



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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July 23, 2012

The Honorable John Austin, Chair
Jefferson County Board of Commissioners
1820 Jefferson Street
Port Townsend, WA 98368

RE: Final Action - Jefferson County Comprehensive SMP Update

Dear Commissioner Austin:

As you are aware, the Department of Ecology (Ecology) conditionally approved the Jefferson County (County) comprehensive Shoreline Master Program (SMP) update subject to required changes on January 26, 2011. We truly appreciate the energetic efforts you have made, based on your strong concerns to protect Puget Sound ecological functions.

However, after working with you and your staff for the past year and a half, we have been unable to resolve our differences with regards to marine net pen aquaculture. Unfortunately, those differences and subsequent delays have prevented the adoption of your new SMP. The time has come for the County and Ecology to take final action regarding this matter. This letter lays out viable paths toward that end.

With the Commissioners' letter of April 25, 2011, we believe we have mutual agreement regarding required changes, other than the inclusion of an outright prohibition of marine net pen aquaculture in County jurisdictional waters. Such a prohibition is in conflict with the Shoreline Management Act (SMA), which requires allowance for water-dependent uses to be included in the SMP. That clearly includes marine net pen aquaculture, so long as the use can be done in an environmentally appropriate manner. We appreciate the County's caution in this matter, and Ecology does not opine about nor support marine net pen aquaculture except for enforcing the law as noted.

There are three options specific to the marine net pen aquaculture provisions that the County could exercise in responding to Ecology's January 26, 2011, conditional approval letter. To complete the SMP approval process, your formal acceptance of all the other required changes will also be needed, should you choose option 1 or 2 below.



The three options available to the County include:

1. Conditional Use: Provide alternative marine net pen provisions acceptable to the County, which include requiring a conditional use permit for marine net pen aquaculture proposals. Provisions would allow this preferred use in appropriate marine environments, while still providing the County with criteria for reviewing and approving or denying new marine net pen projects. The conditional use criteria could be based on SMP provisions the County staff have already drafted.
2. Conditional Use and Moratorium: Provide alternative marine net pen provisions acceptable to the County, which include requiring a conditional use permit requirement (as in option 1), and adopt a moratorium on new marine net pen aquaculture concurrent with this action. The moratorium would provide added time to complete further environmental analysis, to map areas where marine net pen aquaculture can and cannot be located, and to further refine conditional use criteria as needed. Ecology has offered to support such a study with limited additional funding. That offer remains in effect, but cannot be sustained after August, 2012.
3. Reject, Deny, Appeal: Notify Ecology that the County cannot accept Ecology's required changes specific to marine net pen aquaculture. In this case, Ecology would deny the SMP in its entirety, based on a conclusion that "no alteration of the proposal appears likely to be consistent with the policy of RCW 90.58.020 and the applicable guidelines" (RCW 90.58.090[2][d]). The County could then file an appeal of Ecology's denial with the Growth Management Hearings Board (90.58.190), where the areas of disagreement could be heard and judged based on the state's shoreline management policy (RCW 90.58.020) and the applicable guidelines.

If an Ecology denial of the SMP is issued and an appeal is not filed, Ecology will be obligated to commence rulemaking to adopt a comprehensively updated SMP for the County (RCW 90.58.070[2]). We would start with what the County has developed, excepting the marine net pen provisions, and follow the procedural requirements for state rulemaking.

Adopting by rule will require economic impact assessments and public review of the entire program. This could again raise many issues previously addressed and resolved. We estimate this process could take well over a year to complete. This path means a further delay in implementing your newly updated SMP. Because of the significant added costs to the state, and less local involvement in adopting a local program, Ecology does not see this as the preferable option.

The following specific questions were posed by the County:

1. *Don't provisions of statute and rule suggest that Ecology has authority to approve segments or parts of the final SMP that the County presented to Ecology?*
2. *Is Ecology aware of any case law or administrative board decisions that would prohibit Ecology from approving "parts" of the County's final SMP?*
3. *Has Ecology ever chosen to approve a "part" of a proposed SMP?*
4. *Procedurally, if Ecology chose to approve "parts" or "segments" of the proposed final SMP, then wouldn't it be possible for Ecology to say "Section x.y.z. (and any cross-reference to them found elsewhere in the SMP) is rejected as not consistent w/ the policies of the SMA and the guidelines found in Chapter 173-26 WAC."*

In response to the above questions, RCW 90.58.080 establishes a schedule that directs local governments all across the state to comprehensively¹ update their master programs for the regulation of uses within SMA jurisdiction "consistent with the required elements of the guidelines adopted by the department." Ecology's guidelines in WAC 173-26-201(1) set forth the process and elements required to complete a comprehensive shoreline master program update. Subsection (b) requires comprehensive master program updates to fully achieve the procedural and substantive requirements of the guidelines. Addressing aquaculture is a "substantive requirement" of the guidelines.²

Historically, Ecology has approved many locally submitted "limited" SMP amendments addressing specific topics or shoreline environments, but has never approved only parts or segments of a comprehensive SMP update submitted by local government. The County's statutory and contractual obligation is to complete a "comprehensive" update of its SMP addressing all the requirements of the guidelines. To do otherwise could be viewed as promoting "uncoordinated and piecemeal development of the state's shorelines" in conflict with SMA policy (RCW 90.58.020). It should also be noted that substantial funding for update of the SMP was provided to the County to complete a comprehensive scope of work.

Furthermore, consistent with SMP guideline requirements, scientific and technical information was analyzed on a jurisdiction-wide basis and has provided the legal and functional basis for the County's updated SMP policies, regulations and environment designations. These updated SMP provisions, uniquely tailored to local conditions, provide the highly integrated and inter-dependent set of planning and regulatory tools needed to satisfy SMA and SMP guideline requirements. Approval of SMP provisions in segments or parts are therefore unacceptable.

¹ RCW 90.58.030(3)(c) states that a comprehensive master program update means "a master program that fully achieves the procedural and substantive requirements of the departments guidelines effective January 17, 2004."

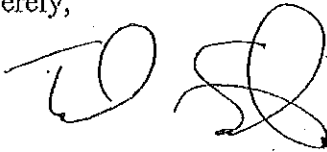
² WAC 173-26-241(3)(b)

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We previously discussed statutory provisions for allowing water-dependent uses, including fin fish operations. Questions were raised by the County on whether, in fact, fin fish aquaculture facilities are water-dependent. State regulations define a water-dependent use as "a use or portion of a use which cannot exist in a location that is not adjacent to the water and which is dependent on the water by reason of the intrinsic nature of its operations" (see WAC 173.26.02). Legally, we see no question that marine net pen aquaculture facilities qualify as a water-dependent use. From our perspective, case law as well as the plain language of statutory definitions and provisions is clear. We have seen no studies or other information that supports an outright ban on these uses within the County.

We greatly appreciate the hard work of the County Commissioners and many others in Jefferson County. We look forward to resolving this single issue so that we can move to final approval of the Jefferson County SMP. We are asking your decision be made on or before August 15, 2012. If you have any questions, please contact Paula Ehlers at Paula.Ehlers@ecy.wa.gov / (360)407-0271. Thank you for your interest in advancing shoreline management in Jefferson County.

Sincerely,



Ted Sturdevant
Director

By certified mail [7009 0820 0001 9056 1257]

cc: Michelle McConnell, Jefferson County
Tom Clingman, Ecology
Paula Ehlers, Ecology
Brian Lynn, Ecology
Peter Skowlund, Ecology
Jeffrey Stewart, Ecology
Gordon White, Ecology