



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000

711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

January 31, 2013

Cathy Lear

Clallam County Community Development

223 East 4th Street
Port Angeles, Washington

98362

Cathy
Dear Ms. Lear:

The following comments are responsive to Clallam County's **November 2012 Shoreline Master Program Final Draft**, the proposed update to the 1992 Clallam County SMP. We recognize extensive revisions have been made to the earlier version from last February. Most notably, perhaps, are revisions to the Environment Designation system, and also the parsing out safety and habitat protection in the buffer zone provisions. Ecology's comments will address these briefly.

We will make suggestions about residential development provisions and about public access. We will also include a number of comments about the aquaculture use definitions, policies, and regulations in **Chapter 3, 5, and 7**. As we are doing additional work to clarify guidance on Channel Migration Zones, our comments in this area will be limited.

Introductory overview

Clallam County and their consultants have done commendable work to strike a balance between the need to protect ecological functions and to allow continuing development and use of Clallam County's extensive shoreline areas. We especially appreciate the degree to which the County has asked for, listened to, and incorporated appropriate suggestions from the public, Tribal governments, and the various resource agencies such as WDFW and WDNR.

The Program Overview and introduction to the SMP in **Chapter 1** is concise, helpful, and on point as an orientation for citizens. These pages clearly describe the purposes and background of shoreline management in both practical and legal terms. Pictorial and schematic information combined with the text communicates well the significance of shoreline regulation.



In **Chapter 1.6**, a helpful addition at the front end (or elsewhere as appropriate) should explain to readers the distinction between “uses” and “development.” These simple words are also fundamental terms as applied per RCW 90.58, and development of an SMP requires parsing them correctly, and not conflating as if they were the same. Both uses and development are regulated by SMP provisions, while each is distinct.

Based on conversations we have had with the City of Forks, **Chapter 1.8** appears to be a place for adding language that describes the linkage between County and City shoreline regulations, once agreements have been made final on how that works and limitations as appropriate.

Ocean Management

We have previously talked about adding a “placeholder” to the Applicability section at the front of the document. Pursuant to WAC 173-26-(360), a brief statement should be added to ensure everyone understands that Clallam County shoreline jurisdiction extends waterward from the OHWM to the three mile limit in the Pacific Ocean, recognizing that shoreline jurisdiction overlaps with other state and federal management systems.

This marine aquatic jurisdiction needs explicit annotation. It is not obvious based on ownership of shoreland areas by the federal government of the Olympic National Park, and by Makah and Quileute Tribal Reservations. Clallam County has no permitting authority on the landward side of OHWM because of these. However the County does have authority waterward to the state limit, despite the overlapping management overlay of the Olympic Coast Marine Sanctuary and the fact underwater state lands are held by Washington Department of Natural Resources.

If Marine Spatial Planning efforts proceed as intended at the statewide level, subsequent updates of your Master Program may find useful applications for addressing various large scale proposals in the ocean environment at some point in the future.

Aquaculture Provisions in Chapters 3, 5, and 7

The following comments relating to the draft aquaculture provisions were compiled and summarized by Cedar Bouta after consultation with Lori LeVander, Perry Lund, and myself. More detailed comments will be attached, and we are available if the County would like to discuss any or all of these comments.

1. Overall, the SMP contains some good policies and regulations. More simplification would help avoid conflicts with existing state and federal regulations.

2. Definitions
 - a. Definitions related to aquaculture are overly complex and in some cases don't meet statute or SMP Guidelines.
 - b. There needs to be more work ensuring the finfish aquaculture-related definitions are clear and applied consistently throughout the SMP.
3. The proposed SMP language does not comply with WAC 173-26-241(3)(b). More work is needed to cross-reference the draft SMP with the WAC provisions regarding commercial geoduck aquaculture.
4. Net pen SMP language pulls from the 1986 interim siting guidelines. We appreciate that they are cross-referencing with that document, which is still a useful reference. However, there are newer best management practices, PCHB rulings, sediment monitoring data, and other sources of data and information that also need to be considered.
5. We believe some of the current SMP language is contrary to current state and federal laws, and would amount to a de-fact ban on net pens. We believe such a ban is not warranted based on current science or 25+ years of operational data from finfish net pen facilities operating in waters of Washington State.
6. Only the legislature can define what development is or make exemptions.

Some of the wording in **Section 3.2.3 Regulations (#4 and 5)** appear to create new exemptions from permit requirements, which is an authority reserved to the Legislature by statute. We note the language in **Regulation #8** on **page 3-6** could appropriately be moved up to a more introductory position among the policy provisions.

