

RECEIVED

JUN 27 2019

ATTORNEY GENERAL'S OFFICE  
Ecology Division

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
CENTRAL PUGET SOUND WASHINGTON REGION  
STATE OF WASHINGTON

TAYLOR SHELLFISH COMPANY, INC., et al.,

Petitioners,

v.

PIERCE COUNTY AND ECOLOGY  
(AQUACULTURE II),

Respondents.

Case No. 18-3-0013c

ORDER ON MOTION FOR  
RECONSIDERATION AND REQUEST TO  
CORRECT SCRIVENER'S ERRORS

This matter came before the Board on the Department of Ecology's (Ecology's) Motion for Reconsideration<sup>1</sup> of the Board's Final Decision and Order (FDO)<sup>2</sup> and Petitioners' joint letter requesting an order to correct scrivener's errors.<sup>3</sup> The Board also had before it Petitioners' Response to Ecology's Motion for Reconsideration.<sup>4</sup>

**I. SCRIVENER'S ERRORS**

Petitioners represent that they have consulted with Respondents and that all parties concur with the request that the Board correct the following errors:

- In addressing Petitioners' challenge to 18S.40.040.C.11 (raised in Issue 17), the Board analyzed restrictions on gear use in section implicating Issues 5, 9, 17, and 21.<sup>5</sup> However, elsewhere the FDO mistakenly indicates that 18S.40.040.C.11 is challenged under Issue 15.<sup>6</sup> Later the FDO mistakenly states that Petitioners

<sup>1</sup> Received June 27, 2019.

<sup>2</sup> Issued on June 17, 2019.

<sup>3</sup> Received June 27, 2019.

<sup>4</sup> Received July 8, 2019.

<sup>5</sup> FDO at 63.

<sup>6</sup> FDO at 36, line 13 and 53, line 23.

1 abandoned Issue 17 without noting that the Petitioners' abandonment was limited  
2 to the portion of Issue 17 that challenged 18S.40.040.D.5.<sup>7</sup>

3  
4 Petitioners' identification of scrivener's errors is well-taken. The Board concludes that  
5 its FDO should be revised as follows:

- 6
- 7 • On Page 36, line 13: Revise the parenthetical after "Predator control" as follows:  
8 "Predator control (issue 45 17)."
  - 9 • Page 52, lines 14 and 15: Revise the first sentence under the CONCLUSIONS  
10 heading as follows: "The board finds and concludes that the petitioners  
11 abandoned issues 6, 9, and part of 17 (pertaining to 18S.40.040.D.5 only) either  
12 specifically or through inadequate argument."
  - 13 • Page 53, line 23: Revise the parenthetical after "Predator control" as follows:  
14 "Predator control (Issue 45 17)."
- 15

16 **II. ECOLOGY'S MOTION FOR RECONSIDERATION**

17 A motion for reconsideration of a final decision of the Board is governed by WAC  
18 242-03-830. WAC 242-03-830(2) provides that a motion for reconsideration shall be based  
19 on at least one of the following grounds:

- 20
- 21 (a) Errors of procedure or misinterpretation of fact or law, material to the party  
22 seeking reconsideration; or
  - 23 (b) Irregularity in the hearing before the board by which such party was  
24 prevented from having a fair hearing.
- 25

26 Ecology does not ask the Board to reconsider "any of its substantive findings of  
27 noncompliance" but instead asks the Board to delete or modify specific language in the  
28 FDO that Ecology believes might be interpreted (and cited) by a future litigant in a manner

29  
30  
31  
32  

---

<sup>7</sup> FDO at 36, line 13.

1 inconsistent with the Shorelines Management Act (SMA) and the requirements of the  
2 Guidelines.<sup>8</sup>

3  
4 Priority of SMA and SSWS

5 Ecology objects to several statements that it worries may be interpreted to state that  
6 water dependent uses are a higher priority under the SMA than the requirement to “protect  
7 the shorelines as fully as possible.”

8 As a preliminary matter, while the statute and guidelines differentiate between  
9 shorelines and shorelines of statewide significance (SSWS),<sup>9</sup> the aquaculture activities at  
10 issue here occur in areas that overlap the boundaries between SSWS, shorelines, and  
11 shorelands.<sup>10</sup> Both respondents argued, generally, that the County’s action was appropriate  
12 based on its legislative discretion. The proffered arguments did not differentiate as to  
13 whether the activity occurred in a SSWS, shoreline, or shoreland. Neither do the County  
14 regulations challenged by Petitioners differentiate.

