEPTEMBER 14, 2010

Anna Hirsch, Transcriptionist
Flygare & Associates, Inc.
1715 South 324th Place, Suite 250
Federal Way, WA 98003

MS. POSTON: Okay, let the record show that it is 7:06pm on Tuesday, September 14th, 2010 and this public hearing is being held at the Ecology Headquarters Auditorium located at 300 Desmond Drive, Lacey, Washington.

This hearing is about the proposed updates to the Shoreline Management Act Rules, Washington Administrative Code 173-18, 173-20, 173-22, 173-26 and 173-27. Legal ads of the public comment period and hearings were published on or around the following dates, August 18th, August 25th, September 1st and September 8th. And they were in the following papers, The Idaho Lewiston Morning Tribune, The Aberdeen Daily World, The Bellingham Herald, the Bremerton/Kitsap Sun, The Centralia Chronicle, The Ellensburg Daily Record, The Everett Daily Herald, The Kennewick/Tri City Herald, The Longview Daily News, The Moses Lake/Columbia Basin

Herald, The Olympian, The Port Angeles/Peninsula Daily News, The Seattle Times, Skagit Valley Herald, The Spokane Spokesman Review, Tacoma News Tribune, Vancouver Columbian, The Walla Walla Union Bulletin, The Wenatchee World, The Yakima Herald Republic, The Goldendale Sentinel, The Stevenson/Skamania County Pioneer and The White Salmon Enterprise.

Ecology also placed information about the comment period on the rules -- and the rules updates on the hearings on the ecology website and on the agency public involvement calendar. A rule proposal notice was emailed on August 17th, 2010 to a list serve made up of local government planners in shellfish and environmental interests. Ecology also sent emails or letters in August 2010 to legislators and tribes interested in geoducks.

Okay, wow that was a mouthful. At this time we have Miss Diane Cooper who has indicated she would like to present her testimony. And you may begin.

Testimony of Diane Cooper

Thank you. And thank you to Ecology for the opportunity to comment and all the work that has been done. It is appreciated. My comments are going to be general in nature and we're going to provide pretty detailed written comments before the -- the October 18th deadline. I'm going to focus on two major concerns and others are going to focus on some other concerns.

Number 1, the changes that Ecology proposes we believe go well beyond the recommendations of SARC and the intent of the

legislature. As you know I represented the Puget Sound growers on SARC and during that process. And that really is -- that was a significant investment of time and energy, not just by me, but by others and Ecology. We believe that the SARC recommendation should be fully considered and be reflected in the new rules. Most SARC members recommended that Ecology develop a guidance document, which we talked about earlier, or BMP's that could be updated as the sea grant science unfolds and practices evolve.

Because the rules are -- are more prescriptive and more detailed they very well will likely be implemented and the practices will be outdated or the rules will be outdated before the practices are implemented. And they're certainly uninformed by the science at this point.

We are concerned with several specific geoduck provisions specifically the buffer requirements, survey requirements, the limiting areas for planting, harvesting and predator exclusion devices, the use of motorized equipment. We have no idea and it's not really indicated how local governments and local planners are going to assess these limitations or what they're going to use to assess them.

Number 2, Ecology should not proceed given that the small business economic impact statement on your own analysis concluded that there's going to be a disproportionate impact to small businesses. The mitigation that's offered is -- is inadequate. Small business economic impact statement is inadequate because it examined only one of the 15 limits and conditions in any detail.

And it made assumptions regarding cost of permitting that are significantly less than the actual cost of opinion and complying with the conditional use permit.

And moreover the one issue that Ecology did assess, the buffer requirement, concluded that there would be a disproportionate impact on small business and then offered little or no mitigation to that impact.

While I represent a larger grower, our industry I think is unique in that its vitality and -- and viability and its overall success is really dependent on having both small and large growers. Having the small businesses impacted is really unacceptable and it threatens the whole industry.

Finally, it's important to recognize that we are -- our industry is currently being challenged by a number of conflicts. Many of the challenges are result of land use conflicts that result from shorefront property owners and working farms. This is not unlike many of the challenges that other natural resource industries have faced in this state. It's critical that the state provide appropriate guidance to local jurisdiction that allows the continued existence and growth of our industry.

We've heard from the state from their -- at various levels. We've heard from the governor all the way down to agency staff that the shellfish industry is critical to the state and that it's important to the state.

Ecology, you have the opportunity now to prove it and acknowledge a long history, our economic and cultural

significance and our beneficial contributions to the marine environment. Thank you.