As we discussed during the January 15, 2013 Advisory Committee meeting at Port Angeles, many of the proposed SMP aquaculture provisions are reiterative to regulations or guidance from different state and federal agencies. We noted that, while including these provisions in the County's SMP may be allowable, there are reasons to proceed with caution in doing so. The Department of Community Development becomes responsible for evaluating large amounts of technical information, and, making permit decisions for actions which are addressed elsewhere. Technical capacity and workload implications should be considered along with RCW and WAC requirements.

Regulating Authorities for Net Pen Aquaculture

The following state and federal agencies have regulatory authority over the marine salmon net pen industry in Washington State:

- Washington State Department of Fish and Wildlife (WDFW) – Management and regulatory authority over commercial aquaculture for disease control and escapement.
- Department of Agriculture – Jointly develops regulations for commercial aquaculture with WDFW.
- Department of Ecology – Regulates the discharges from net pens by issuing NPDES permits containing operational conditions to protect water quality and sediment standards.
- Department of Natural Resources – Leases aquatic lands to net pen operators.
- Washington State Counties – Issue Shoreline Permits to net pens to operate in State waters.
- Treaty Tribes of Washington State – Tribes co-manage natural resources in Washington and have input into aquaculture disease control regulations developed by WDFW.
- National Marine Fisheries Service (NMFS) – NMFS administers Endangered Species Act (ESA) for anadromous salmonids.
- Army Corp of Engineers – The Corp requires net pens to have a “Section 404” navigation permit.

Local and state agency coordination on aquaculture

There may in fact be some value in having local oversight of the regulatory reviews done by other agencies. Some Advisory Committee members certainly expressed strong interest in doing so. At the same time, we should be careful about exactly how SMP provisions are worded.

Regulation #5 on page 3-3 is an example where non-native fish populations are “discouraged” except in upland systems. The County can decide to express a preference, but should have a rationale for doing so. Native and non-native species would have similar impacts in the water, so why the preference for one over the other?

We should ensure that the SMP does not constrain the County to adhere to references which later become out-of-date, nor ones that prove contrary to other legitimate regulatory authorities. An

example is **Regulation #10 on page 3-6**, that would make 1986 technical guidance- which may change as the science advances- into enforceable regulation the County is responsible for. **#10(i)** is a single line that says most of what is useful and necessary if the surrounding provisions are dropped. The wording in **#10(j) and (m)**(for using regional broodstock) are both contrary to current recommendations by WDFW. These provisions would require amending the SMP to remove, and are plainly inadvisable.

Shoreline master program policies and regulations do need to correlate land use regulation onshore with decisions about offshore location of water-dependent uses such as net pens. This appears to be addressed to some degree by **Regulation #7 on page 3-6**.

Residential Development provisions

Ecology encourages locating residential development in areas where homeowners will be relatively safe, and which avoid taxpayer expenditures for rescue and cleanup operations. The need for shoreline stabilization and structures such as levees should be avoided. Guidelines at WAC 173-26-241 for residential uses state that:

Master programs shall include standards for the creation of new residential lots through land division that accomplish the following:

(i) Plats and subdivisions must be designed, configured and developed in a manner that assures that no net loss of ecological functions results from the plat or subdivision at full build-out of all lots.

(ii) Prevent the need for new shoreline stabilization or flood hazard reduction measures that would cause significant impacts to other properties or public improvements or a net loss of shoreline ecological functions.

Residential development, including appurtenant structures and uses, should be sufficiently set back from steep slopes and shorelines vulnerable to erosion so that structural improvements, including bluff walls and other stabilization structures, are not required to protect such structures and uses. (See RCW 90.58.100(6).)

There is a need to be clear in the SMP about the location of primary residential structures, particularly for the safety of residents from such hazards as landslides and flooding. Houses and other structures need to be located far enough back from the edges of bluffs and outside areas where streams and rivers are shown prone to meander over time.

The proposed language in **Chapter 3.8** appears to address these concerns to some degree. The policies and regulations appear to be correctly aligned. Some of the assumptions therein may need further scrutiny, such as allowing for new residential lots with frontage of 150 feet, and the premise (**Section 3.8.3 #7, page 3-21**) that a 75 year lifespan is the basis for “life of a structure.” Further evaluation of cumulative impacts should help to clarify if those assumptions are realistic, and whether their implementation would result in no net loss of ecological functions.

