

**JEFFERSON COUNTY
BOARD OF COUNTY COMMISSIONERS**

AGENDA REQUEST

TO: Board of County Commissioners
Philip Morley, County Administrator

FROM: Stacie Hoskins, Interim Director of Community Development, Planning Manager and
Shoreline Administrator *SH*
Michelle McConnell, Associate Planner *MM*

DATE: December 19, 2011

SUBJECT: Review Ecology feedback on *Formal Jefferson County Response to Ecology on Changes to the Locally Approved Shoreline Master Program* re: finfish aquaculture provisions (MLA08-475)

ATTACHED: 12-7-11 Letter from Ecology

STATEMENT OF ISSUE: The Board shall consider options for how to proceed given WA Department of Ecology's recent feedback regarding the finfish aquaculture provisions in the 10/31/11 *Formal Jefferson County Response to Ecology on Changes to the Locally Approved Shoreline Master Program* that they cannot support the provisions as written.

ANALYSIS/STRATEGIC GOALS/PROS and CONS:

Ecology's approval is regarding the December 7, 2009 *Locally Approved SMP*, submitted to Ecology on March 1, 2010 as Exhibit A of Jefferson County Resolution 77-09 (erroneously referenced in Ecology documents as 'Ordinance Number 77-09') as the proposed amendments to the Jefferson County Comprehensive Plan and Jefferson County Code. This SMP Comprehensive Update (MLA08-475) is required by law and must be completed by December 1, 2011.

In March 2010, the County submitted a *Locally Approved Shoreline Master Program (SMP)* to the Washington Department of Ecology (Ecology) for final review and approval, per RCW 90.58 and WAC 173-26. After a public review process, Ecology reviewed the County's proposed SMP update for consistency with state statutory and rule requirements.

On January 26, 2011 Ecology determined that the County has met the procedural and policy requirements of the Shoreline Management Act and the SMP Guidelines, pending some required changes. A letter from Ecology's director with three attachments outlines their conditioned approval, findings and conclusions, required and recommended changes. The County needs to consider the required changes and respond as to whether to accept or propose alternatives to those changes as part of the process for final adoption by the state and by local ordinance.

The Board considered Ecology's conditioned approval and after thoughtful deliberation proposed alternatives to some of the required and recommended changes. The Draft County Response was

created and made available for review and comment. In sum, 63 possible changes are under consideration for the Locally Approved SMP.

On July 11, 2011, the Board of County Commissioners held a public hearing to solicit public review and comment on the *DRAFT Jefferson County Response to Ecology on Changes to the Locally Approved SMP* (Draft County Response). The comment period opened June 22 and closed July 25, 2011. More than 60 written comments were received by the Board, and 19 people provided testimony to the Board at the public hearing. The Board considered public input and deliberated the issues on September 19 and 26, and October 3, 2011 prior to directing staff to prepare the County's formal response, including final edits as discussed.

The *Formal Jefferson County Response to Ecology on Changes to the Locally Approved Shoreline Master Program* was prepared and released on October 31, 2011. Prior to starting preparation of the ordinance package for adoption of the revised SMP via local ordinance, staff requested consultation from Ecology on the issue of finfish aquaculture to ensure there would be no problems upon submittal of the locally adopted SMP to the State for final adoption. Ecology convened a team of policy and technical experts and met in-house to discuss the 10/31/22 finfish provisions. Ecology has sent a letter providing their feedback that, in short, they will not support a complete prohibition of in-water finfish aquaculture as a limitation of a water-dependent use without adequate scientific analysis that shows there is nowhere in Jefferson County the use could be allowed with mitigation.

FISCAL IMPACT/COST-BENEFIT ANALYSIS:

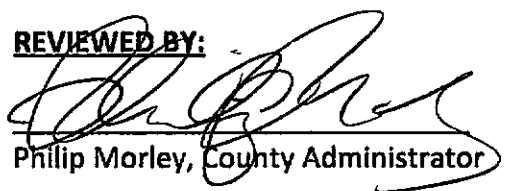
Grant funding for the SMP Update ended in June 2009. Department of Community Development staff work is covered by the department's annual budget.