MS. POSTON: Thank you. Okay, Ms. Stock. Hello?

Testimony of Amanda Stock

Hi, my name is Amanda Stock with Plauche and Stock and I'm here on behalf of Taylor Shellfish this evening. Thank you for the opportunity to comment. As Ms. Cooper just mentioned, we're both providing comments that are general in nature and we will be following up with detailed written comments in addition to testimony at this hearing.

And Ms. Cooper spoke about two issues that are of -- of primary concern to Taylor and I'm going to speak about a -- a separate issue that's also of great concern to us and -- and other growers in the community. And that pertains to the changes that are being proposed that are applicable to all aquaculture not just to geoduck. And the changes that Ecology is proposing represent a significant departure from Ecology's current policy with regards to aquaculture in general.

The changes that are proposed remove important water quality protections and place aquaculture at the end of the line when balancing conflicting preferred shoreline uses including navigation. And although this is I think what we've all acknowledged as sort of a -- a shortened rule making process that's at a timeline, it's really come out of the -- the end of a very long exhaustive process that not only the aquaculture

stakeholders but Ecology and I know many other people in this room spent an incredible amount of time working on these recommendations coming out of SHB22-20, the SARC process and all the conversations that went around coming up with a set, you know, agreed on recommendations to Ecology. And then the subsequent comments that the growers including Taylor submitted as Ecology was draft -- was drafting these rules.

And with regards to the changes that are applicable to all of aquaculture that remove the significant protections represent a change at the end of a very long process that doesn't feel like a -- frankly a logical end to all of the work that went into coming up with these recommendations. And as a result growers are frustrated and discouraged and they're angry and they're at a loss.

And with regard to these changes that are applicable to all of aquaculture, which include retaining subsistence commercial and recreational shellfish beds as critical saltwater habitats 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. And that includes also the language that's proposed to be removed that states that aquaculture is water dependent and a preferred use of the shoreline.

As well as some of the things that -- that Ms. Cooper referenced the -- that the fact that Ecology proposed changes go

well beyond the recommendations of SARC and that the small business economic impact statement doesn't really adequately take into account the impacts to the growers.

And as I mentioned we're going to be following up with written comments and we urge you to carefully consider the written comments that we'll be submitting in -- in response to Ecology's proposed changes. Thank you.

MS. POSTON: Okay. Thank you. Okay, Mr. Bloomfield. Hi.

Testimony of Tom Bloomfied

I'm just -- I'll keep this even more brief. I'd like to -- to start by saying thank you for the opportunity to testify. I would like to speak to the economic impact of the proposed changes.

On a very personal level for the last eight years I have been salting away money with the idea and the business plan to start my own small farm. And if these rules are adopted as proposed that idea will be shelved because I believe that that will create a business environment that is not attainable for a small business.

I would also like to formally request specific examples of aquaculture that is not water dependent. I don't believe that can exist so if you can provide that that would be great. Thank you.

MS. POSTON: Okay. Thank you so much. Mr. Allen.

MR. ALLEN: Okay. Want me to start?

MS. POSTON: Go ahead.

Testimony of Brian Allen

All right. I'm sorry, I'm a little punchy I've been up on the low tide last night (inaudible) this morning so. My name is Brian Allen I am a small business owner in Thurston County and a aquaculture farmer. I haven't had a -- a lot of time to review the proposed rule changes so I'm -- I just wanted to be here and -- and say something and then we're -- I'm going to submit written comments so look for those.

But things have changed quite a bit in the last five years for us shellfish farmers. And I think if I were to think of start -- starting a -- a shellfish farming business today I probably wouldn't simply because the -- there has been such a sea change of regulatory oversight. We haven't had any new project development in three years because of it.

And so when I see things like requiring conditional use permits and the guidance to local jurisdictions it seems to me to be overreaching. I think that Ecology has plenty of opportunity for regulatory oversight already with the 401 and of course it's own management process. And that the local counties should be able to determine on their own how to regulate shoreline activities.

The other thing I want to say is -- is that I'm growing world class seafood right here and I'm doing it without chemicals

and without hormones (inaudible) feeding them and I will -- that's where I'll leave it.

MS. POSTON: Okay. Thank you. Mr. Wishart. Hi.