15 The Board did not hold that the SMA prioritizes water-dependent uses over reserving  
16 areas for “protecting and restoring ecological functions to control pollution and prevent  
17 damage to the natural environment...” as Ecology alleges.<sup>11</sup> The Board begins on page 6 of  
18 the FDO by quoting the court in *Buechel v. Dep’t of Ecology*, “The SMA is to be broadly  
19 construed in order to protect the state shorelines as fully as possible.”<sup>12</sup>

20 However, the Board disagreed that the County’s legislative discretion is sweeping  
21 with regard to a preferred use in a SSWS. Thus, on page 8 of the FDO, the Board quotes  
22 directly from the guidelines<sup>13</sup> and statute:<sup>14</sup>

23  
24  
25  
26  
27  
28  
29  
30  
31  
32

Land use policies and regulations should protect preferred shorelines uses  
from being impacted by incompatible uses. The intent is to prevent water-  
oriented uses, especially water-dependent uses, from being restricted on

<sup>8</sup> Motion for Reconsideration at 1-2.

<sup>9</sup> Differences exist as to the standard of review, Board’s jurisdiction, and use priorities.

<sup>10</sup> FDO at 6 citing *Ex. E3257* at 0529-32.

<sup>11</sup> Motion for Reconsideration at 5 citing WAC 173-26-201(2)(d)(i).

<sup>12</sup> FDO at 6, footnote 24.

<sup>13</sup> WAC 173-26-211(3)(b) citing RCW 90.58.340.

<sup>14</sup> WAC 173-26-176(2) citing RCW 90.58.020.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

shoreline areas because of impacts to nearby nonwater-oriented preferred uses.

\*\*\*

[T]he policy goals of the act relate both to utilization and protection of the extremely valuable and vulnerable shoreline resources of the state.

On page 10, the Board goes into greater detail regarding the SMA’s “concept of preferred shoreline uses which are defined as consistent with controlling pollution, preventing damage to the natural environment, or unique to/dependent upon use of Washington’s shorelines,”<sup>15</sup> and states:<sup>16</sup>

Unlike the Growth Management Act (GMA), which identifies 13 non-hierarchical goals to guide planning but leaves it to local governments to balance competing priorities, the SMA begins with a legislative declaration that, in developing and approving shoreline master programs (SMPs), local governments and the Department of Ecology ... shall (1) plan for and foster all reasonable and appropriate uses; and (2) protect the interest of the people of the state by adhering to a hierarchical list of preferred uses in shorelines of statewide significance.

Next the Board further quotes the statute relating to SSWS, which emphasizes that, “local government, in developing master programs for shorelines of statewide significance, shall give preference to uses . . . which: (1) Recognize and protect the statewide interest over local interest”.<sup>17</sup>

The Board concluded:<sup>18</sup>

Thus all allowed uses are required to offset adverse environmental impacts as *much as possible* and to protect the ecological functions of the shorelines.

Role of Science

Ecology complains that the FDO overstates the role of science in planning for water dependent uses in a Shoreline Master Program (SMP) and fails to acknowledge what it

<sup>15</sup> FDO at 10 citing RCW 90.58.020.  
<sup>16</sup> FDO at 10-11, citing RCW 90.58.020 and WAC 173-26-201(2)(c).  
<sup>17</sup> RCW 90.58.020.  
<sup>18</sup> FDO at FDO at 11 citing WAC 173-26-201(2)(c).

1 suggests is the “[SMA] Guidelines’ precautionary principle,”<sup>19</sup> but then cites appellate court  
2 decisions interpreting a totally separate “precautionary principle,” one included in the  
3 Department of Commerce’s regulations regarding the protection of critical areas under the  
4 requirements of the Growth Management Act (RCW 36.70A.172), rather than the regulation  
5 referenced by Ecology, WAC 173-26-201(3)(g).  
6

7 Neither respondent attempted to justify or support the County’s action on the basis of  
8 WAC 173-26-201(3)(g) in its briefing or oral arguments. Ecology raises the defense for the  
9 first time in its motion for reconsideration.<sup>20</sup> However, in its May 31, 2018, letter granting  
10 conditional approval (with required changes) of the County’s SMP update, Ecology opined  
11 and concluded, *inter alia*:<sup>21</sup>

12 The County has chosen to take a precautionary approach in these prohibitions  
13 based on broadly stated concerns. ... Outright use prohibitions are among the  
14 most challenging for Ecology to review for consistency with state laws and  
15 rules. ... [T]he policy goals of the act relate to both utilization and protection of  
16 the extremely valuable and vulnerable shoreline resources of the state. ... The  
17 rules acknowledge potential locations for aquaculture are relatively restricted  
18 and the technology associated with some forms of aquaculture are  
19 experimental, therefore SMPs “should recognize the necessity to provide  
20 some latitude in the development of this use as well as its potential impact on  
21 existing uses an natural systems. ... [T]o address both the use and protection  
22 goals of the SMA, outright prohibitions on water-dependent preferred uses  
23 should be well founded. *Prohibitions should be supported by substantive  
24 analysis of the most current, accurate, and complete scientific and technical  
25 information available. ...*