RECOMMENDATION:

Staff recommends the Board:

1. Provide staff direction on scheduling a workshop session with Ecology in January 2012;
2. Consider options for discussion with Ecology.

REVIEWED BY:


Philip Morley, County Administrator



Date



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

PO Box 47775 • Olympia, Washington 98504-7775 • (360) 407-6300

December 7, 2011

Ms. Michelle McConnell
Jefferson County Department of Community Development
621 Sheridan Street
Port Townsend, WA

Dear Michelle:

Our recent conversations focused on whether prohibition of in-water finfish aquaculture was appropriate in all areas through the Shoreline Master Program for Jefferson County. Ecology reviewed and considered the materials you provided on October 31, 2011. Our discussion led to the following conclusions. While this letter does not constitute a formal decision from the agency, it indicates how the SEA Program would likely advise the Director were Jefferson County to maintain its position favoring an across-the-landscape prohibition of net pen facilities in marine waters.

Our March 18, 2011 memo to you was also reviewed (copy attached for your convenience.) The County's proposed finfish language was reviewed in relation to the Shoreline Management Act and WAC 173-26 requirements. The County relies in part on WAC 173-26-201(3)(g) as the justification for the prohibition on net pens in Jefferson County. While this section does refer to the "precautionary principle..." it is not determinative on whether finfish aquaculture should be prohibited throughout Jefferson County. The Guidelines also state that:

"For development projects that may have unanticipated or uncommon impacts that cannot be reasonably identified at the time of master program development, the master program policies and regulations should use the permitting or conditional use permitting processes to ensure that all impacts are addressed and that there is no net loss of ecological function of the shoreline after mitigation." See WAC 173-26-201(3)(d)(iii).

The County also argues that net pen aquaculture is not a water dependent use, and should only be allowed in upland areas. Net pen aquaculture is a preferred water dependent use as defined in the SMA and the Shoreline Guidelines. Under the SMA, the County is obligated to identify suitable (from both an ecological and feasibility perspective) locations, within the jurisdiction where this activity might be allowed to occur.

Conversely, the County should also identify those areas of the shoreline where it would be inappropriate to allow net pen aquaculture. Areas should be identified where the shoreline is particularly sensitive or otherwise requires heightened protection, or where net pen operations



would conflict with other authorized uses, and these should be designated for protection. Along with materials recently gathered, Ecology expects that these designations would be informed by the shoreline inventory and characterization.

Ecology appreciates the compiling and careful consideration of the scientific literature on finfish aquaculture done by Jefferson County over the past several months. The updated bibliography that resulted should be a helpful resource here and for other jurisdictions.

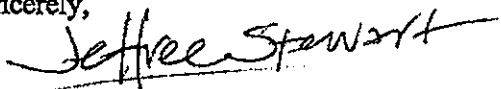
However, Ecology does not conclude from the materials cited that net pen aquaculture cannot be allowed, in some limited fashion and with appropriate mitigation, without jeopardizing shoreline resources in Jefferson County.

As part of Ecology's consideration of the County's materials, Ecology also consulted with resource agencies with expertise on net pen aquaculture, including WDFW and NOAA. The input of these agencies generally supports Ecology's conclusion about the use. The regulatory programs of other state and federal programs should be taken into account as they contribute to protecting ecological resources. The requirements of a Shoreline Master Program are only one part of the legal framework for regulating such activities.

Ecology would like to continue to work with Jefferson County toward achieving aquaculture provisions in its SMP with appropriately limited allowance for such water-dependent uses, and with necessary, effective safeguards for the protection of ecological resources.

It's our hope we are very close to a mutually agreeable conclusion on this one remaining issue, and that our cooperative efforts to refine this aspect of the SMP will get Jefferson County "across the finish line" for this comprehensive update.