Testimony of Bruce Wishart

Hi. Thank you for the opportunity to comment. I'm Bruce Wishart also a member of the SARC and -- and glad as many of you are to be nearing the end of this long process. Representing People For Puget Sound and the environmental community tonight. I -- I'll try and make my comments brief. We will be also submitting written comments and we hope to continue the dialogue with everyone in the room and all the other stakeholders as we work to finalize the rule. I think we've had a good constructive discussion and probably will continue to do so up until the final draft of the rule comes out.

But to start with thank you to Ecology for all your hard work pulling this proposal together. We do see some improvements in this version of the rule as opposed to the pre-draft rule. I think there's been some clarification it's certainly easier to read and interpret.

I'd like to start by indicating our support for the conditional use permit requirement, the language beginning on Page 73. We very much support the idea of clear direction to local governments in terms of buffers and best management practices. We think that's appropriate. And while the conditions and the rule and the requirements to the rule are not

as prescriptive as we would have preferred, we actually prefer numeric buffers and -- and other more prescriptive standards to ensure protection of habitat, we do understand, you know, that were compromises made and this is -- this the middle ground.

We appreciate the inclusion of the baseline survey requirement in this version of the rule. We do have a few concerns with this -- the conditional use permit section though. And one of them is that it now appears and -- and we were disturbed to find that monitoring and reporting requirements now seem to be optional, left to the discretion of local governments. We think that some level of monitoring and reporting should be required and spelled out in the guidelines.

We were also concerned with new language that seems to make conversion of areas of non-geoduck aquaculture to geoduck aquaculture not necessarily subject to a conditional use permit. And we're not clear what the intent was there but we'd like to continue talking about that with you.

On Page 30 changes have been made to a section regarding designation of preferred uses. Our goal is to ensure that when local governments are conducting planning that they designate environmentally significant areas first and then subsequently other preferred uses. I think that's the intent of Ecology, that's been their longstanding position in this area and that's what the guidelines had originally said.

I know there's been an attempt to clarify this language but we still think area needs some work and so we -- we want to

continue working on that section of the rule.

We do have several other comments and -- and a lot of specifics. I'll probably leave that for the written comments and -- and appreciate the opportunity tonight to speak. Thank you.

MS. POSTON: Okay. Thank you. Okay, at this time no one else has indicated on the sheets that they would like to provide testimony so I'm opening it up. Is there anyone out here? Please come forward, Sir. Yes. You were the first one with your hand up in the air. And if you could state your name for the record and go ahead and begin talking then.

Testimony of Al Schmauder

My name is Al Schmauder. I've been active in the Chambers-Clover Watershed for many years. I have four points I'd like to point out to be considered.

I'd like to see Ecology have some provisions where regulations prepared by jurisdictions are coordinated within the watershed of those jurisdictions. Our watershed has seven jurisdictions with the Chambers-Clover Watershed, for the cities and the county plus the military base and each one is doing their regulations at this time but there's nobody saying -- maybe that -- maybe Ecology is looking at it but I don't think Ecology has a -- a mandate yet or a desire or (inaudible) or an emphasis to make sure that where your jurisdictional lines meet and your rivers and creeks flow across those lines that those regulations are reasonable so our developers don't have a 12 foot setback on one side and 25 foot on the other and it just depends on the

line. You know, we -- we need to have some kind of a watershed view of these various jurisdictions where -- where we have multiple people in -- in play. Our watershed councils might look at that but I think we need some horsepower to help us.

The second thing is I'd like to have something in the regulations of the state that encourage volunteer restoration efforts. We have many do-gooders, ecologists and high school and grade school students who want to do something on the shoreline. And it's -- it's probably very difficult. So I'd like to see something in the regulations that projects are designed primary for shoreline improvement that ecology tried to modify our JARPA permit process, the Joint Aquatic Resources Permit Application, to allow -- we have a couple cases in there we used the JARPA for speeding the process and making the fees minimal. If we had another little line in there that said, "For shoreline restoration work that's designed primary to help the shoreline these will also be able to go through the speedier process, JARPA process." This would allow a lot of us as our funding gets minimal and we got people who want to volunteer and do stuff they certainly don't want to sit around and wait for permits and pay a high fee to help the -- help our shorelines. So I think that is something we should consider and get into all these. I'm going to try to get in the individual ones but we should be an overall umbrella in this area too.