26 *Finding: Ecology finds these prohibitions on aquaculture are not adequately  
27 supported in the submitted record by scientific and technical information nor by  
28 any analysis of the impacts of these proposed regulations on existing*

29 <sup>19</sup> WAC 173-26-201(3)(g) states in part: As a general rule, the less known about existing resources, the more  
30 protective shoreline master program provisions should be to avoid unanticipated impacts to shoreline  
31 resources. If there is a question about the extent or condition of an existing ecological resource, then the  
32 master program provisions shall be sufficient to reasonably assure that the resource is protected in a manner  
consistent with the policies of these guidelines.

<sup>20</sup> Motion for Reconsideration at 6-7.

<sup>21</sup> Attachment A: Findings and Conclusions: Pierce County SMP – Ordinance No. 2013-45s4, pp. 25-26.

1           *aquaculture activities. The record contains no analysis demonstrating that the*  
2           *total of all restrictions on aquaculture remains consistent with the policy of the*  
3           *SMA and the SMP Guidelines and the preferences for water-dependent uses.*  
4           *Ecology also finds that the County's SMP is required to recognize and*  
5           *implement the use preferences set forth in RCW 90.58.020 on Shorelines of*  
6           *Statewide Significance and that Ecology must ensure optimum implementation*  
7           *of these policies to ensure the statewide interest is met.*

8           The Board decided that one of the questions presented in this case was, in essence,  
9           whether a local government may impede a preferred shoreline use that is locally unpopular,  
10          justifying the enactment of burdensome regulations by citing environmental concerns not  
11          supported by scientific or technical information. Agreeing with Ecology's findings in its May  
12          31, 2018, letter, the Board's determination was that it may not.

13          In sum, no one sentence in the FDO can be read out of context or in isolation from  
14          the entire discussion. Nevertheless, the Board will make the following clarifications to the  
15          FDO language:

- 16           • On page 8, line 15-17: In sum, the utilization of shorelines SSWS for economically  
17           productive uses that are particularly dependent on shoreline location or use is  
18           given the highest high priority under SMA and the guidelines. WAC 173-26-  
19           176(3)(a).
- 20           • On page 12, line 2-3: ~~But the~~ *It is a priority under state law to preserve the*  
21           *shorelines for preferred, water-dependent uses.*
- 22           • On page 13, line 14: This case requires the application of an Act that makes the  
23           protection of the statewide interest over, rather than local interest, a higher priority  
24           in SSWS, while minimizing "in so far as practical, any resultant damage to the  
25           ecology and environment of the shoreline area and the public's use of the water."  
26           • On page 20, line 25 to page 21, line 2: The utilization of shorelines for  
27           economically productive uses that are particularly dependent on shoreline location  
28           or use is ~~given the a~~ highest priority under SMA and the guidelines. ~~Theoretically,~~  
29           ~~all science being equal, t~~The SMA clearly decrees that statewide interest shall  
30             
31             
32

1 take precedence over local interests in SSWS, and The SMA does not allow for  
2 regulation of a preferred use that is not supported by Ecology's guidelines call for  
3 scientific and technical information or management recommendations to support  
4 restrictions on a preferred use.

- 5 • On page 36, line 1-2: To support taking a precautionary approach RCW  
6 90.58.100 requires the County must have a basis in to utilize scientific and  
7 technical information and management recommendation-s in developing its SMP,  
8 including adopting restrictions on a preferred shoreline use.  
9

10  
11 Justification for SMP amendment

12 Ecology reads the Board's criticism that the County failed to analyze the need for or  
13 impacts of its regulations to mean that a local government is required to demonstrate that  
14 there is a need for an SMP provision by demonstrating actual harm in their absence.<sup>22</sup> To  
15 the contrary, the sentence to which Ecology objects is taken directly from Ecology's own  
16 finding that the County's outright prohibitions were "not adequately supported ... by  
17 scientific and technical information nor by any analysis of the impacts of these proposed  
18 regulations on existing aquaculture activities."<sup>23</sup>  
19

20 **The Board finds** it is not necessary to clarify this language.  
21

22 **III. ORDER**

23 Based upon review and consideration of the submissions by the parties and having  
24 deliberated on the matter, the Board Orders as follows:

- 25 1. The request for correction of scrivener's errors is granted;  
26 2. Ecology's Motion for Reconsideration is granted, in part;  
27 3. The Board will amend its Final Decision and Order to read as follows:  
28  
29  
30

31  
32 <sup>22</sup> Motion for reconsideration at 9.

