May 27, 2010

WS Department of Ecology
Ms. Cedar Bouta
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360-407-6406

Re: Department of Ecology Discussion Draft dated May 11, 2010, Summary of Proposed Changes to Chapter 173-26, Shoreline Management Act – Geoduck Aquaculture.

The Discussion Draft:
http://www.ecy.wa.gov/programs/sea/shorelines/smp/rulemaking/Ch_17326_Geoduck_draft.pdf

House Bill 2220:
http://www.ecy.wa.gov/programs/sea/shellfishcommittee/pdf/2220_Final_Bill.pdf

Dear Ms. Bouta;

The Discussion Draft contains a number of areas of significant problems and concerns. Beginning on page 1, the Draft Overview lays the groundwork for changing certain language in the SMA with several statements that are misinterpretations and overstatements of HB 2220 and the SMP guidelines.

The Draft statement that HB 2220 is *"predicated on allowing geoduck aquaculture to continue and expand"* is a misrepresentation of The Bill. HB 2220 does not predicate, assert or otherwise imply that geoduck aquaculture should or must be allowed to continue and expand. HB 2220 only requires Ecology to develop guidelines with the advice of SARC for the appropriate siting and operation of geoduck aquaculture to be included in local master programs. There is no implication or explicit language in The Bill that geoduck aquaculture expansion must move forward. HB 2220 is the direct result of South Puget Sound citizen's efforts in reaction to the unchecked proliferation of geoduck aquaculture without permits and scientific assessments; and the failure of state and local governments to enforce the SMA. The intent of The Bill was to stop or limit the unregulated expansion of geoduck aquaculture on State tidelands; not to ensure that it continues and expands.

The Draft statement that *"the SMP Guidelines are clear that commercial aquaculture is an important and economically valuable water-dependent use"* is hyperbole, and it follows a longstanding institutional bias that Ecology traditionally has bestowed on the shellfish industry. In Ecology's "Findings and Conclusions", and in Ecology's press

release of February 26, 2009, Ecology grossly overstated and misrepresented aquaculture as a preferred use under the SMA.

Joan K. Thomas, of the Washington Environmental Council, one of the original drafters of the SMA, spoke on the history of the act at the 1991 SMA Symposium. Thomas stated:

"I have thought about this carefully over the years as I have seen my expectations frustrated. We have lost the full potential of the SMA to protect a valuable resource through fainthearted administration."

"When the SMA was written in 1971, aquaculture meant oysters and clams and one salmon raising operation. This activity was recognized and protected as water-dependent. I do not read the original intent or the original guidelines to promote the industry as we know it today. In fact, the guidelines specified that navigational access not be restricted and that visual access of upland owners be considered. Aquaculture has become a sore point between local governments and the Department of Ecology – a fraying of the partnership."

http://nsgl.gso.uri.edu/washu/washuw91002.pdf (see page 16)

The Environmental Council, along with citizen and environmental groups, were instrumental in the passage of the SMA and in getting the SMA on the ballot. In 1970, these groups had gathered over 160,000 signatures in 10 weeks. The earlier versions of the act also provided for direct citizen enforcement.

What is clear is that the SMA and the Guidelines did not intend for the shorelines of Puget Sound to be summarily handed over for the commercial production of geoducks to benefit a handful of private companies. What is also clear is that the vast majority of citizens that have been witnessing the largely unregulated expansion of geoduck aquaculture are opposed to it. What Ecology is promoting in this Draft is the continuation of the *"fraying of the partnership"* spoken of by Thomas in 1991.

In the Discussion Draft's reference to adhering to the overarching goals of the SMA, these goals are specifically enumerated in the SMA:

"The overarching policy is that the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible…"

Overarching means overriding, overruling, encompassing and overshadowing everything. It means predominate and paramount. It means that everything else in the Shoreline Management Act, including aquaculture, is under the umbrella of this one singular idea. This was the intention of the voters when the SMA was enacted into law. The SMA also very clearly gives priority to single family residences and shoreline recreational uses over aquaculture as a preferred use. The Shoreline Management Act also states:

"Alterations of the natural conditions of the shorelines of the state, in those limited instances when authorized, shall be given priority for…development that will provide an opportunity for substantial numbers of people to enjoy the shorelines of the state".