Enforcement. I haven't read the regulation I've got to admit but -- fully, but we need to ensure that our enforcement

processes are clear and meaningful. Enforcement rules should act as a deterrent and not as a penalty but, you know, we need these deterrents. We don't really want to -- we don't want to penalize people but they need to have some reason for not complying. And those not complying reasons for people that -- that -- that deliberately want to damage the shorelines there should be a hurt in the regulation someplace that's easy to enforce. Not too Mickey Mouse and weasel worded. If they hurt the environment because they obviously want to and they say sorry I'm going to disregard these regulations fine, here's your penalties start paying, let's go to court and talk about it. But we've got to be able to win these enforcement issues. We've got to be able to -- to have some active enforcement processes. And we have enforcement in our county on some rules but they're so vague and difficult to process they never get enforced. So lets get some clear meaningful enforcement rules.

Third thing, under the natural environment area I conclude that the shellfish use in our shorelines or our natural -- our natural shoreline environments it's hard to justify that it does not damage our natural environments. So we have to ensure our regulations, the conditional use permits are great I encourage those. I want to make sure that we're going to go into a natural shoreline that all public uses and enjoys for the next 100 years that we don't put in aquaculture that screws up that shoreline. And I can think of very few aquacultural processes -- the -- the commercial type, that are not going to damage our natural

conditions -- our natural environments. So I'd like strong rules in that right -- in that area that aquaculture is probably going to be off limits unless you have very good farm (inaudible). Thank you.

MS. POSTON: Okay. Thank you. Okay, is there anyone else who would like to say anything? Yes, Sir. Okay, have a seat. Please state your name for the record.

Testimony of Clayton Johnson

Yes, my name is Clayton Johnson. I'm a private citizen I do not represent any organization. But I want to speak particularly to the aquaculture that -- about geoducks. One thing I have on just about everyone in this room is age. And I have grown up on Puget Sound my ancestors were pioneers in the area. And what concerns me more than anything else about this is that the word growth is used here several times this evening.

Now I own a small summer place in (inaudible) and I've been watching what's been going on. And I've also watched what has happened in Puget Sound as well as the rest of the country and there are people who would cut every tree, there are people who would take every resource if they could without regulation. And I submit -- I haven't read the regulation changes and so on but I submit they're probably not too strong. If anything, the geoduck people -- and I'm not your enemy I just want you to be controlled. I think you have been very lightly regulated, very lightly regulated and you've done things -- just gone right

ahead. And so I don't think that we want to just let things happen without very tight controls and without letting our Puget Sound become industrialized.

If you want to see what I'm really talking about consider the Nisqually Delta now and then most of you all know where that is and you also know where the Port of Tacoma is. The Port of Tacoma once looked like the Nisqually Delta it doesn't anymore. There were people who wanted to make the Nisqually Delta a deep water port and if they had succeeded it would look just like the Port of Tacoma does now. I do not want Puget Sound to be developed so much that my kids, grandkids cannot use it. Thank you.

MS. POSTON: Okay. Thank you. Okay, is there anyone else? No? Okay. All of the testimony just received at the four public hearings and this is the -- third one, along with any written comments received at the end of the public comment period, which is October 18th, will be part of the official record for the proposed rule revision. And whether a comment is presented orally or in writing they receive equal mate -- equal weight -- tough night -- in the decision making process.

If you would like to email or send written comments they must be postmarked no later than five o'clock p.m. on October 18th, 2010. And please mail your comments to Cedar Butay with --

UNKNOWN FEMALE SPEAKER: (Inaudible).

MS. POSTON: Did it do it wrong again? I'm sorry.

UNKNOWN FEMALE SPEAKER: (Inaudible).

MS. POSTON: I am so bad with names. You can beat me afterwards. Anyways, send your comments to Cedar with the Washington Department of Ecology, Post Office Box 47600 Olympia, Washington 98504-7600. You may also email comments and the email address is the word shorelinerule, as one, at ecy.wa.gov. The different venues in which you can comment are listed up here.

After the comment period Ecology staff is going to review all of the comments that have been submitted and prepare a document called a Response To Comment Summary. People who gave testimony or submitted comments will be notified when the responsiveness summary is available.

Adoption of the rule updates is currently scheduled for December 14th, 2010. If the proposed rule amendments are adopted that day and filed with the state code advisor, the rule will go into effect 31 days later making it around mid January.

On behalf of the Department of Ecology thank you so much for attending the open house and our public hearing. And I appreciate your cooperation, your courtesy with each other. Let the record show this hearing is adjourned at 7:32. Thank you.

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(End of Hearing)

IN RE: Department Of Ecology

Shorelands And Environmental Assistance Program

HELD: September 14, 2010 - Department Of Ecology

AFFIDAVIT

I, Anna Hirsch do certify that the recordings provided to us of the Department Of Ecology Public Hearing, held in Lacey, Washington was transcribed by me to the best of my ability.