Some uncertainty must be noted about **Regulation #3** in **Section 3.8.3**. The language here includes “beach –access structures” as “water-dependent and water –related structures.” A similar concern is noted about **Section 3.8.5** where “accessory uses” and “appurtenant structures” seem rather vague and unclear about what is included, and also how the terms relate to one another. Structures and uses appear to be conflated here. And related provisions in **Section 3.13** need to be clarified as to how many similar or related structures would be allowed on a single lot. This also relates to provisions in **Section 4.2.3 of Chapter 4**.

As written, the definition for “appurtenant” structure would default to that in the WAC because a specific definition is not found in **Chapter 7**. We do not consider beach access structures to qualify as water-dependent. We believe appurtenant structures should be carefully enumerated and described as to what fits that category. If they are not spelled out, proposals for rather large and significantly impactful structures may be argued for as falling under those provisions.

In **Chapter 3, Section 3.18**, the policy provisions appear generally sound, in keeping with Guidelines requirements in terms of avoiding unnecessary armoring and removal of existing impairments where appropriate and possible. There is one regulation that did not seem to make sense, **#3 in Section 3.18.3**, which appears to say the owner of an existing bulkhead could come in once and year and add ten percent more fill to the existing structure as maintenance.

Buffers and vegetation conservation

The provisions for establishing buffers and protecting the ecological functions of shoreline vegetation appear thoughtful and carefully designed. There may need to be some additional explanatory text about the relationships between safety and habitat buffers, as the system proposed is fairly complex.

We have concerns about the basis for identifying a safety buffer from the Ordinary high Water Mark to a set distance landward in Channel Migration Zone areas. The nature of rivers and streams, some more than others, such as the Bogachiel or the Hoh, is to move far and fast under certain conditions. In Figure 4.2 on page 4-12, a set figure of 150 feet from OHWM is identified as being outside the Channel Migration Zone, and we think this deserves further discussion and evaluation.

Public Access

As was noted during the Advisory Committee meeting January, the policies and regulations about Public Access in **Chapter 4, Section 4.6**, while they are fine as far as they go, seem remarkably scant and less than comprehensive, considering that public access is among the fundamental policy elements of the Shoreline Management Act. Per the Guidelines, "The master program should seek to increase the amount and diversity of public access to the state's shorelines consistent with the natural shoreline character, property rights, public rights under the Public Trust Doctrine, and public safety."

The present version addresses public access for larger scale developments, provides criteria for assessment of feasibility, and talks about what must be demonstrated to avoid providing public access. It says that existing public access on County owned rights of way "shall not be diminished..." The present language does not require any kind of alternate contribution requirement in cases where public access is not provided.

More significantly, it does not say anything specific about public access requirements associated with new residential subdivisions, nor anywhere else. The Guidelines call for each local government to "establish policies and regulations that protect and enhance both physical and visual public access."

Previous Advisory Group conversations have addressed this subject in general terms, with recognition there are vast areas of waterfront in Clallam County which are in public ownership. It has been indicated that public access planning at the Countywide level would preclude the need for requiring individual public access in residential areas. That approach is an option, but we have yet to see the requisite planning instrument to effect it. Absent that countywide plan, the same requirements as indicated in **Section 4.6.3** should also apply to residential subdivisions with more than four lots.

We would like to have some further conversation with the citizens and the County about the long term needs for public access, to what extent those have been adequately addressed, and where could improvements be made the SMP could support with appropriate language.

Conclusion

In addition to these comments, further work has and will be done by Ecology regarding Channel Migration Zone delineation and hazard avoidance evaluation. Detailed remarks about the aquaculture provisions are available in addition to what is summarized in this letter. The comments here are the ones we had time to make before the deadline, and further collaborative review will doubtless be appropriate. As noted earlier, generally we view Clallam County's work in development of an updated Shoreline Master Program to be exemplary, and look forward to working through the remaining details towards local and statewide adoption, collaboratively.

Sincerely,

A handwritten signature in black ink that reads "Jeffrey Stewart". The signature is written in a cursive style and is underlined with a single horizontal line.

Jeffrey Stewart

Shoreline Specialist

Washington Department of Ecology

360-407-6521

Cc: Paula Ehlers, Peter Skowlund, Perry Lund, Cedar Bouta, Patricia Olson

New multiunit residential development, including the subdivision of land for more than four parcels, should provide community and/or public access in conformance to the local government's public access planning and this chapter.