This statement clearly indicates that shoreline alterations will be (1), limited in instance, and (2), prioritized toward recreational uses. Yet on page 2 of the Discussion Draft Overview, Ecology seeks to *"compel"* local governments to site geoduck aquaculture. Why does Ecology wish to *"compel"* or force, coerce or otherwise pressure Puget Sound counties into siting geoduck aquaculture? This is not consistent with the SMA or the Guidelines, nor is it required under HB 2220. Also on page 25, the Discussion Draft proposed language reads:

"…local governments with marine shorelines should identify areas suitable for commercial geoduck aquaculture…"

And on pages 52 and 98 of the Draft:

"Local governments should classify appropriate areas for commercial geoduck aquaculture…"

Why is Ecology mandating that Puget Sound counties set aside specific areas for geoduck aquaculture? What about counties such as Mason and Thurston that have already grandfathered in these sites? Will this take into account public comment and the wishes of the community? Will there be pressure on property owners to lease private tidelands specifically for geoduck aquaculture? What about private tideland owners that do not want to be a part of Ecology's geoduck aquaculture reserves? Is there a way for property owners or a community to opt-out of Ecology's geoduck aquaculture reserves? What about existing geoduck aquaculture areas where eelgrass and sand dollars have already been removed? Will these areas now be classified as inappropriate for geoduck aquaculture and these habitats restored to their natural condition?

HB 2220 only requires Ecology to develop guidelines with the advice of SARC for the appropriate siting and operation of geoduck aquaculture to be included in local SMP's. The Bill does not require the guidelines to identify, establish and otherwise set aside areas specifically for geoduck aquaculture. WAC 173-26-201 does not establish that shoreline areas should be set aside for geoduck aquaculture.

Whether or not geoduck aquaculture is a *"water dependent"* or *"preferred"* use consistent with the overarching principals of the SMA is debatable. On page 16 of the Draft, Ecology proposes the following statement changes:

"Reserve shoreline areas for water-dependent and associated water-related uses, such as marinas, ports and commercial geoduck aquaculture".

There may be agreement that geoduck aquaculture is an industrial activity, and that it belongs in an industrial area like a port or a marina, but the fact is geoduck aquaculture is being placed in pristine areas, fish habitat areas and in residential areas. Marinas or ports are not generally allowed in these areas. Marinas and ports are consistent with the overarching principals of the SMA because they benefit the public. Geoduck aquaculture does not appreciably benefit the public, but rather it primarily benefits only a handful of large shellfish corporations and a few property owners. The SMA was not intended to accommodate geoduck aquaculture in the way that it is being attempted with the changes proposed to the SMP guidelines in the Discussion Draft.

We are opposed to including *"commercial geoduck aquaculture"* along with marinas and ports in WAC 173-26. Ecology should also consider whether or not geoduck aquaculture should be classified as a *"preferred use"* under the SMA. It does not preserve the natural character of the shoreline. It does not protect the resources and ecology of the shoreline. It decreases recreational opportunities for the public in the shoreline area. The public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines is not being preserved. It is an alteration of the natural condition of the shoreline. It is not a *"reasonable or appropriate use"*. It does not *"promote and enhance the public interest"*. It is contrary to the state's policy of *"protecting against adverse effects to the waters of the state and their aquatic life"*. It is not a preferred use consistent with prevention of damage to the environment. It does not meet the *"no net loss of ecosystem function"* criterion. Intertidal geoduck aquaculture and harvest techniques adversely affect eelgrass and sand dollars, depress key prey invertebrates important to endangered salmon, disrupt resident and migratory birds, and significantly impact the aesthetic qualities of the shoreline.

Ecology should re-consider the AG opinion that geoduck aquaculture is not a *"development"* in every situation. The AG opinion is fundamentally flawed in that it did not properly consider the fact that the Public Trust Doctrine includes all the waters of Puget Sound, and that the public retains its *"jus publicum"* rights to the underlying tidelands whether or not they are publicly or privately owned. The AG drew from limited information that was shellfish industry focused, and did not include an exhaustive review of the facts.

The Discussion Draft should include consideration of the 2007 Pierce County Hearing Examiners Ruling (not an opinion) in the Foss/Taylor Shellfish appeal. This ruling, which is more recent than the AG opinion, was rendered after several weeks of expert witness testimony from both sides of the geoduck aquaculture issue. The Hearings Examiner concluded that geoduck farms are indeed a *"structure"*; that they *"interfere with the public's use of the water"*; and that they cause *"habitat disruption"*. The Hearings Examiner also upheld that geoduck aquaculture is a *"development"* in all cases, and as such requires a Substantial Shoreline Development Permit.