_____

Anna Hirsch,
Transcriptionist

DEPARTMENT OF ECOLOGY

SHORELANDS AND ENVIRONMENTAL ASSISTANCE PROGRAM

SHORELINE MANAGEMENT ACT RULE MAKING 2010

GRAYS HARBOR COLLEGE, BISHOP CENTER

BEV POSTON, HEARING OFFICER

SEPTEMBER 15, 2010

Anna Hirsch, Transcriptionist
Flygare & Associates, Inc.
1715 South 324th Place, Suite 250
Federal Way, WA 98003

MS. POSTON: Okay, let the record show that it is 7:11pm on Wednesday, September 15th, 2010 and this hearing is being held at the Grays Harbor Community College, Bishop Center located at 1620 Edward P. Smith Drive in Aberdeen, Washington.

This hearing is about the proposed updates to the Shoreline Management Act Rules, Washington Administrative Code 173-18, 173-20, 173-22, 173-26 and 173-27. Legal ads of the public comment period and hearings were published in or around the following dates, August 18th, August 25th, September 1st and September 8th. And they were in the following papers, The Idaho Lewiston Morning

Tribune, The Aberdeen Daily World, The Bellingham Herald, The Bremerton/Kitsap Sun, The Centralia Chronicle, The Ellensburg Daily Record, The Everett Daily Herald, The Kennewick/Tri City Herald, The Longview Daily News, The Moses Lake/Columbia Basin Herald, The Olympian, The Port Angeles/Peninsula Daily News, The Seattle Times, The Skagit Valley Herald, the Spokane Spokesmans Review, The Tacoma News Tribune, The Vancouver Columbian, The Walla Walla Union Bulletin, The Wenatchee World, The Yakima Herald Republic, The Goldendale Sentinel, The Stevenson/Skamania County Pioneer and The White Salmon Enterprise.

Ecology also placed information about the comment period on these updates and notice of the hearings on its website and on their agency public involvement calendar. The rule proposal notice was emailed on August 17th, 2010 to a list serve made up of local government planners in shellfish and environmental interests. Ecology also sent emails or letters in August to legislators and tribes interested in geoducks.

Okay, We're ready to begin with formal testimony. And if you'd state your name for the record you can go ahead and begin.

Testimony of Mark Ballo

Okay. My name is Mark Ballo. My -- I have two main concerns I -- that I will address here. And that is one is the small business economic impact analysis that was performed by Department of Ecology that determined that there was a disproportionate impact on small businesses from this rule and we

-- I'm representing Brady's Oysters, which is a small business.

My other concern is the definition of the critical saltwater habitat, the -- the removed language (inaudible) commercial and recreational shellfish beds and was replaced with naturally occurring beds of native shellfish species. And I -- I believe that the naturally occurring beds of shellfish native being the -- the operative word, native shellfish species needs to be fixed.

MS. POSTON: Okay. Thank you. Okay, Mr. Morris.

MR. MORRIS: I will pass.

MS. POSTON: Okay. Then Mr. Hall. Please state your name for the record and go ahead.

Testimony of Eric Hall

My name is Eric Hall and I have some concerns over the language in the -- the new law here. I -- I strongly feel that Ecology should retain commercial and recreational shellfish beds as critical saltwater habitat. Removing these shellfish beds from this classification takes away vital water quality protection for both shellfish and for marine waters in Washington State. Shellfish beds like other critical saltwater habitat requires a high level of protection due to the important ecological function they provide such as water quality improvement and three dimensional habitat.

Shellfish raised for human consumption requires a high level of protection. And I feel that this wording, this language in this law taking away commercial and recreational shellfish beds

we would not get the same level of protection that we would -- needed for our beds. That's pretty much all I have.

MS. POSTON: Okay. Thank you so much. Let's start with Vicki Wilson. Ladies first. State your name for the record and please go ahead.

Testimony of Vick Wilson

Okay. My name is Vicki Wilson and I want to start by being clear about my perspective and that is that I am a geoduck farmer and I am extremely proud of my industry from the largest growers to the smallest growers. I think we make an incredible contribution economically, environmentally and culturally. Are we a perfect industry? Absolutely not. Are we a net benefit to the state? Absolutely.

I have many areas of concern about the rules as proposed and I'm going to comment mostly in writing about those not tonight.

MS. POSTON: Okay.

