

STATE OF WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD
FOR CENTRAL PUGET SOUND

SEATTLE SHELLFISH, LLC
and PACIFIC COAST SHELLFISH
GROWERS ASSOCIATION,

Petitioner,

v.

PIERCE COUNTY and
WASHINGTON STATE DEPARTMENT
OF ECOLOGY,

Respondent.

Case No. 09-3-0010

FINAL DECISION AND ORDER

(Seattle Shellfish)

SYNOPSIS

On April 21, 2009, Pierce County adopted Ordinance No. 2009-26, amending the Pierce County Shoreline Master Program (SMP). The amendment previously had been approved by the Washington State Department of Ecology as a Limited Amendment to the SMP following a two-year review process conducted by the County and Ecology. The Ordinance revises Chapter 20.24 Aquacultural Practices and Chapter 20.56 Piers and Docks of the County's Shoreline Management Regulations. The amendment and regulations are intended to sunset upon the adoption of the County's comprehensive update to the SMP.

On July 27, 2009, Seattle Shellfish, LLC, and Pacific Coast Shellfish Growers Association filed a timely Petition for Review challenging the County's action on the basis of various provisions of the Shoreline Management Act, RCW 90.58, (SMA) and the SMP Guidelines, WAC 173-26, as well as the Growth Management Act RCW 36.70A. The challenge contended the approved ordinance by the County and Ecology should not

1 *have been approved as a limited amendment, but rather as a portion of a larger*
2
3 *comprehensive plan update to its SMP.*

4
5
6 *After a review of the briefs, oral arguments, and the Record, the Board determined the*
7
8 *Petitioners **have not carried their burden of proof** in their challenge of Ordinance*
9
10 *No. 2009-26. It should be noted that the Board is divided on a portion of Issue 3*
11 *regarding the Limited Amendment, with Board Member Pageler dissenting, finding the*
12 *SMP amendment will affect a substantial portion of the County's shorelines.*

13
14
15
16 *[KEYWORDS: Shoreline Management Act, Shoreline Master Program, Limited*
17 *Amendment]*

21 **I. PROCEDURAL BACKGROUND**

22 PETITION FOR REVIEW

23
24
25
26 On July 27, 2009, Seattle Shellfish, LLC and Pacific Coast Shellfish Growers Association
27 (collectively, Petitioners) filed a Petition for Review (PFR) with the Central Puget Sound
28 Growth Management Hearings Board (Board). With this PFR, Petitioners challenge
29 Pierce County's adoption and the Washington State Department of Ecology's (Ecology)
30 approval of Ordinance No. 2009-26, which amended the County's Shoreline Master
31 Program (SMP).
32
33
34
35
36
37

38 HEARING ON THE MERITS

39
40 The Hearing on the Merits was held on November 30, 2009, at the Pierce County
41 Environmental Services Building in University Place, Washington.¹ Board members
42 Dave Earling and Margaret Pageler were present, Board Member Earling presiding.
43
44
45
46
47
48

49 ¹ Byers and Anderson, Inc. provided court reporting services for the Hearing on the Merits. A transcript
50 of the proceedings was provided to the Board on December 16, 2009 and is referred to herein as "**HOM Transcript**".

1 Petitioners were represented by Amanda Stock; Pierce County was represented by Pete
2 Philley; and Ecology was represented by Sonia Wolfman.
3
4
5

6
7 **II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF,**
8 **and STANDARD OF REVIEW**
9

10 Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations,
11 and amendments to them, are presumed valid upon adoption.² This presumption
12 creates a high threshold for challengers as the burden is on the petitioners to
13 demonstrate that any action taken by the County is not in compliance with the GMA.³
14
15
16
17

18 The Board is charged with adjudicating GMA compliance and, when necessary,
19 invalidating noncompliant plans and development regulations.⁴ The scope of the Board's
20 review is limited to determining whether a County has achieved compliance with the
21 GMA only with respect to those issues presented in a timely Petition for Review.⁵ The
22 GMA directs that the Board, after full consideration of the petition, shall determine
23 whether there is compliance with the requirements of the GMA.⁶ The Board shall find
24 compliance unless it determines that the County's action is clearly erroneous in view of
25 the entire record before the Board and in light of the goals and requirements of the
26 GMA.⁷ In order to find the County's action clearly erroneous, the Board must be "left
27 with the firm and definite conviction that a mistake has been committed."⁸
28
29
30
31
32
33
34
35
36
37

38
39 ² RCW 36.70A.320(1) provides: [Except for the shoreline element of a comprehensive plan and
40 applicable development regulations] comprehensive plans and development regulations, and
41 amendments thereto, adopted under this chapter are presumed valid upon adoption.

42 ³ RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity]
43 the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city
44 under this chapter is not in compliance with the requirements of this chapter.

45 ⁴ [RCW 36.70A.280](#), [RCW 36.70A.302](#).

46 ⁵ RCW 36.70A.290(1).

47 ⁶ RCW 36.70A.320(3).

48 ⁷ RCW 36.70A.320(3).

49 ⁸ *City of Arlington v. CPSGMHB*, 162 Wn.2d 768, 778, 193 P.3d 1077 (2008) (Citing to *Dept. of Ecology v.*
PUD District No. 1 of Jefferson County, 121 Wn.2d 179, 201, 849 P.2d 646 1993); See also, *Swinomish*
Tribe, et al v. WWGMHB, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB*, 157
50 Wn.2d 488, 497-98, 139 P.3d 1096 (2006).

1 In reviewing the planning decisions of cities and counties, the Board is instructed to
2 recognize "the broad range of discretion that may be exercised by counties and cities"
3 and to "grant deference to counties and cities in how they plan for growth."⁹ However,
4 the County's actions are not boundless; their actions must be consistent with the goals
5 and requirements of the GMA.¹⁰
6
7
8
9

10
11 Thus, the burden is on Petitioners to overcome the presumption of validity and
12 demonstrate that the challenged action taken by the County is clearly erroneous in light
13 of the goals and requirements of the GMA.
14
15
16
17

18 The Board's review of Ecology's decision here is also governed by RCW 90.58.190(2)
19 because the shorelines at issue here are "shorelines of statewide significance."¹¹ The
20 Shoreline Management Act provides in RCW 90.58.190(2):
21
22

23 (c) If the appeal to the growth management hearings board concerns a
24 shoreline of state-wide significance, the board shall uphold the decision by
25 the department unless the board, by clear and convincing evidence,
26 determines that the decision of the department is inconsistent with the policy
27 of RCW 90.58.020 and the applicable guidelines.
28

29 (d) The appellant has the burden of proof in all appeals to the growth
30 management hearings board under this subsection.
31
32

33 Thus, the Board must test the SMP Amendment against the policy of RCW 90.58.020
34 and the applicable SMP Guidelines, upholding Ecology's decision to approve the
35
36
37
38
39
40

41
42 ⁹ RCW 36.70A.3201.

43 ¹⁰ *King County v. CPSGMHB*, 142 Wn.2d 543, 561, 14 P.2d 133 (2000)(Local discretion is bounded by the
44 goals and requirements of the GMA). See also, *Swinomish*, 161 Wn.2d at 423-24. In *Swinomish*, as to
45 the degree of deference to be granted under the clearly erroneous standard, the Supreme Court has
46 stated: The amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It
47 requires the Board to give the [jurisdiction's] actions a "critical review" and is a "more intense standard of
48 review" than the arbitrary and capricious standard. *Id.* at 435, Fn.8.

49 ¹¹ Pursuant to RCW 90.58.030(2)(e)(iii), "Shorelines of Statewide Significance" are generally defined as
50 those areas of Puget Sound lying seaward of the extreme low tide. The challenged SMP Amendment
applies to intertidal areas, which lie landward of extreme low tide. Thus, the heightened evidentiary
standard may not be applicable to most of the issues in this case.

