



## JEFFERSON COUNTY

DEPARTMENT OF COMMUNITY DEVELOPMENT

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# Memorandum

**To:** Jeffree Stewart, Project Officer, WA Department of Ecology

**From:** Stacie Hoskins, Interim Director and Planning Manager; *JH*  
Michelle McConnell, Associate Planner and SMP Update Project Manager *MM*

**CC:** David Alvarez, Chief Civil Deputy Prosecuting Attorney

**Date:** February 21, 2012

**Subject:** Follow-up legal questions from 1/23/2012 workshop with Board of County Commissioners to facilitate attorney – attorney meeting/conference

We appreciate the attendance of Ecology staff at the recent workshop session with the Jefferson County Board of County Commissioners (BoCC) to discuss in-water finfish aquaculture provisions for our pending Shoreline Master Program Comprehensive Update. We look forward to continued work with you to find an amenable solution to the current challenge in meeting both the State requirements and the Board's interests. In the questions below, the phrase "final SMP" is used to mean the document the County may at some point send to Ecology which would, in essence, include the content of the 12/7/2009 Locally Approved Shoreline Master Program (LA-SMP) plus the content of the 10/31/2011 Formal Jefferson County Response to Ecology on required and recommended changes, save any pending in-water finfish aquaculture provisions.

The following legal questions are grouped into five categories and were prepared by our legal counsel in consultation with staff, as based on the BoCC – Ecology workshop last month. We request that you forward this correspondence to the other members of your team, especially Ecology's legal counsel, to facilitate an attorney-to-attorney meeting/conference to discuss these important issues.

### WATER DEPENDENT:

Term not defined by Shoreline Management Act (SMA). The SMP guidelines define "water dependent" as follows:

“(39) ‘Water-dependent use’ means 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.”  
WA ADC 173-26-020

We were told quite clearly at the January 23<sup>rd</sup> meeting that marine net pens are water-dependent because they rely on the presence of water with salinity.

1. Is it mandatory to allow all water dependent uses when there are alternative means that may still be water dependent but have a lesser environmental impact? For example, upland tanks may use marine water rather than siting net pens in-water.

### **SEGMENTS:**

Here is the applicable portion of WAC 173-26-120(7): (It implements RCW 90.58.090)

“Within thirty days after receipt of the local government written response pursuant to subsection (6) of this section, the department shall make written findings and conclusions regarding the consistency of the proposal with the policy of RCW 90.58.020 and the applicable guidelines, provide a response to the issues identified in subsection (6) of this section and either approve the proposal as submitted, recommend specific changes necessary to make the proposal consistent with chapter 90.58 RCW policy and its applicable guidelines, or deny the proposal in those instances where no alteration of the proposal appears likely to be consistent with the policy of RCW 90.58.020 and the applicable guidelines. The written findings and conclusions shall be provided to the local government, all interested parties, tribes, and agencies of record on the proposal.

In reaching its determination of consistency with the policy of RCW 90.58.020 and the applicable guidelines, the department shall approve **those parts of a master program relating to shorelines** unless it determines that the submitted parts are not consistent with the policy of RCW 90.58.020 and the applicable guidelines. The department shall approve those parts of a master program relating to shorelines of statewide significance only after determining the program provides for optimum implementation of the statewide interest as set forth in the policy of RCW 90.58.020 and the applicable guidelines.”

WA ADC 173-26-120

2. Doesn't the fact that Ecology's response to the LA-SMP is already partitioned three ways, specifically Ecology silence on those sections of the LA-SMP it approves of, Ecology stating its "required" changes and finally Ecology stating its "recommended" changes suggest that when the County sends to Ecology its final SMP text that Ecology has the ability to approve the parts of the SMP that are consistent with the SMA guidelines found in Chapter 173-26 WAC per the 2<sup>nd</sup> paragraph listed above?
3. Since the text of RCW 90.58.090(4) states Ecology "shall approve the **segment** of a [SMP] relating to critical areas (as defined in the GMA) provided the [SMP] segment is consistent with RCW 90.58.020 and applicable shoreline guidelines and if the **segment** provides a level of protection of critical areas [equal to that of the County's Critical Areas Ord.] ..." doesn't this suggest that Ecology has authority to approve segments or parts of the final SMP that Jefferson

County will present to Ecology? Is Ecology aware of any case law or administrative board decisions that would prohibit Ecology from approving “parts” of the County’s final SMP? To your knowledge 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.”