MS. WILSON: I also have some very positive comments for Ecology about the rules and likewise I will put those in writing because I -- I think they do deserve to be recognized for their efforts.

Tonight I want to focus on one point and it's a similar one to what's been presented by others and that is the impact on small business. And I want to try and personalize it for people who don't I guess have that perspective or haven't walked in those shoes. As a very small -- very, very small geoduck grower

I cannot overstate the concern I have regarding the negative impacts of the proposed rules on small growers. If the message that Ecology is trying to communicate is that small growers don't belong in aquaculture these rules are doing a sterling job of communicating that.

The small business economic impact analysis that was done comes no where near to capturing the cost of small growers and my husband and I would be delighted to sit down with Ecology staff and have a frank and honest discussion about the impacts that we would feel as a result of these.

If you took a scale and you placed on side of that the benefits of what we do and on the other side of that the detriments of what we do the up sides so far outweigh the down sides that it's just absolutely baffling to me why people do not want me in this industry. And these rules seem to underlie that.

I know that as a very, very small grower that I might seem insignificant to many people but I do make a very important positive difference. I'm important to the -- to the people I employ, the people I pay a living wage to and provide medical and dental coverage to. I'm important to the families that I lease ground from. The 80 year old couple or the recently divorced middle age woman who are struggling to keep their property on the shoreline and we're helping them do that.

I'm important to the State's economy. I bring new money into the State and that's a good thing. Why do we think the governor continues to make trade emissions to Asia? And I'm

important to the State's water quality. The direct contributions of all shellfish aquaculture, not just geoduck, but all shellfish aquaculture are frequently discussed and so I -- I won't go there.

But I do want to give an example of a more indirect contribution to water quality that growers make. The example is -- has to do with one of our leasers who called us -- and this is a small plot it's probably four tenths of an acre if that. But he was ready to fertilize his prize lawn and he stopped and thought about it for a moment and he gave us a call and he said, "You know, I'm about ready to do this but I wanted to find out if it would be a bad thing for geoduck." And that would -- that gave us the opportunity to have a discussion with this leaser about water quality and what he might not want to do. This person has lived on the sound for years and years and years and they've never thought about water quality before. He does now and he does so because of shellfish aquaculture. He is vested in the sounds health and it's because of what we do.

So please don't take us out of the language on critical saltwater habitat. Don't change the language about the critical importance of shellfish beds to water quality. We're among your most important allies, use us.

MS. POSTON: Okay. Thank you. Mr. Steve Wilson.

MR. WILSON: If I testify orally I'll just say something (inaudible).

MS. POSTON: You know, that could have been

entertaining.

MR. WILSON: (Inaudible).

MS. POSTON: Okay. Then the next person I have is Mr. Nichols. Please state your name for the record and go ahead.

Testimony of Jeff Nichols

My name is Jeff Nichols, I'm a resident of Montesano. And for the record I'm an electrician. Born and raised Western Washington, grew up on Puget Sound and now live here on the harbor.

Just in my own opinion -- and I'm just kind of generalizing I suppose but we -- we have roughly 300 miles of Pacific Ocean coastline. And for all intents and purposes less than 10 percent of it put to any use whatsoever, 90 percent of it's untouched. And in reading through what I've got so far and I -- and I want to do a little bit more research on this so I'll probably submit further written comments.

But to change the definition and remove language such as commercial and recreational shellfish beds -- and not only is this an important activity recreationally but it's also an important portion of our economy. It helps offset our trade and balance with other countries and anything that could be a detriment to small business and our commercial shellfish growers has a negative impact on this state. And it's absolutely not acceptable.

When I'm allowed the opportunity to further review these

proposed changes I'll probably submit more in writing. But at this point that's all I'd like to say is that if it negatively impacts our commercial growers it's not acceptable. And from what I can see here this -- this could negatively impact them. It could stop them from expanding, it could stop new growers from starting businesses and for what? It -- it doesn't really seem to serve any purpose. I look and as I read through here it talks about a no net loss. It doesn't say anything about the studies that have been done to support the fact the fact that we need to not have any net loss. It just simply says we don't, you know, we -- we can't allow any net loss of this critical saltwater habitat.

That's all I'm going to say for now. I'll save the rest for my written.

MS. POSTON: Okay. Thank you.

MR. NICHOLS: Thanks.

MS. POSTON: Okay. Mr. Harrison. Please state your name for the record and go ahead.