1 Amendment unless the appellants present clear and convincing evidence of error.
2
3 Lastly, in order to effect its purpose, the SMA is to be construed liberally.¹²
4
5

6 **III. BOARD JURISDICTION**

7

8 The Board finds that the Petition for Review was timely filed, pursuant to RCW
9 36.70A.290(2). The Board finds that Petitioners have standing to appear before the
10 Board, pursuant to RCW 36.70A.280(2). The Board finds that it has jurisdiction over
11 the subject matter of the petition pursuant to RCW 36.70A.280(1).
12
13
14
15

16 **IV. PRELIMINARY MATTERS**

17

18 A. Pierce County's Motion to Supplement¹³

19

20 Pierce County sought supplementation of the record with a Declaration of Pierce County
21 GIS Specialist Aaron Michael and two attachments - a map of the County's Shoreline
22 Environments and a table as to the distribution of the shorelines throughout the
23 County.¹⁴ The purpose of these submittals is to provide accurate information as to the
24 mileage, percentage, and location of the shoreline environments. Petitioners did not
25 object to the supplementation but did note that due to the inconsistency between these
26 documents and the Record, the Board should give these documents the appropriate
27 weight. At the HOM, the Board granted the County's Motion to Supplement.
28
29
30
31
32
33
34
35

36 B. Pierce County's Motion to Dismiss Abandoned Issues¹⁵

37

38 Within their opening brief, Petitioners expressly abandoned Issue 6.¹⁶ Pierce County
39 recognized this abandonment and sought dismissal.¹⁷ At the HOM, the Board
40 concurred and Issue 6 was dismissed in its entirety.
41
42
43

44 ¹² See e.g. *Samuel's Furniture v. Dept. of Ecology*, 147 Wn.2d 440, 448 (2002)(Citing to RCW
45 90.56.900).

46 ¹³ See HOM Transcript at 7-8.

47 ¹⁴ Pierce County's Prehearing Response Brief, at 22. The County filed this brief on November 9, 2009
48 and its will be referred to as **County HOM Brief**.

49 ¹⁵ See HOM Transcript at 8-10.

50 ¹⁶ Petitioners' Prehearing Brief, at 10, fn. 35. Petitioners filed this brief on October 27, 2009 and it will
be referred to as **Petitioners' HOM Brief**. Issue 6 provides: *Does the SMP Amendment fail to comply*

1
2
3 In addition, Pierce County moved for the partial dismissal of Issues 7 and 8.¹⁸ In
4 regard to Issue 7, the County noted that this issue cites various provisions of the Pierce
5 County Code (PCC) but Petitioners' briefing did not set forth argument on several of
6 these provisions.¹⁹ As for Issue 8, the County contended that although the issue
7 statement referenced the goals and policies of certain elements of the SMP, Petitioners'
8 briefing was confined to argument related to consistency with the SMP's Aquacultural
9 Practices policies.²⁰

10
11
12
13
14
15
16 Petitioners did not dispute the County's claim and, therefore, the Board dismissed those
17 specific provisions and elements not argued. As for Issue 7, the following provisions
18 were dismissed: PCC 19A.20.050, 19A.20.090, 19A.30.070, 19A.30.220, 19A.40.010,
19 19A.40.020, 19A.40.070, 19A.60.120, and 19A.60.130. As for Issue 8, the following
20 elements were dismissed: Economic Development, Shoreline Use, Rural Environment,
21 Conservancy Environment, Natural Environment, Use Activity for Residential
22 Development, and Use Activity for Bulkheads, Breakwaters, Jetties, and Groins.

30 **V. ISSUES AND DISCUSSION**

31
32
33 The protection of Washington's shorelines for all citizens is an important state
34 constitutional interest reflected in the SMA, and the management of these shorelines is
35 a power the State has chosen to share with local governments.²¹ The policies of the
36 SMA are clearly "based upon the recognition that shorelines are fragile and that the
37
38
39
40

41
42 *with the SMA, including WAC 173-26-186(8)(d), because it fails to evaluate and consider cumulative*
43 *impacts of reasonably foreseeable future development on shoreline ecological functions and other*
44 *shoreline functions fostered by the policy goals of the act; and fails to contain policies, programs, and*
45 *regulations that address adverse cumulative impacts and fairly allocate the burden of addressing*
46 *cumulative impacts among development opportunities?*

47 ¹⁷County HOM Brief at 21.

48 ¹⁸County HOM Brief, at 21.

49 ¹⁹County HOM Brief, at 21.

50 ²⁰County HOM Brief, at 21.

²¹ *Biggers v. Bainbridge Island*, 162 Wn.2d 683, 702 (2007) and RCW 90.58.050 (Establishes a cooperative program of shoreline management between local government and the State).

1 increasing pressure of additional uses being placed on them necessitated increased
2 coordination in their management and development.”²² Thus, the SMA was enacted to
3 protect and manage the shorelines of Washington State to foster all reasonable and
4 appropriate uses, while protecting against adverse effects to public health, land,
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
33
34
35
36
37
38
39
40
41
42

The Challenged Action – Pierce County’s SMP Amendment²⁴

13 With their PFR, Petitioners challenge Pierce County’s adoption and Ecology’s
14 subsequent approval of Ordinance 2009-26. This Ordinance represents a limited
15 amendment to the County’s Shoreline Master Program (SMP) and revises sections
16 of Title 20 of the County’s Shoreline Management Regulations, specifically Chapter
17 20.24 Aquacultural Practices and Chapter 20.56 Piers and Docks.²⁵ These
18 regulations are intended to be interim regulations and are to sunset upon the
19 adoption of the County’s comprehensive update to its SMP.²⁶
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42

27 The challenged action represents part of the County’s three-year process to
28 complete a comprehensive update to its SMP. The process began in 2006 when the
29 County Council directed Pierce County’s Planning and Land Services (PALS) to
30 develop recommendations for interim regulations in order to address emerging
31 issues related to aquaculture and shoreline structures prior to the completion of the
32 comprehensive SMP update.
33
34
35
36
37
38
39
40
41
42

42 ²² *Buechel v. Ecology*, 125 Wn.2d 196, 203 (1994).

43 ²³ RCW 90.58.020; *Samuel’s Furniture v. Ecology*, 172 Wn.2d 440, 448 (2002); *Buechel v. Ecology*, 125
44 Wn.2d 196, 203 (1994). In addition, in order to effect its broad purpose, the SMA is to be construed
45 liberally. RCW 90.58.900; *English Bay Enterprises v. Island County*, 89 Wn.2d 16, 20 (1977).

46 ²⁴ This section represents a compilation of facts presented in the briefs and exhibits submitted by all
47 parties to this matter. See also the three Ordinances which pertain to the County’s amendment to its
48 SMP – Ordinance 2007-34s2, adopted October 16, 2007 (Exhibit SMP IR-12-391); Ordinance 2008-25,
49 adopted June 2, 2008 (Exhibit SMP IR 15-420); and Ordinance 2009-26, adopted April 21, 2009 (Exhibit
50 SMP IR 15-421).

²⁵ The Petitioners have not challenged the County’s regulations as to Piers and Docks.

1 PALS drafted regulations which were reviewed by both the Peninsula Advisory
2 Commission (PAC) and the County Planning Commission (CPC) and were the
3 subject of various public meetings and hearings. Recommendations were
4 forwarded to the County Council which conducted additional public hearings.
5
6 Based on the recommendations and public participation, the County Council, in
7
8 October 2007, adopted Ordinance 2007-34s2. As required by RCW 90.58.090, this
9 ordinance was then forwarded to, but ultimately rejected by, Ecology as a limited
10 amendment due to the presence of certain code provisions related to critical areas.
11
12
13
14
15

16 In response to Ecology's rejection, the County, on June 3, 2008, adopted Ordinance
17 2008-25 which repealed the critical areas provisions. This Ordinance, which
18 retained the other regulations adopted by Ordinance 2007-34s2, was forwarded to
19 Ecology for its review. In a letter dated February 25, 2009, Ecology notified the
20 County that it approved the limited amendment interim regulations for aquaculture
21 and piers and docks set forth in Ordinances 2007-34s2 and 2008-25, subject to
22 several changes. Ecology's changes included the deletion of regulations related to
23 the hours and days of operation for geoduck aquaculture and the prohibition of
24 geoduck aquaculture within the Urban and Rural-Residential Shoreline
25 Environments.
26
27
28
29
30
31
32
33
34

35 On April 21, 2009, with the adoption of Ordinance 2009-26, the County Council
36 stated its agreement to Ecology's changes and modified the regulations to
37 incorporate these changes. On May 18, 2009, Ecology notified Pierce County that
38 it was in receipt of the County's agreement and, therefore, the SMP-limited
39 amendment took effect on May 14, 2009 as provided in RCW 90.58.090.
40
41
42
43
44
45
46
47
48

49 ²⁶ The Board notes that the requirement for the regulations to "sunset" upon implementation of the
50 County's comprehensive update to its SMP is only expressly stated in the first of the County's
enactments. *See* Ordinance 2007-34s2, Section 5.

1 With their PFR, Petitioners set forth various issues²⁷ for the Board's review which
2 allege various violations of the Shoreline Management Act (SMA), RCW 90.58, the
3 SMP Guidelines, WAC 173-26, and the Growth Management Act (GMA), RCW
4 36.70A by both Pierce County and/or Ecology. The Board will address these issues
5 beginning with Legal Issue 3 and then follow the format Petitioners used in
6 presenting the remaining issues in their briefing. Throughout this FDO, the action
7 being challenged – Ordinance 2009-26 – will be referenced as the SMP
8 Amendment.