Sincerely,



Jeffrey Stewart
Shoreline Specialist

cc: Gordon White, Ecology
Tom Clingman, Ecology
Peter Skowlund, Ecology
Paula Ehlers, Ecology
Brian Lynn, Ecology
Lori Levander, Ecology

Nicholson, Donna (ECY)

Subject: FW: Net Pen Aquaculture

From: Stewart, Jeff R. (ECY)
Sent: Friday, March 18, 2011 5:00 PM
To: 'Michelle McConnell'
Cc: Skowlund, Peter (ECY); Ehlers, Paula (ECY)
Subject: Net Pen Aquaculture

Hi Michelle

This follows up on our conversations and correspondence about various ways Jefferson County could provide alternative language for net pen aquaculture that will be consistent with RCW 90.58 and the Guidelines at WAC 173-26. Sending now so you have it for your meeting--will follow up with a letter next week, and send the documents you requested.

Jefferson County's Locally Adopted SMP (2010) included an outright ban (prohibition) of net pen aquaculture throughout the jurisdiction. Ecology review determined there was insufficient science basis presented for an outright prohibition of a water-dependent use. Our required changes struck the prohibition language and replaced it with across the board requirements for Conditional Use review and approval. Jefferson County Commissioners wanted instead to include more particular guidelines or constraints. Ecology was asked if we would approve the same language that was adopted in Whatcom County's (2008) update.

Ecology convened a policy discussion on 15 March 2011 about when it may be appropriate to use prohibition language in reference to water dependent uses such as net pen aquaculture. We talked about the Whatcom SMP, where Barry Wenger explained how local conditions and science were applied to specified prohibition language being adopted. The broad context of aquaculture and food production was reviewed, with NOAA and Ecology Water Quality and other agencies roles being noted.

The appropriateness of regulating through the permit process versus banning a water-dependent use outright was talked about. The difficulty of legally defending an outright prohibition was discussed. With the information we have seen, an outright ban in Jefferson County would be hard to defend. Peter Skowlund noted the Whatcom approach is not an outright ban. The outright prohibition is limited only to commercial salmon net pens, and, it does allow temporary net pens for certain not for profit/restoration type operations.

The following conclusions from our discussion today may be useful to Jefferson County as it considers alternative language:

The criteria are application of stricter standards to specified geographic areas, and consistency with Guidelines provisions.

There needs to be some evaluation of the sites proposed for prohibition that demonstrates a need for protection.

Local governments can apply stricter standards than those outlined in the Guidelines, including limited prohibitions of water dependent uses, but only where such a prohibition can be shown necessary. This is more likely appropriate in smaller jurisdictions or those with relatively few shoreline areas.

Jurisdictions like King or Jefferson County, which have diverse and large water bodies and a wide range of conditions, would require a high showing of evidence to support an outright ban throughout the jurisdiction.

It is appropriate to identify areas where conditions warrant prohibiting an activity, showing the science basis for doing so.

It is not appropriate to use the Environment Designation system as a "back door" or de facto means of prohibition (e.g. allowing net pens only in areas where existing shoreline conditions are not appropriate for such uses or only in upland ED's where in-water net pens aren't practical anyway).

It is appropriate to apply the purpose statements for different Environment Designations as a rationale for limiting, and for specifying restrictions or conditions that are consistent with those purpose statements.

Ecology and Jefferson County's SMP provisions relating to AQ must be supported by and aligned with the policies of RCW 90.58.020, effectively apply the "preferred use" priorities of WAC 173-26-201(2)(d) in the order listed, first reserving appropriate areas for protecting ecological processes and functions, then reserving shoreline areas for water-dependent AQ..., and provide rationale accordingly based on analysis and SMP provisions should recognize shoreline conditions and technologies will evolve.

I hope some of this may help in your continuing discussions.

Look forward to talking with you soon-

Jeffree Stewart
Shoreline Specialist
Washington Department of Ecology
360-407-6521