Testimony of Bryan Harrison

Bryan Harrison. I guess I need to disclose that I was a member of SARC that advisory committee not the committee that wrote the rule Ecology did but part of a committee that provided some advise to Ecology.

And first I want to talk about process. I want to commend Ecology for the manner in which this rule was developed. Because

you did appoint an advisory committee and bring in diverse opinions that argued and debated and actually looked at science before developing a rule and even recommended that additional studies be done in area that were not -- that were not clear.

And most importantly I want to commend Ecology throughout the process for successfully maintaining its independent thought and in adherence to good government process and throughout the process I didn't see Ecology advocating for one position or the other but merely facilitating. And as someone who has been critical of rule develop process in the past I think it's worth noting that -- that as far as process I think Ecology did what they needed to do and this actually is a model for other state rule development.

Also I want to thank you for having a hearing on the coast and for the most part adhering to that primary principal that was developed in the shoreline rules 10 years ago in which everything is measured against the no net loss of ecological functions. In a couple areas it may have strayed from that but primarily it didn't and I think preserving that consistency is good.

Also appreciate your development of a process to do less than a comprehensive shoreline master program amendment. I know in Pacific County we've been frustrated with the inability to make minor amendments even if they would prove to be beneficial to the environment we've been prevented from doing that. So that is good.

But I do have specific comments and I'll quote sections and

I may have numbered these incorrectly because I admit that by the time I got to the sub, sub, sub, sub sections I sometimes got lost. But under 173.26.211.5CiiH under Aquatic Environment, there -- this is the one area that I feel it may have strayed from a principal of no net lost of ecological functions in developing a concept of previewing aesthetics in views and knowing that much of what happens in Pacific County are industrial and commercial development. It's all along Willapa Bay and the rivers that flow into it. It's all in the shoreline environment. Much of it is ugly or viewed by some as ugly. And I can tell you in the process of making recommendations on these rules I was approached by someone from Puget Sound who said, "Well we need to tell you country bumkins who might not understand that those of us that are professionals that live along Puget Sound don't appreciate the ugly blue collar industries that we have to look at and expanded that view to the shellfish industry." I -- that was said in private to me but I can tell you if there is any avenue for including aesthetics and views someone's going to find the shellfish industry ugly. I'd hate to go down that slippery slope even though I don't think that was Ecology's intent. But there are those that might use that.

Under 173.26.221.2CiA under the seventh bullet under wetlands there is a reference to county's planning for and regulating vegetation removal. The existing rules say significant vegetation removal. The word significant has been

removed and I guess my concern with that is now we're addressing any vegetation removal even if it's de minimus. I would ask that you consider putting the word native in front of vegetation removal.

In my counting we've spent millions of dollars many years controlling invasive weeds (inaudible) high enough. There are others that are arriving. And if -- I guess I would ask that you consider again putting the native in front of vegetation removal because in order to protect the environment noxious, non-native species need to be removed or else deferred to the local government to decide what is native or what is invasive and needs to be removed. We all do have noxious weed control (inaudible) that can do that.

Under 173.26.221.2CiiiA Critical Saltwater Habitats, I -- and I think others have referred to this. The reference to commercial and recreational shellfish growing is removed as a preferred use. It doesn't mean that you can't allow it but amongst many uses traditionally commercial and recreational shellfish has had a leg up in being recognized as a preferred use.

It substitutes naturally beds of native shellfish species. And in Willapa Bay I'm not sure what's natural anymore. How many years does an introduced shellfish species that propagating on its own as well as being cultured and mixing and I'm sure interbreeding, when does something become native or naturally occurring? I'm not sure that any of us can answer that and I

concur with those that have testified before without the shellfish industry and Willapa Bay it would not look and be as protected and pristine as it is today. And restoring the commercial and recreational shellfish as a preferred use I can tell you it's strongly support by Pacific County.

Under 173.26.221.2CiiiB at the 15th bullet, it refers to protection of associated upland native plant communities. An important thing to do, very valuable to the ecology. However, I just suggest you be mindful of the jurisdictional extent of -- of shorelines. Don't ask the county to regulate something that -- that is beyond the 200 foot that we can't. That's more of a note than anything else.

And lastly, under the geoduck issue 173.26.241.2B under Conditional Uses, this is one area in which the guidelines depart from the standard hierarchy of permitting. Most uses that are considered development in the rule either are considered if they're very minor to be an exemption or a little bit more impactful will require a development permit or if there's some controversy or major impact of conditional use or variance. All of geoduck activity however minor or major appears to require a conditional use.