17 **A. Limited Amendments under the SMA [Issue 3]**

- 19 3. Does the SMP Amendment fail to comply with the SMA and
20 applicable guidelines, including WAC 173-26-201, which outlines a
21 comprehensive process to prepare or amend a shoreline master
22 plan, because the County erroneously proposed the SMP
23 Amendment as a "limited" amendment and failed to incorporate the
24 steps indicated in WAC 173-26-201 for comprehensive shoreline
25 master program amendment?
26

28 Positions of the Parties

30 Petitioners assert that the SMP was erroneously classified as a Limited Amendment and,
31 as such, the County circumvented the required comprehensive amendment process
32 which includes inventorying the shorelines, characterizing ecological functions, and
33 analyzing demands.²⁸ Petitioners acknowledge that the SMP Guidelines at WAC 173-26-
34 201 permit limited amendments to a SMP under certain situations, but they contend, in
35 their opening and reply briefs, that the County's rationale does not satisfy many of
36 these situations.²⁹ Specifically, Petitioners contend:
37

- 38 1. There has been no previous comprehensive SMP amendment since the County's
39 original SMP was adopted in 1974,³⁰
40
41
42

47 ²⁷ As noted *supra*, only 7 issues remain before the Board as the Petitioners abandoned one of their issues
48 in its entirety.

49 ²⁸ Petitioners' HOM Brief, at 20-21.

50 ²⁹ Petitioners' HOM Brief, at 21-22.

³⁰ Petitioners' HOM Brief, at 22.

- 1 2. There are substantive issues, such as major use conflicts, that are best
2 addressed during a comprehensive review,³¹
- 3 3. The SMP Amendment affects a substantial portion of the County's shoreline
4 areas,³²
- 5 4. The SMP Amendment represents a significant modification to shoreline
6 management practices within Pierce County and significantly alters use
7 regulations,³³
- 8 5. The physical conditions of the County's shorelines have changed significantly
9 since the original SMP was adopted.^{34, 35}

10
11
12 According to Petitioners, any one of these factors triggers the need for a comprehensive
13 amendment process and therefore, processing the SMP Amendment as a Limited
14 Amendment violated the SMA and its Guidelines.
15
16

17
18
19 Pierce County's response largely deferred to Ecology on this issue but did maintain that
20 the SMP Amendment constituted a Limited Amendment.³⁶
21
22

23
24 Ecology provides the responsive argument, contending that it properly determined the
25 SMP Amendment qualified as a Limited Amendment under WAC 173-26-201's criteria
26 and that its interpretation is entitled to substantial deference.³⁷ Ecology sets forth
27 countering arguments to each of the criteria Petitioners contend precluded the process
28 of a Limited Amendment in this matter:
29
30
31

- 32 1. Although there has not been a comprehensive SMP amendment since the date
33 of original adoption, the Limited Amendment is intended to maintain the integrity
34 of the County's current comprehensive SMP update by placing interim controls in
35 place until the comprehensive amendment can be completed,³⁸
36
37
38
39
40
41
42

43 ³¹ Petitioners' HOM Brief, at 23-24.

44 ³² Petitioners' HOM Brief, at 24-27.

45 ³³ Petitioners' HOM Brief, at 27-28.

46 ³⁴ Petitioners' HOM Brief, at 28-29.

47 ³⁵ Petitioners' Reply Brief, at 23-33.

48 ³⁶ County Response Brief, at 38. The County cites to several documents in the Record as to the limited
49 scope of the SMP Amendment – see Exhibits SMP IR 8-154, SMP IR 1-1, and SMP IR 4-39.

50 ³⁷ Ecology HOM Brief, at 12-13.

³⁸ Ecology HOM Brief, at 20.

2. Substantive issues, such as use conflicts, will be assessed during the comprehensive process and the SMP Amendment defers the issue for resolution to this process,³⁹
3. The SMP Amendment does not affect a substantial portion of the County's shorelines but, in regard to the Natural Environment, serves to clarify intertidal aquaculture regulations,⁴⁰
4. The SMP Amendment largely mirrors existing practices and represents a codification of the status quo and best management practices,⁴¹
5. Although geoduck aquaculture is a relatively new use, the SMP Amendment is not addressing a substantial change in the patterns of use which will be addressed during the comprehensive process.⁴²

Board Analysis and Findings

The Board views Issue 3 as the fundamental question in the Petition for Review: *Is the action taken by Pierce County and the Department of Ecology a "Limited Amendment" under WAC 173-26-201 or, does the action taken by the Respondents beg the need for the required comprehensive amendment process?* It should be noted that the County, in large part, defers to Ecology for responsive argument on Issue 3, but does maintain the SMP Amendment constitutes a Limited Amendment.⁴³

WAC 173-26-201 provides guidance for the comprehensive process necessary to prepare or amend shoreline master programs. This SMP Guideline, without using the term "Limited Amendment," provides criteria for when a jurisdiction may amend its SMP without needing to complete a full comprehensive review. WAC 173-26-201 provides: (Relevant to Petitioners' argument, emphasis added)

(1) Applicability. This section outlines a comprehensive process to prepare or amend a shoreline master program. *Local governments shall*

³⁹ Ecology HOM Brief, at 17-28 ,20.

⁴⁰ Ecology HOM Brief, at 18-19.

⁴¹ Ecology HOM Brief, at 13-18.

⁴² Ecology HOM Brief, at 17-18.

⁴³ The Board does note that a "Limited Amendment" is not expressly defined in either the SMA or the SMP Guidelines. While RCW 90.58.090 refers to approvals of master program "segments," and the SMA and SMP Guidelines provide a procedure by which certain amendments are not subject to the comprehensive process, the term "limited amendment" is not used. Ecology and/or the Legislature may wish to include the term to make clear the intent.

1 *incorporate the steps indicated if one or more of the following criteria*
2 *apply:*

3
4 (a) The master program amendments being considered represent a
5 significant modification to shoreline management practices within the local
6 jurisdiction, they modify more than one environment designation
7 boundary, or significantly add, change or delete use regulations;

8 (b) Physical shoreline conditions have changed significantly, such as
9 substantial changes in shoreline use or priority habitat integrity, since the
10 last comprehensive master program amendment;

11 (c) The master program amendments being considered contain
12 provisions that will affect a substantial portion of the local government's
13 shoreline areas;

14 (d) There are substantive issues that must be addressed on a
15 comprehensive basis. This may include issues such as salmon recovery,
16 major-use conflicts or public access;

17
18 (f) There has been no previous comprehensive master program
19 amendment since the original master program adoption; or

20
21 *Other revisions that do not meet the above criteria may be made*
22 *without undertaking this comprehensive process provided that the process*
23 *conforms to the requirements of WAC [173-26-030](#) through [173-26-160](#).*
24

25 To understand this case, a brief background of the process undertaken is necessary. It
26 is clear from the Record that the County and Ecology kept in regular contact during the
27 Pierce County amendment process. Beginning in July 2006, with email correspondence
28 from Ecology to Pierce County,⁴⁴ the two agencies were in regular communication.
29 Ecology raised the question of Pierce County's intent to proceed with a Limited
30 Amendment, and expressed concerns about the prospect of the proposed action
31 meeting the requirements for a Limited Amendment.⁴⁵ In a follow-up letter to Pierce
32 County in October 2006, Ecology again questioned whether the action under
33 consideration would qualify as a Limited Amendment and noted that the amendments:⁴⁶
34
35
36
37
38
39

- 40 • Modify shoreline management practices/regulations within multiple shorelines
41 environments
- 42 • Contain provisions that affect a substantial portion of the County's marine
43 shorelines
- 44 • The County has had no previous comprehensive master program amendment
45 since the original SMP adoption
- 46
- 47
- 48

49 ⁴⁴ Ecology, Exhibit 1.

50 ⁴⁵ Ecology, Exhibit 5.

⁴⁶ Ecology, Exhibit 9.

- The physical shoreline conditions in the County have likely changed significantly since the 1974 SMP adoption.