In Ecology's consideration of the SMP updates in Whatcom and Jefferson Counties, it should be noted that Whatcom County does not have areas that are suitable for geoduck aquaculture. Jefferson County has fewer areas that are suitable for geoduck aquaculture,

and the SMP update there was heavily influenced by geoduck interests on the Planning Commission. The geoduck industry is primarily interested in expanding commercial operations in South Puget Sound; in Mason, Thurston and Pierce Counties; not Whatcom and Jefferson Counties. Therefore, Ecology needs to pay attention to these counties where there is relevancy. The fact is, nearly everyone in these counties that lives or owns property anywhere near geoduck aquaculture, and is not on the payroll, detests the geoduck industry with a passion that is apparently difficult to comprehend by those who have not directly witnessed or understand the degradation and disruption produced by this industry.

Ecology should consider the Pierce County Interim Regulations in its evaluation of this issue. The Pierce County Council unanimously voted on behalf of citizens and agreed that the historic nature of quiet, pristine and unspoiled shorelines was at stake with the expansion of geoduck aquaculture development. Citizens and waterfront owners do not want commercial geoduck development in their neighborhoods. Pierce County listened to its citizens and responded. The Pierce County Interim Regulations also addressed the problem of aquaculture debris which has not been addressed by Ecology, in spite of the mandate of HB 2220.

Ecology should also consider The Growth Management Hearings Board Decision of January 19, 2010, which rejected the shellfish industry's attempt to get rid of Pierce County's Interim Regulations. The Hearings Board ruled that it is within Pierce County's authority to manage aquaculture, and to establish use and location restrictions. There is nothing in the SMA or SMP Guidelines which mandates that all water dependent or preferred uses be allowed in all environments or under any or all circumstances. Rather, the SMA contemplates that shoreline alterations will be authorized only under limited circumstances.

The Discussion Draft proposes the requirement of a Conditional Use Permit (CUP) for commercial aquaculture in Critical Saltwater Habitats. Geoduck aquaculture should be considered separately from other less damaging methods of shellfish aquaculture. Geoduck aquaculture should not be considered itself a Critical Saltwater Habitat, nor should it be allowed to occur in other Critical Saltwater Habitats. WAC 173-26-221 (c) Standards, states that *"...human made structures shall not intrude into Critical Saltwater habitats..."* unless the project can be shown to result in no net loss of ecosystem functions within the Critical Saltwater Habitat. Ecosystem functions and net loss have to be considered on a site by site basis rather than on a larger scale. The fact that an eaglet may not be able to feed without being snagged in anti-predator netting is perhaps the most obvious example of a loss of ecosystem functioning. In general, most of the nearshore intertidal area functions as nurseries for fish, birds and invertebrates, and geoduck aquaculture tends to occur in the most productive habitats. Sand dollar beds need to be included as critical saltwater habitat, and then they need to be protected from commercial geoduck aquaculture along with eelgrass. According to the Magnuson-Stevens Act, sand dollar beds are *"Significant Resource Areas"*.

Additional questions and comments about the Discussion Draft:

*There does not appear to be any provisions for baseline studies on a per site basis.
*The Draft does not address the ongoing problem of derelict aquaculture gear, an issue that was supposed to be considered under HB 2220.
*The preliminary Sea Grant studies do not appear to have been factored into the Draft.
*There is no evidence of any long term benefits from geoduck aquaculture per the SMP guidelines.
*What are the criteria for areas that are suitable for geoduck aquaculture? Are these areas also suitable for recreation or *"priority"* uses?
*What is the best available method to reduce turbid runoff?
*Is there public involvement in CUP's?
*Are CUP's required for new or additional plantings on existing farms if sited in Critical Saltwater Habitats?
*The Draft does not adequately address use conflicts.
*The Draft does not provide for the removal of geoduck aquaculture already sited inappropriately (planted in eelgrass beds, sand dollar beds, areas where aquaculture created a use conflict, adverse cumulative impacts, etc.).

On page 100 of the Draft: *"Local conditional permit approvals should recognize that harvest may continue for five or more years after the last planting of geoduck seed and consider the limits and conditions in WAC 173-26-241 (3) (b) (i) (E)."* This is a Catch 22 – permits are good for 5 years but harvesting may continue indefinitely based on planting over those 5 years. What if (page 102) the *"...right to harvest geoduck once planted"* – they plant in the 5th year? This needs to be clarified and further defined.

Thank you for your time consideration.

Regards,

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