I guess I don't really have much opinion on that because I'm not in the industry and frankly I don't think it exists in Willapa Bay but it -- it does stand out that this is one use that regardless of how major or minor doesn't have access to allowing local government to categorize some of those uses as either an

exception or a standard permit.

And I guess with those specific comments again, I just want to commend Ecology for rule making in this process. It was tortured but at least you did spend a lot of time on it and looked at the science before you began writing the rule. So thanks.

MS. POSTON: Okay. Thank you. Okay, Mr. Wadsworth. State your name for the record, Sir and go ahead.

Testimony of Pat Wadsworth

Okay. I -- I'm Pat Wadsworth and I was - I know very little about this whole subject but I was asked to come here by State Representative Kevin Van de Wege. And what he was -- this is exactly what he was worried about was this -- this language here about critical saltwater habitat. And by redefining it he's afraid along with all the growers that -- that would limit the -- the growers and if they -- and -- and the language here also says -- it says, "net loss". Does that mean that if they were to -- it -- it kind of sounds like if were wanting to expand that it would be a -- a very tenuous process to do that. And with all the job losses we have now at the harbor and around here, if we get any more -- I mean if -- if this puts them in a bind where they have to lay off workers it's more lost revenue to the state, the State's laying off people.

I wish you would look at it very carefully and make sure that it's not going to harm people. Because that's what we're

all about. That's what the Department of Ecology is -- you're -- you're job is to protect us in the long term but maybe this is -- maybe the wording was short term and -- and wasn't really thought about because we have to think about twenty years in the future that's what you guys are -- that's what your main job is, is -- is looking into the future and saying, okay, what do we want this to look like in 20 years? Do we want to have all the shellfish -- the -- the oyster beds gone because they can't function anymore because they have so many regulations on that -- that they can't -- they can't pay anybody so they have to lay people off and -- and they end up closing down. That's -- that's some of the -- the fears out there.

So if you guys could really, really look at this and make sure it's not going to harm them because that's what the fear that I'm hearing from out there. So -- and that -- that's all I have to say and I may have further comment on -- on paper but I'll have to research this and -- and get some more information on it because I'm coming into this totally green.

MS. POSTON: Okay.

MR. WADSWORTH: But I did -- I -- I am doing this for him because he's way up -- he's way up north so he can't -- he can't be here so. Thank you.

MS. POSTON: Okay. Thank you. Okay, I don't have anyone else who indicated that they wanted to provide testimony so I'm going to open up and is there anyone else who like to say something on the record? No? That's okay you don't have to.

Okay. If you'd like to email or send written comments they must be received no later than five o'clock p.m. on October 18th, 2010. Please mail your comments to Cedar Bouta -- did I say it right?

UNKNOWN FEMALE SPEAKER: Yes, you did.

MS. POSTON: Thank you, Ma'am. Washington Department of Ecology at Post Office Box 47600 Olympia, Washington 98504-7600. You may also email your comments to the following and the address is shorelinerule, all one word, at ecy.wa.gov. All the testimony that's been received at the four public hearings along with written comments received by the end of the comment period again, October 18th, are part of the official record for this proposed rule revision. Whether a comment is presented orally or in writing they will received equal weight in the decision making process.

After the comment period Ecology staff is going to prepare -- they're -- they're going to review all of the comments and then prepare a document called a Response To Comment Summary. And the people who gave testimony or submitted comments will be notified with the -- when it's available for them. I would imagine it probably would be posted on the website too once it's been completed. That's usually how we -- we do things at the agency.

The adoption of the rule updates is currently scheduled for December 14th, 2010. If the proposed rule amendments are adopted they they're filed with the state code advisor's office and that means that the rule usually will go into effect 31 days later so

that's about mid January.

So, on behalf of the Department of Ecology I want to thank you so much for coming to our hearing. And I appreciate your cooperation and your courtesy with each other and with us. Let the record show that this hearing is adjourned at 7:43. Thank you so much. I'm sorry, 7:36 let me try that again.

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(End of Hearing)

IN RE: Department Of Ecology
Shorelands And Environmental Assistance Program
Shoreline Management Act Rule Making 2010

HELD: September 14, 2010 - Grays Harbor College, Bishop Center

AFFIDAVIT

I, Anna Hirsch do certify that the recordings provided to us of the Department Of Ecology Public Hearing, held in Aberdeen, Washington was transcribed by me to the best of my ability.

_____

Anna Hirsch,
Transcriptionist