With this letter, Ecology also requested the County submit, in writing, how its proposal would not require a comprehensive plan process based upon WAC 173-26-201 (1). In a November 2006 e-mail, while the County did not expressly clarify as requested by Ecology, the County stated that it was moving forward and included a November 8, 2006 Staff Report that provides comments on the points raised by Ecology.⁴⁷

In February 2007, the County submitted a letter to Ecology referencing a meeting that took place between the agencies in December 2006 at which Pierce County enumerated its reasons to proceed as a Limited Amendment.⁴⁸ While the County acknowledged it had not attempted to use the comprehensive process and a criteria-by-criteria analysis on how its proposed amendments would qualify as a Limited Amendment, the County provided the following points:⁴⁹

- Total shoreline affected is relatively small –Aquaculture 9.5 percent and Piers/Docks 11 percent;
- Changes are within existing regulations and are the minimum necessary to increase shoreline protections as part of the comprehensive SMP process and reasonably amend uses in a limited way;
- Interim controls can be significant tool in the successful transition from old to new SMP provisions and provide reasonable limited protections without undermining the comprehensive SMP update;
- Substantial changes will occur during the final comprehensive SMP update.

In November 2007, the County submitted a letter to Ecology noting that the County adopted amendments to the SMP via Ordinance 2007-34s2.⁵⁰ In December 2007, Ecology rejected the proposed amendment, stating that it did not meet the limited amendment criteria and the submittal was incomplete.⁵¹ The reasons noted for rejection

⁴⁷ Ecology, Exhibit 10.

⁴⁸ Ecology, Exhibit 12, Page 6.

⁴⁹ Ecology, Exhibit 12, Page 6.

⁵⁰ Ecology, Exhibit 16.

⁵¹ Ecology, Exhibit 17.

1 by Ecology consisted of significant changes to the Ordinance since the two parties had
2 last consulted, including changes to the Pier/Docks regulations and inclusion of Critical
3 Areas provisions. In addition, Ecology noted that the County had not yet provided
4 written documentation as to the SMP Guidelines criteria, a SMP checklist, and
5 documentation of oral testimony at public hearings.
6
7
8

9
10
11 On June 24, 2008, Pierce County transmitted a letter to Ecology notifying the
12 department that the County had adopted Ordinance 2008-25, which struck various
13 provisions of Ordinance 2007-34s2, including those related to critical areas.⁵²
14
15
16

17
18 On July 17, 2008, Ecology notified the County that its submittal of Ordinance 2008-25
19 was complete and Ecology's formal review process to determine if the proposal was
20 consistent with the SMA and the SMP Guidelines would begin. With this letter, Ecology
21 did not expressly state that Ordinance 2008-25 was a Limited Amendment, but the
22 Board reads the intent of this letter to be such an expression.⁵³
23
24
25

26
27
28 Following Ecology's public review, it notified Pierce County that the amendment was
29 approved conditioned on the County's agreement to several changes, including deletion
30 of the prohibition on intertidal aquaculture in the Urban and Rural-Residential
31 Environments. Ecology's approval would not become effective until written notice of
32 Pierce County's agreement to the changes.⁵⁴
33
34
35

36
37
38 On May 14, 2009, Pierce County notified Ecology that, via Ordinance 2009-26, the
39 County incorporated the changes required by Ecology.⁵⁵
40
41
42

43
44 As mentioned *supra*, Pierce County and Ecology were in regular contact for two years
45 as the amendment process developed. The Record is clear throughout the process that
46
47

48 ⁵² Ecology, Exhibit 19.

49 ⁵³ Ecology, Exhibit 20.

50 ⁵⁴ Ecology, Exhibit 49.

⁵⁵ Ecology, Exhibit 55.

1 Ecology pressed for clarification from Pierce County to articulate why it believed the
2 proposed amendments qualified as a Limited Amendment under WAC 173-26-201.
3 Ecology ultimately rejected Ordinance 2007-34s2 for the reasons noted above.
4
5
6

7 While the County never provided direct written answers to Ecology's question, the
8 County clearly was in communication with Ecology, offering rationale for its position
9 that the amendment should proceed as a Limited Amendment, contending that the
10 amendments were minor in nature, and pointing out that the County had begun the
11 process of updating its comprehensive SMP. In addition, with the passage of Ordinance
12 2008-25, the County responded to Ecology by deleting portions of Ordinance 2007-34s2
13 that were troubling to Ecology. Ecology, with those changes, agreed the County's
14 submittal was complete and began the formal review process.
15
16
17
18
19
20
21

22 After the formal review, Ecology notified the County that it required modification to two
23 sections of the Ordinance 2008-25: 1) Chapter 20.24 Aquacultural Practices and 2)
24 Chapter 20.56 Piers and Docks. In regard to geoduck aquaculture, these changes
25 included the deletion of regulations restricting the days/hours of operations and
26 prohibition on aquaculture within the Urban and Rural-Residential Environments.⁵⁶ The
27 County responded with Ordinance 2009-26, accepting the requested changes.
28
29
30
31
32
33

34 For the most part, the Record is clear and easy to follow despite the lack of a specific
35 articulation by Ecology as to how Pierce County's proposals transformed from failing to
36 be suitable for processing as a Limited Amendment to processing it as a Limited
37 Amendment. The Board notes that it would be beneficial, in the future, for both
38 Ecology and a local jurisdiction, to ensure that clear documentation for such a
39 determination is contained in the Record.
40
41
42
43
44
45
46
47
48
49
50

⁵⁶ See Attachment B to Ordinance 2009-26.

1 Be that as it may, it is clear that within that six-month period with Ecology's letter to
2 the County on July 17, 2008, Ecology made its determination that "the County's SMP
3 submittal is complete and we can begin the formal review process."⁵⁷
4
5
6
7

8 While Petitioners acknowledge that Limited Amendments are permitted under the SMP
9 Guidelines, they argue that the requirements in this case have not been met by Ecology
10 or Pierce County. RCW 90.58.190 (c) directs the growth boards ..."shall uphold the
11 decision by the department unless the board by clear and convincing evidence,
12 determines that the decision of the department is inconsistent with the policy of RCW
13 90.58.020 and the applicable guidelines." In addition, the courts have directed that
14 deference need be given to an agency's interpretation of its own regulations. As the
15 Supreme Court wrote in *Silver Streak v. Department of Labor and Industries*:⁵⁸
16
17
18
19
20
21 (Emphasis added)
22

23
24 This court has made clear that we will give great *deference to an agency's*
25 *interpretation of its own properly promulgated regulations*, "absent a
26 compelling indication" that the agency's regulatory interpretation conflicts
27 with legislative intent or is in excess of the agency's authority. We give
28 this high level of deference to an agency's interpretation of its regulations
29 because the agency has expertise and insight gained from administering
30 the regulation that we, as the reviewing court, do not possess.
31
32

33 The courts have also stated the well-known rule that an agency's interpretation of its
34 own regulations will be upheld so long as that interpretation is plausible.⁵⁹ For
35 example, in *Pitts v. Department of Social and Health Services*, the Court stated:⁶⁰
36
37
38 (Emphasis added)
39
40

41
42 ⁵⁷ Ibid, Exhibit 10.

43 ⁵⁸ 159 Wn. 2nd 868, 884-85 (2007); See also, *W. WA Operating Engineers Apprenticeship Commission v.*
44 *WA State Apprenticeship & Training Council*, 144 Wn. App. 145, 163 (2008)(Stating that generally the
45 Court gives "considerable deference to an agency's interpretation of its own regulations" and that "this
46 high level of deference is appropriate because the agency has expertise and insight in administering the
47 regulation that reviewing courts do not possess.").

48 ⁵⁹ See e.g. *Samson v. Bainbridge Island*, 149 Wn. App. 33, 45 (2009); *Pitts v. Dept. of Social and Health*
49 *Services*, 129 Wn. App. 513, 523 (2005)(Substantial weight and deference shall be given to agency's
50 interpretation).

⁶⁰ *Pitts*, 129 Wn. App. at 523; See also, *Seatoma Convalescent Center v. Dept. of Social and Health*
Services, 82 Wn. App. 495, 518 (1996)(Stating that "substantial weight and deference should be given to

1
2 [A court will give] substantial weight and deference to an agency's
3 interpretation of the statutes and regulations it administers ... [the court]
4 will *uphold an agency's interpretation if it is plausible and not contrary to*
5 *legislative intent.*
6

7 Thus, as the agency charged with the administration of the SMA and the regulations
8 promulgated in WAC 173-26, substantial weight and deference is due to Ecology's
9 interpretation of WAC 173-26-201's provisions and this interpretation should not be
10 overturned unless it does not reflect a plausible construction of the WAC language or is
11 contrary to the Legislature's intent.
12
13
14

15
16 Although the Board acknowledges the substantial weight and deference due Ecology, as
17 the agency charged with not only promulgating the SMP Guidelines but also
18 administering them, the Board is divided as to whether Pierce County's action, as a
19 Limited Amendment, was exempt from compliance with WAC 173-26-201's provisions
20 based on the arguments presented by the parties. Board member Earling finds
21 Ecology's arguments are convincing while Board member Pageler finds that Ecology
22 erred as to one of WAC 173-26-201's exemption criteria. Board member Pageler has
23 provided rationale for her position in a dissent related solely to this issue which is
24 provided at the end of this Final Decision and Order.
25
26
27
28
29
30
31
32

33 **Conclusion**

34
35 The Board is divided as to whether or not Pierce County's amendment to its SMP
36 satisfies the SMP Guidelines requirements for a "Limited Amendment." Thus, since the
37 Board could not reach agreement on the appropriate disposition of this issue, Ecology's
38 interpretation remains as to the ability of the County's SMP Amendment to be processed
39 as a Limited Amendment.
40
41
42
43
44
45
46
47
48

49 an agency's interpretation of the statutes and regulations it administers" and "the agency's interpretation
50 should be upheld if it reflects a plausible construction of the language of the statute and is not contrary
to the legislative intent.").