<sup>23</sup> Attachment A: Findings and Conclusions: Pierce County SMP – Ordinance No. 2013-45s4, pp. 25-26.

- 1 • On page 36, line 13: Revise the parenthetical after “Predator control” as  
2 follows: “Predator control (issue 45 17).”
- 3 • On page 52, lines 14 and 15: Revise the first sentence under the  
4 CONCLUSIONS heading as follows: “The board finds and concludes that the  
5 petitioners abandoned issues 6, 9, and part of 17 (pertaining to  
6 18S.40.040.D.5 only) either specifically or through inadequate argument.”
- 7 • On page 53, line 23: Revise the parenthetical after “Predator control” as  
8 follows: “Predator control (Issue 45 17).”
- 9 • On page 8, line 15-17: In sum, the utilization of shorelines SSWS for  
10 economically productive uses that are particularly dependent on shoreline  
11 location or use is given the highest high priority under SMA and the guidelines.  
12 WAC 173-26-176(3)(a).
- 13 • On page 12, line 2-3: ~~But the~~ *It is a priority under state law to preserve the*  
14 *shorelines for preferred, water-dependent uses.*
- 15 • On page 13, line 14: This case requires the application of an Act that makes  
16 the protection of the statewide interest over, rather than local interest, a higher  
17 priority in SSWS, while minimizing “in so far as practical, any resultant damage  
18 to the ecology and environment of the shoreline area and the public’s use of  
19 the water.”
- 20 • On page 20, line 25 to page 21, line 2: The utilization of shorelines for  
21 economically productive uses that are particularly dependent on shoreline  
22 location or use is given the a highest priority under SMA and the guidelines.  
23 ~~Theoretically, all science being equal, t~~The SMA clearly decrees that statewide  
24 interests shall take precedence over local interests in SSWS, and ~~The SMA~~  
25 ~~does not allow for regulation of a preferred use that is not supported by~~  
26 Ecology’s guidelines call for scientific and technical information or  
27 management recommendations to support restrictions on a preferred use.
- 28
- 29
- 30
- 31
- 32



- On page 36, line 1-2: ~~To support taking a precautionary approach~~ RCW 90.58.100 requires the County must have a basis in to utilize scientific and technical information and management recommendation-s in developing its SMP, including adopting restrictions on a preferred shoreline use.

Entered this 7<sup>th</sup> day of August 2019.

\_\_\_\_\_  
Cheryl Pflug, Board Member

\_\_\_\_\_  
Deb Eddy, Board Member

\_\_\_\_\_  
William Roehl, Board Member

**Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.<sup>24</sup>**

<sup>24</sup> A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be served on the board but it is not necessary to name the board as a party. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

1 **BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD**  
2 **CENTRAL PUGET SOUND REGION**

3  
4 Case No. 18-3-0013c

5 Taylor Shellfish Company, Inc., Seattle Shellfish, LLC., North Bay Partners, LLC. v. Pierce  
6 County and State of Washington Department of Ecology

7  
8 **DECLARATION OF SERVICE**

9 I, DESIREE ORTIZ, under penalty of perjury under the laws of the State of  
10 Washington, declare as follows:

11  
12 I am the Legal Assistant to the Growth Management Hearings Board. On the date  
13 indicated below a copy of the ORDER ON MOTION FOR RECONSIDERATION AND  
14 REQUEST TO CORRECT SCRIVENER'S ERRORS in the above-entitled case was sent to  
15 the following through the United States postal mail service:  
16  
17

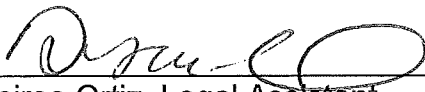
18 Mark Lindquist  
19 Pierce County Prosecuting Attorney  
20 Todd Campbell  
21 Deputy Prosecuting Attorney  
22 955 Tacoma Ave S. Ste 301  
23 Tacoma WA 98402

Jon E. Cushman  
Cushman Law Offices, P.S.  
924 Capitol Way South  
Olympia WA 98501

24 Phyllis J. Barney  
25 Cheerful Catunao  
26 Office of the Attorney General  
27 PO Box 40117  
Olympia WA 98504-0117

Samuel W. Plauche  
Jesse G. Denike  
Plauche & Carr, LLP  
1218 Third Ave Suite 2000  
Seattle WA 98101

28 DATED this 7<sup>th</sup> day of August 2019.

29  
30   
31 \_\_\_\_\_  
32 Desiree Ortiz, Legal Assistant