## **RULEMAKING**

See RCW 90.58.070(2):

“(2) If any local government fails to submit a letter as provided in subsection (1) of this section, or fails to adopt a master program for the shorelines of the state within its jurisdiction in accordance with the time schedule provided in this chapter, the department shall carry out the requirements of RCW 90.58.080 and adopt a master program for the shorelines of the state within the jurisdiction of the local government.”

West's RCWA 90.58.070

See WAC 173-26-070:

“(1) The department may adopt a shoreline master program by rule in the following circumstances:

(a) Pursuant to RCW 90.58.070(2), when a local government fails to approve a master program relating to shorelines of the state within its jurisdiction in accordance with the time schedule provided for in RCW 90.58.080, the department shall carry out the requirements of RCW 90.58.080 and adopt by rule a master program for shorelines of the state within the jurisdiction of the local government. The department has adopted by rule a master program for shorelines of the state within the jurisdiction of those local governments listed in subsection (2) of this section;

(b) Pursuant to RCW 90.58.090(4), when the department determines that those parts of a master program relating to shorelines of statewide significance do not provide for optimum implementation of the policy of chapter 90.58 RCW to satisfy the statewide interest, the department may develop and adopt by rule an alternative to the local government’s master program proposal. The department has adopted by rule an alternative master program for shorelines of statewide significance within the jurisdiction of those local governments listed in subsection (2) of this section.”

WA ADC 173-26-070

5. We understand from Asst. AG Sonia Wolfman that Ecology is involved in rulemaking with Spokane County and now inquire as to what was the triggering event (or non-event) that caused Ecology to enter into rule-making? Was it something in writing from Spokane County? If so, what was that writing? What are the basic steps of rule-making, and how long does the process take? We assume final adoption of a local ordinance would still be necessary once rule-making is complete.

6. What level of involvement by county staff would be required during a rule-making process?
7. Does the County get charged with the costs incurred during a rule-making process?
8. If County participation at the staff level remains at the same intensity during rule-making as it has been up to the current date is there any state or grant money available to help defray this cost?
9. Would only portions of the final SMP be open to revision or amendment (through rule-making) or would the entire final SMP be vulnerable to alteration via Ecology rule-making?
10. During rule-making would it be Ecology or the County that would be responsible for requesting, receiving, analyzing and responding to public comments?
11. Since the policies made part of any SMP enter into the County's Comprehensive Plan (a GMA-derived document) if rule-making were to occur would it be Ecology or the County that would be responsible for assuring "early and continuous public participation" as is required by the GMA?
12. Can rule-making be triggered by a written correspondence from the County to Ecology stating that the County is no longer willing to go through the iterative process regarding marine (in-water) net pen farming?
13. More generally, can rule-making occur before the County sends its final SMP to Ecology?

### **WHAT IS THE RECORD?**

14. In the opinion of Ecology or Ecology's counsel what is the date or the event that once and for all closes the local government's record?
15. Has Ecology's counsel ever in the past litigated the issue of whether certain documents or records should be considered part of the record before the governing body of the local government as that governing body makes a legislative decision on possible SMP text?
16. Does Ecology have a citation to a RCW, WAC or internal document that would reflect or contain a definition of what is (or is not) part of the local government's record as it considers approval of possible SMP text?
17. With respect to any local government going through the process of updating its SMP does Ecology compile a list of the records, documents, papers etc. that it has used, reviewed, read & considered in its assistance of that local government?
18. Is Ecology compiling any kind of list or record of documents it has used or reviewed with respect to its efforts regarding the updating of the Jefferson County SMP?
19. If such a list or compilation exists, when and how does Ecology provide same to the local government such as Jefferson County?

**APPEALS:**

Note: In general, appeals of any final decision by Ecology are heard by the Growth Management Hearings Board or in our case the “Western WA GMHB” version of the now-unified GMHB.

20. Assuming Ecology and the County are co-Respondents, i.e., on the same side of any SMP-related litigation, if there are procedural challenges made to the final SMP (for example, a challenge based on failure to provide for public participation) does defending against such a procedural challenge fall primarily or solely on the County?
21. Similarly, if Ecology and the County are co-Respondents and there is a challenge to a substantive provision of the final SMP does Ecology take the “laboring oar” in defending the lawfulness of the challenged section or text?

**END OF DOCUMENT**