1 **B. Ecological Functions of shellfish farms, including farms as critical**
2 **saltwater habitat and priority habitat and shellfish as priority species**
3 **[Relevant portions of Issues 5,⁶¹ 7, and 8]⁶²**
4

- 5
- 6 5. Does the SMP Amendment fail to comply with the SMA, including
7 the policy of RCW 90.020 and applicable guidelines, including WAC
8 173-26-186 (8)(a), WAC 173-26-186 (8)(b), WAC 173-26-
9 186(8)(b)(i), WAC 173-26-221(2)(c)(iii), and WAC 173-26-020(24)-
10 (25), because the County in preparing the SMP amendment failed
11 to use a process that identifies, inventories, and ensures
12 meaningful understanding of current and potential ecological
13 functions provided by shorelines; failed to include policies and
14 regulations designed to achieve no net loss of ecological functions
15 associated with aquaculture; ... ; failed to include policies and
16 regulations to protect commercial shellfish beds, which are critical
17 saltwater habitats under WAC 173-26-221(2)(c)(iii)(A), and failed to
18 meet all other requirements of WAC 173-26-221(2)(c)(iii)(B)-(C)
19 regarding saltwater habitats; failed to protect shellfish beds, which
20 are priority habitats under WAC 173-26-020(24); and failed to
21 provide for protective measures and/or management guidelines for
22 farmed shellfish species, which are priority species under WAC 173-
23 26-020(25)?
- 24
- 25
- 26
- 27 7. Does the SMP Amendment fail to comply with the Growth
28 Management ACT (GMA), RCW Chapter 36.70A, including the
29 internal consistency provisions of RCW 36.70A040(4), because the
30 SMP Amendment is inconsistent with and fails to implement the
31 goals and policies of the Pierce County Comprehensive Plan
32 regarding maintenance and enhancement of natural resource-
33 based industries such as aquaculture such as Sections 19A.10.10,
34 ~~19A.20.050, 19A.40.010, 19A.40.020, 19A.40.030, 19A.40.070,~~
35 ~~19A.50.020, 19A.50.030 19A.50.90, 19A.60.050, 19A.60.60,~~
36 ~~19A.60.070 19A.60.120 and 19A.60.130~~ of the Comprehensive
37 Plan, and the goals and policies of the Comprehensive Plan
38 regarding the reduction of sprawl, such as Sections 19A.10.10,
39 ~~19A.20.050, 19A.20.090, 19A.30.070 and 19A.30.220~~ of the
40 Comprehensive Plan?
41
42
43
44
45
46

47 ⁶¹ Issue 5 also asserts the County failed to design and implement regulations in a manner consistent with
48 relevant constitutional and legal limitations as to private property. This aspect of Issue 5 is addressed
49 *infra* at Section 7.

50 ⁶² Strikethrough represents those provisions set forth in the issue statement that were dismissed by the
Board. See Section IV Preliminary Matters.

- 1 8. Does the SMP Amendment fail to comply with the GMA, including
2 the internal consistency provisions of RCW 36.70A.040(4), because
3 the SMP Amendment is inconsistent with and fails to implement the
4 goals and policies of the County's SMP, including the goals and
5 policies of the Economic Development Element, the Shoreline Use
6 Element, the Rural Environment, the Conservancy Environment, the
7 Natural Environment, the Use Activity Policies for Aquacultural
8 Practices, the Use Activity Policies for Residential Development, and
9 the Use Activities Policies for Bulkheads, Breakwaters, Jetties and
10 Groins?
11
12
13

14 Petitioners combine their argument for Issue 5 with Issues 7 and 8; thus the Board
15 addresses Issue 5 within the context of the Petitioners' arguments here.
16
17

18
19 • **Ecological functions of shellfish aquaculture**
20

21 Positions of the Parties
22

23 Petitioners argue that both the SMP Guidelines, in WAC 173-26-186(8)(a)-(b), and the
24 County's own GMA Comprehensive Plan, in PCC 19A.60.020 Environmental Objective 2,
25 require a SMP to achieve no net loss of ecological functions.⁶³ According to Petitioners,
26 shellfish and shellfish farms provide numerous ecological functions, such as the filtering
27 of pollutants, resulting in an improved aquatic ecosystem for a variety of marine
28 species, including salmon.⁶⁴ Petitioners contend that despite public comment in this
29 regard, the County failed to assess those current and potential ecological functions
30 when amending its SMP.⁶⁵ In addition, Petitioners assert the County failed to consider
31 the net loss of ecological functions that would result from prohibiting shellfish farms
32 within approximately 40 percent of the marine shorelines of Pierce County.⁶⁶
33
34
35
36
37
38
39
40
41
42
43

44 ⁶³ Petitioners' HOM Brief, at 11. Although Petitioners cite to PCC 19A.60.020 ENV Objective 2, the
45 Petitioners failed to cite this provision and therefore it is not available for challenge as to inconsistency.
46 The Petitioners did not, in regard to ecological functions, set forth argument in relationship to Issues 7
47 and 8.

48 ⁶⁴ Petitioners' HOM Brief, at 11-12; *See also* Petitioners' Reply Brief, at 17. Petitioners filed this brief on
49 November 17, 2009 and it will be referred to as **Petitioners' Reply Brief**.

50 ⁶⁵ Petitioners' HOM Brief, at 12.

⁶⁶ Petitioners' HOM Brief, at 12.

1 In response, Pierce County clarified its record with an affidavit demonstrating that the
2 Natural Environment, where geoduck farming is prohibited, is only 20 percent of the
3 County's marine shorelines, and a high proportion of the Natural shorelines are off-limit
4 to development because they abut federal reserves or state correctional facilities.⁶⁷ The
5 County contends it has conducted extensive analysis of all its shorelines, via the Critical
6 Areas Ordinance (CAO), which is based on Best Available Science (BAS).⁶⁸ The
7 County asserts Petitioners have not demonstrated how the SMP Amendment fails to
8 achieve no net loss of ecological functions and, in fact, that the SMP Amendment
9 provides greater protection.⁶⁹

10 Ecology did not set forth specific arguments as to the ecological functions of shellfish
11 farms.

12 Board Analysis and Findings

13 Despite the citation to the SMA policy contained in RCW 90.58.020 and numerous SMP
14 Guidelines, when setting forth argument in regard to ecological function, the Petitioners'
15 argument is limited to WAC 173-26-186(8). This provision provides: (Emphasis
16 provided as to the citations noted by Petitioners)

17 (8) ... It is recognized that shoreline ecological functions may be
18 impaired not only by shoreline development subject to the substantial
19 development permit requirement of the act but also by past actions,
20 unregulated activities, and development that is exempt from the act's
21 permit requirements. The principle regarding protecting shoreline
22 ecological systems is accomplished by these guidelines in several ways,
23 and in the context of related principles. These include:

24 *(a) Local government is guided in its review and amendment of local
25 master programs so that it uses a process that identifies, inventories, and
26 ensures meaningful understanding of current and potential ecological
27 functions provided by affected shorelines.*

28 *(b) Local master programs shall include policies and regulations*

29 ⁶⁷ County HOM Brief, at 38, referencing Declaration of Aaron Michael, Attachment B.

30 ⁶⁸ County HOM Brief, at 41-42.

31 ⁶⁹ County HOM Brief, at 42.

1 *designed to achieve no net loss of those ecological functions.*

2 ...

3
4 This WAC provision states the SMA's policy to protect the "ecological function" of the
5 shorelines and that SMPs are to be designed so as to "achieve no net loss." The
6 Board reads WAC 173-26-186(8) as having both a procedural aspect (process to
7 identify, inventory, and understand ecological functions) and a substantive aspect
8 (achieve no net loss of those functions). Thus, similar to the GMA's requirement of
9 RCW 36.70A.172 that local governments are to consider best available science so as to
10 protect the functions and values of a critical area, here too, Pierce County was required
11 to have an understanding of the ecological functions provided by its shorelines so as to
12 enact regulations which protect those functions from a net loss.
13
14
15
16
17
18
19

20 Pierce County contends it has satisfied the WAC requirement as it inventoried its
21 shorelines when preparing its Critical Areas Ordinance and that this ordinance is based
22 on Best Available Science.⁷⁰ Petitioners do not appear to dispute this, but rather assert
23 the County failed to assess the ecological functions shellfish farms provide.
24
25
26
27

28
29 There is no doubt from the Record presented to the Board that infaunal species of
30 bivalve shellfish, such as geoducks, can provide certain ecological services such as
31 increasing water clarity and removing nutrients from the water due to the fact that they
32 are filter feeders.⁷¹ Therefore, the information about the "ecological services" a
33 shellfish operation may provide was available to Pierce County and Ecology during the
34 approval process.
35
36
37
38
39
40
41
42

43
44 ⁷⁰ County Response Brief, at 41. See also, *Tahoma Audubon, et al v. Pierce County*, CPSGMHB Case
45 No. 06-3-0001, Order on Compliance (Aug. 7, 2008).

46 ⁷¹ The Board notes that of the exhibits cited by Petitioners, only Exhibit 11-229 and Exhibit 11-328 provide
47 actual science; the balance of cited exhibits are merely statements made at Planning Commission
48 hearings stating the ecological benefits of aquaculture. The Board further notes that although these
49 exhibits contain references to scientific literature, none of this literature appears to speak directly to
50 geoduck aquaculture within the intertidal zone. Rather, the cited literature addresses oysters, mussels,
and clams. Since geoducks and clams are both infaunal animals, the focus of environmental impacts
based on the clam may be more relevant.

1 Petitioners have not demonstrated that banning new shellfish farming in the Natural
2 Environment or that regulating future shellfish operation in other zones constitutes a
3 “net loss.” Nothing in the record requires closure of existing shellfish beds or loss of the
4 functions they currently provide. The County’s action only restricts the potential for
5 future intensified shellfish cultivation, with its argued ecological benefits: on its face,
6 this is not a net loss. The Board concludes that Petitioners have not carried their burden
7 of demonstrating noncompliance with WAC 173-26-186(8).
8
9
10
11
12

13 **Conclusion**

14 The Board concludes that Petitioners have failed to carry their burden of proof in
15 demonstrating Pierce County’s adoption and Ecology’s approval of Ordinance 2009-26,
16 enacting the SMP Amendment, violated WAC 173-26-186(8) as asserted by Petitioners.
17
18
19
20

- 21 • **Shellfish farms as critical saltwater habitat and priority habitat and**
22 **Shellfish as a priority species**
23
24

25 Positions of the Parties

26 Petitioners state that under the SMA, shellfish beds are critical saltwater habitats, a type
27 of critical area, which are to be afforded a higher level of protection due to the
28 important ecological functions they provide.⁷² Petitioners also state that shellfish beds
29 are priority habitat and that both native and non-native shellfish of commercial
30 importance are priority species under the SMA.⁷³ Petitioners contend that in adopting
31 the SMP Amendment, Pierce County has failed to comply with both GMA and SMA
32 requirements for the protection of these areas and the species dependent on the areas,
33 as well as Pierce County’s own Comprehensive Plan goals.⁷⁴ Rather, Petitioners view
34 the SMP Amendment as one that protects shoreline residential and recreational uses
35 and not the functions of the critical habitat of shellfish farms.⁷⁵
36
37
38
39
40
41
42
43
44
45
46
47

48 ⁷² Petitioners’ HOM Brief, at 13.

49 ⁷³ Petitioners’ HOM Brief, at 13.

50 ⁷⁴ Petitioners’ HOM Brief, at 13-14; Petitioners Reply Brief, at 16-17.

⁷⁵ Petitioners’ HOM Brief, at 14-15.

1 In response, Ecology argues the SMP Amendment codifies reasonable best
2 management practices (BMPs) for aquaculture operations which, in fact, results in the
3 protection of shellfish and shellfish beds.⁷⁶
4
5
6

7
8 Pierce County did not directly respond to this aspect of Petitioners' arguments.
9

10 11 Board Analysis and Findings 12

13
14 Pierce County's critical areas ordinance (CAO) was enacted in 2004 and challenged
15 before this Board in *Tahoma Audubon Society, et al, v. Pierce County*.⁷⁷ The Board's
16 order in that case indicates that Pierce County produced maps of its marine shorelines
17 identifying commercial and recreational shellfish areas, eelgrass beds, forage fish
18 spawning areas, and other priority shoreline resources to be protected.⁷⁸ Following
19 amendments to protect salmon habitat, the County's CAO was found in compliance with
20 the GMA.⁷⁹
21
22
23
24
25
26

27
28 In the present matter, Pierce County sought to incorporate its 2004 critical areas
29 ordinance into the proposed SMP amendment when it enacted Ordinance 2007-34s2.
30 The County withdrew the CAO section of the proposal when Ecology indicated it could
31 not be considered as a limited amendment. Thus, the CAO provisions are not before us.
32
33
34
35
36

37 Any revisions necessary to critical areas to comply with the SMA and Ecology's
38 Guidelines – to bring the CAO for shorelines within the SMA – must be considered as
39 part of Pierce County's full SMP update process. With reference to aquaculture,
40 Petitioners have highlighted some of the guidelines that the County should consider and
41 Ecology must apply in the SMP process:
42
43
44
45
46

47 ⁷⁶ Ecology Prehearing Brief, at 29. Ecology filed this brief on November 10, 2009 and it will be referred
48 to herein as **Ecology HOM Brief**.

49 ⁷⁷ CPSGMHB Case No. 05-3-0004c, Final Decision and Order (July 12, 2005).

50 ⁷⁸ *Tahoma Audubon*, at 8-9, and 40 (Findings, Ordinance 2004-56s).

⁷⁹ *Tahoma Audubon*, Order Finding Compliance (Jan. 12, 2006).

1
2
3 WAC 173-26-221(2)(c)(iii)

4 (A) Critical saltwater habitats include all ... commercial and recreational shellfish
5 beds ...

6 (B) ...

7 All public and private tidelands or bedlands suitable for shellfish harvest shall be
8 classified as critical areas. Local governments should consider both commercial
9 and recreational shellfish areas. ...

10 WAC 173-26-020

11 (24) "Priority habitat" ... [includes] ... shellfish bed.

12 (25) "Priority species" ... [includes] ... Criterion 3. Species of recreational,
13 commercial, and/or tribal importance [such as] shellfish ... that are vulnerable to
14 habitat loss and degradation.

15
16 Ecology's approval of the SMP Amendment as a limited amendment appropriately
17 recognizes that it is an interim measure, subject, among other things, to review in the
18 full SMP update process, where Pierce County's critical areas' inventory and regulations
19 may be reaffirmed or revised in light of the SMP Guidelines.⁸⁰
20
21
22
23
24

25 In sum, the County has a valid critical areas ordinance that identifies and protects
26 existing shellfish beds. Challenge to the existing CAO is untimely. The CAO is being
27 incorporated into the County's SMP in a full update process subject to Ecology's review
28 and approval. Petitioners' challenge based on SMA critical areas guidelines concerning
29 shellfish beds and shellfish species is premature at present.
30
31
32
33
34

35 **Conclusion**

36
37 The Board concludes that, to the extent Petitioners' challenge concerning critical
38 saltwater habitat, priority habitat and priority species is based on the GMA, it is
39 untimely, and to the extent it is based on the SMA, it is premature. This portion of Legal
40 Issues 5, 7, and 8 is therefore dismissed.
41
42
43
44

45 **C. Aquaculture as a water-dependent and preferred use [Issues 4, 7, and** 46 **8]**

47
48
49 ⁸⁰ See *Citizens for Rational Shoreline Planning et al v. Whatcom County*, WWGMHB Case No. 08-2-
50 0031, Final Decision and Order (April 20, 2009) (appeal of County CAO is timely when it is reenacted as
part of a Shoreline Master Plan update).

- 1 4. Does the SMP Amendment fail to comply with the SMA, including
2 WAC 173-26-176 and WAC 173-26-241, because it fails to plan for,
3 foster, and give preference to aquaculture, a water-dependent and
4 preferred use under the SMA?
5

6
7 The text of Issues 7 and 8 is set forth above in Section A. Petitioners combine their
8 argument for Issue 4 with Issues 7 and 8; the Board will address this issue within the
9 context of the Petitioners' arguments.
10

11
12
13 Positions of the Parties

14 Petitioners concede that they are not arguing aquaculture must be permitted in all
15 environments under all circumstances but, rather, Ecology and the County improperly
16 addressed a use conflict by imposing restrictions on only one use rather than balancing
17 competing uses.⁸¹ According to Petitioners, this imbalance is demonstrated by the
18 fact that the intent and effect of the SMP Amendment was to significantly restrict
19 intertidal shellfish farming and that the newly-adopted use regulations, such as a
20 substantial bond requirement, setbacks, and noise/light/access restrictions, will have a
21 significant economic impact on shellfish farmers.⁸²
22

23
24
25
26
27
28
29
30 Petitioners argue the SMA requires preference to those uses, such as intertidal shellfish
31 farming, which are water-dependent, because of the intrinsic nature of the operation;
32 both the SMP Guidelines and the County's SMP Policies reiterate this fact.⁸³ According to
33 Petitioners, the SMP Amendment is inconsistent with these policies because it
34 completely prohibits intertidal aquaculture on approximately 40 percent of the County's
35 marine shorelines without any consideration as to the restrictions which natural
36 conditions place on potential locations.⁸⁴
37
38
39
40
41

42
43
44
45
46 ⁸¹ Petitioners' Reply Brief, at 18-20.

47 ⁸² Petitioners' HOM Brief, at 18-19.

48 ⁸³ Petitioners' HOM Brief, at 15-16.

49 ⁸⁴ Petitioners' HOM Brief, at 18 (Natural conditions noted by Petitioners include water quality, temperature,
50 salinity, and oxygen content. Petitioners also list "adjacent land uses" but the Board does not see these
as "natural" conditions).

1 In response, Pierce County notes that with the adoption of the SMA, the Legislature
2 sought to balance competing shoreline interests, but it also sought to preserve the
3 shorelines in the best public interest.⁸⁵ Pierce County argues that, although the SMA
4 sets forth preferred uses and seeks to foster all reasonable and appropriate uses, this
5 does not mean any use must be allowed everywhere.⁸⁶ The County clarifies that
6 aquaculture is permitted on 80 percent of its shorelines with only the Natural
7 Environment prohibiting certain types of aquaculture.⁸⁷

8
9
10
11
12
13
14 Similarly to the County, Ecology asserts that there is nothing in the SMA or SMP
15 Guidelines which mandates that all water-dependent or preferred uses be allowed in all
16 environments or under any circumstances.⁸⁸ Rather, Ecology argues the SMA
17 expressly contemplates shoreline alterations will be authorized only under limited
18 circumstances so as to minimize ecological or environmental damage.⁸⁹ Ecology cites to
19 this Board's holding in *Samson v. Bainbridge Island* and other cases to support this
20 assertion, and contends that despite any particular status, the SMA still grants authority
21 to restrict or condition these uses based on the overarching policies of the SMA.⁹⁰
22 Ecology contends that so long as Pierce County makes reasonable allowances for
23 preferred uses in the jurisdiction as a whole, it is consistent with the SMA for the
24 County to prohibit or restrict such uses to certain locations, especially for shorelines of
25 statewide significance like Pierce County's marine shorelines.⁹¹

26
27
28
29
30
31
32 In addition, Ecology states that it did amend the County's proposed regulation to
33 eliminate certain restrictions which were objected to by the aquaculture industry, but
34 that the ones which remain, such as the bond requirement and tube marking, are not
35
36
37
38
39
40
41
42
43

44
45 ⁸⁵ County Response Brief, at 39-40.

46 ⁸⁶ County Response Brief, at 40.

47 ⁸⁷ County Response Brief, at 41.

48 ⁸⁸ Ecology HOM Brief, at 22.

49 ⁸⁹ Ecology HOM Brief, at 22-23.

50 ⁹⁰ Ecology HOM Brief, at 23-24. Cases cited include matters before both the Shorelines Hearings Board and the Washington Courts.

⁹¹ Ecology HOM Brief, at 25.

1 unfair, do not create an unreasonable burden on shellfish farmers, and are necessary to
2 protect the public interest in the shorelines.⁹²
3
4

5 Board Analysis and Findings
6

7 The Board sees Petitioners' argument as two-fold: (1) by adopting use regulations
8 which not only restrict the location for aquaculture but result in an unfair/unreasonable
9 burden limiting the economic viability of aquaculture operations, Pierce County is not
10 fostering a preferred, water-dependent use – intertidal shellfish farming – within the
11 County's shoreline environments, and (2) in enacting these regulations, the County
12 failed to properly balance conflicting uses.
13
14
15
16
17
18

19 The Board notes that Pierce County has five shoreline environments – Urban, Rural-
20 Residential, Rural, Conservancy, and Natural.⁹³ Petitioners appear to concede that
21 Pierce County has the authority to prohibit intertidal shellfish farming outright within the
22 Natural Environment, even if it is a preferred, water-dependent use.⁹⁴
23
24
25
26
27

28 Although aquaculture, by its very nature, is a water-dependent use and therefore can
29 be a preferred use of the shoreline, the SMA also embodies a "legislatively-determined
30 and voter-approved balance between protection of the state shorelines and
31 development,"⁹⁵ with the SMA's primary purpose being "to protect the state shorelines
32 as fully as possible."⁹⁶ As to development of the shorelines, RCW 90.58.020 states:
33
34
35 (in part, emphasis added)
36
37

38 Alterations of the natural condition of the shorelines of the state, in those
39 limited instances when authorized, shall be given *priority for ...* [list of
40 uses] and *commercial developments which are particularly dependent on*
41 *their location on or use of the shorelines* of the state ...
42
43

44 ⁹² Ecology HOM Brief, at 26-28.

45 ⁹³ See Pierce County SMP at 14-20.

46 ⁹⁴ See Petitioners' Reply Brief, at 18, stating: "Petitioners are not arguing that aquaculture must be
47 permitted in all environments and under all circumstances."

48 ⁹⁵ *Biggers v. Bainbridge Island*, 162 Wn.2d 683, 597 (2007).

49 ⁹⁶ The SMA speaks to such uses and expressly references commercial uses which are dependent on
50 their location on or use of the shorelines (RCW 90.58.020); *Buechel v. Ecology*, 125 Wn.2d 196, 203
(1994).

1 Permitted uses in the shorelines of the state shall be designed and
2 conducted in a manner to *minimize, insofar as practical, any resultant*
3 *damage to the ecology and environment of the shoreline area* and any
4 interference with the public's use of the water.
5

6
7 The SMP Guidelines, WAC 173-26, at WAC 173-26-241(2) General Use Provisions, also
8 address preferred use and the underlying need to protect the shoreline. This provision
9 states: (in part, emphasis added)
10

11
12
13 (2)(a)(i) Establish a system of use regulations and environment
14 designation provisions ... that *gives preference to those uses that are*
15 *consistent with the control of pollution and prevention of damage to the*
16 *natural environment, or are unique to or dependent upon uses of the*
17 *state's shoreline areas.*
18

19 2(a)(ii) Ensure that all [SMP] provisions concerning proposed development
20 of property are established, as necessary, *to protect the public's health,*
21 *safety, welfare, as well as the land and its vegetation and wildlife ...*
22

23 2(a)(iii) ...[I]n implementing this provision, *preference shall be given first*
24 *to water-dependent uses,* then to water-related uses and water-
25 enjoyment uses.
26

27 Ecology provides a definition of aquaculture at WAC 173-26-241(3)(b) which denotes its
28 water-dependent nature and status as preferred use: (in part, emphasis added)
29

30
31
32 (b) Aquaculture. Aquaculture is the culture or farming of food fish,
33 shellfish, or other aquatic plants and animals. This activity is of statewide
34 interest. *Properly managed, it can result in long-term over short-term*
35 *benefit and can protect the resources and ecology of the shoreline.*
36 *Aquaculture is dependent on the use of the water area and, when*
37 *consistent with control of pollution and prevention of damage to the*
38 *environment, is a preferred use of the water area.* Local government
39 should consider local ecological conditions and provide limits and
40 conditions to assure appropriate compatible types of aquaculture for the
41 local conditions as necessary to assure no net loss of ecological functions.
42

43 Therefore, based on the SMA and the SMP Guidelines, the Board concludes that
44 aquaculture, such as intertidal shellfish farming, is a water-dependent use, which is a
45 "preferred use" and may be *properly managed* in order to be *consistent with control of*
46 *pollution and prevention of damage to the environment.*
47
48
49
50

1 Pierce County's SMP also sets forth policy statements in regard to Aquacultural Practices
2 which, although promoting aquaculture, also support potential restrictions on location
3 and operation:⁹⁷ (In part)
4
5
6

7 (d) Aquacultural operations should be encouraged to locate and operate
8 in a manner which will preclude damage to specific fragile areas and
9 existing aquatic resources. These operations should generally maintain
10 the highest possible levels of environmental quality.
11

12 ...
13 (f) Aquacultural enterprises should be located in areas where the
14 navigational access of upland owners and commercial traffic is not
15 significantly restricted.
16

17 (g) Recognition should be given to the possible detrimental impact
18 aquacultural development might have on the visual access of upland
19 owners and on the general aesthetic quality of the shoreline area.
20 ...

21 Therefore, the Board concludes it is within Ecology's and Pierce County's authority to
22 establish use and location restrictions for aquaculture operations.
23
24

25
26 Under the prior use regulations, former PCC 20.24.030, geoduck *harvesting* was
27 permitted outright in all shorelines environments.⁹⁸ With the challenged SMP
28 Amendment, specific reference to geoduck *harvesting* has been replaced with the more
29 general reference to aquaculture within all shoreline environments.⁹⁹
30
31
32
33
34
35
36

37 ⁹⁷ Pierce County SMP, at 22-23.

38 ⁹⁸ As the Court of Appeals noted in *Washington Shellfish v. Pierce County*, 132 Wn. App. 239, 254-257
39 (2006) former PCC 20.24.030 regulated two types of activities: geoduck harvesting (.030(A)) and
40 aquaculture, including planting (.030(B)-(D)).

41 ⁹⁹ The County's Use Regulations provide a definition of Aquaculture as well as Water-Dependent
42 Aquaculture Uses. Pierce County Code (PCC), Chapter 20.24 provides:

43 PCC 20.24.010(A): Aquaculture. The commercial culture and farming of food fish,
44 shellfish, and other aquatic plants and animals in lakes, streams, inlets, estuaries, and
45 other natural or artificial water bodies.

46 PCC 20.24.010(C): Water Dependent Aquaculture Uses. All uses that cannot exist in
47 any other location and are dependent on the water by reason of the intrinsic nature of the
48 operation. Examples of water-dependent uses include but are not limited to the following:

- 49 1. Boat launch facilities
- 50 2. Fish Pens
3. Shellfish and seaweed rafts and floats
4. Racks and longlines.

1 Although Pierce County originally proposed to prohibit aquaculture operations that use
2 tubes, netting, and other materials in the Urban and Rural-Residential Environments –
3 which would undoubtedly impact geoduck farming – the County deleted this language
4 pursuant to Ecology’s recommendations.¹⁰⁰ Thus, aquaculture operations are now
5 permitted in four of the County’s five shoreline environments – in the Urban and Rural-
6 Residential Environments subject to Shoreline Substantial Development Permit review
7 and, in the Rural and Conservancy Environments, subject to review for a Shoreline
8 Substantial Development Permit and/or Shoreline Conditional Use Permit.¹⁰¹ These
9 four shoreline environments encompass approximately 80 percent of the County’s
10 shorelines. Therefore, the Board concludes that Petitioners have failed to demonstrate
11 that the use and location restrictions in the SMP violate the preferred-use policies of the
12 SMA and Pierce’s County’s SMP.
13
14
15
16
17
18
19
20
21

22 As to the second argument, Petitioners assert the SMP Amendment imposes 22
23 additional use restrictions, including a bond requirement, setback requirement, marking
24 equipment, access restriction, harvest notification, noise/light and other restrictions.
25 Petitioners argue that imposing these restrictions on a planning basis has a different
26 impact than issuance of specific permit conditions for specific farms on a case-by-case
27 basis.¹⁰² Petitioners not only contend that the totality of these restrictions are
28 particularly burdensome, but that in enacting any regulation, the County was required
29 to conduct an “informed balancing among potentially conflicting, preferred land uses,”
30 namely intertidal shellfish farming and residential and recreational uses.¹⁰³ Petitioners
31 rely on WAC 173-26-241(3) to support their contention that the SMP Guidelines
32 “essentially require” an “informed balancing.”¹⁰⁴
33
34
35
36
37
38
39
40
41

42
43 ¹⁰⁰ Pierce County Exhibit 241 - Ordinance 2009-26, Attachment A.

44 ¹⁰¹ Whether a SSDP or SCUP is needed is dependent on the use of structures. Petitioners cite to an
45 Attorney General Opinion, AGO 2007 No. 1, which concluded that geoduck aquaculture does not include
46 structures.

47 ¹⁰² HOM Transcript at 77.

48 ¹⁰³ Petitioners’ HOM Brief, at 17.

49 ¹⁰⁴ Petitioners’ HOM Brief, at 17 (citing to 241(3)(b) which provides (In part, emphasis added):
50 Aquaculture should not be permitted in areas where it would result in a net loss of ecological functions,
adversely impact eelgrass and macroalgae, or *significantly conflict* with navigation and other water-
dependent uses.

1
2
3 The Board recognizes Petitioners' concern, but finds that the local government's choice
4 between planning-level regulations and case-by-case permit conditions may be left to
5 the County in this case. The Board notes that the SMP Amendment also subjects
6 recreational docks and piers to new prescriptive regulations, which have not been
7
8 appealed.
9
10

11
12
13 Of the 22 new restrictions on intertidal aquaculture, Petitioners only submit specific
14 arguments concerning the bond, setback, and marking requirements. The Board finds
15 that the Record demonstrates that the PVC pipes¹⁰⁵ used for intertidal shellfish farming
16 sometimes break, become dislodged, or are simply abandoned by farmers.¹⁰⁶ Once
17 broken and/or dislodged, these PVC pipes are carried by the tides to other areas,
18 thereby littering not just adjacent shorelines but the benthic community of the
19
20 nearshore and pelagic environment on even distant shorelines.¹⁰⁷ These broken pipes,
21
22
23
24

25
26 ¹⁰⁵ A description of the process of geoduck planting, growing, and harvesting is provided by the Court of
27 Appeals in *Washington Shellfish v. Pierce County*, 132 Wn.App. 239, 242-45 (2006). The Court notes:
28 "To plant geoducks, WSF pushes 6- to 12-inch long, 3-inch diameter, polyvinylchloride (PVC) pipes into
29 the shoreline using rope to guide tube placement ... WSF places geoduck seeds into the PVC pipes,
30 covers the pipes with netting, and pins and wire-ties the netting cover in place to protect the geoduck
31 seedlings. After six months, WSF removes the netting and pipes to allow the geoduck seeds to grow
32 naturally ... When the planted geoducks mature five years later, divers use high-pressure water jets to
33 harvest them from their burrows three to four feet down in the sand substrate. From a boat anchored
34 offshore, the harvesters dive down to the bottom, insert a water jet into the sand substrate next to the
35 geoduck, use water jets to excavate the substrate around the geoduck and loosen its grip, and then pull
36 the geoduck out of the sand. In the process, loosened sand and silt move around in the nearby saltwater.
37 Removal of each geoduck leaves an excavation pit in the sand substrate one and a half to two feet in
38 diameter."

39 ¹⁰⁶ Pierce County Exhibit 213 ("Rogue tubes"); Pierce County Exhibit 130 (Removal of equipment to
40 protect Eagle fledgings); Pierce County Exhibit 131, Slide 26 (Marine Debris caused by PVC tubes ending
41 up in bottom of Puget Sound or left on tideland); Pierce County Exhibit 186 (Bond for cost of removal of
42 abandoned equipment); Pierce County Exhibit 217 (Maintenance and waste disposal, abandonment of
43 equipment, pipes/nets); Pierce County Exhibit 227 (Require bonding and labeling to ensure cleanup);
44 Pierce County Exhibit 229 (In objecting to bond and marking requirement, Shellfish Association appears
45 to concede that marine debris/removal is present in aquaculture operations); Pierce County Exhibit 235
46 (Letter from Oyster Company suggesting the marking of equipment as opposed to bond requirements but
47 noting that farmers should be responsible for their own debris); Pierce County Exhibits 240, 241, 255,
48 (Debris problems); Pierce County Exhibit 262 (Seattle Shellfish noting that "materials escape" can occur
49 due to improper management); Ecology Exhibit 16 (Oct 2007 Tahoma Audubon letter – "document
50 pollution problems", Taylor Shellfish Powerpoint, Various Public Comment Letters, inc. Pinneo "garbage
left behind").

¹⁰⁷ The Board further notes that it is not just PVC pipes but the nets and ropes associated with the farming
operations that can be lost to the marine environment.

1 along with associated nets and ropes, could create hazards for fish and wildlife as well
2 as other users of the waters. Thus, the bond and marking requirements are directly
3 related to the environmental consequences of improper management, equipment
4 failure, and/or abandonment.
5
6
7

8
9 The Petitioners protested that the amount of the bond, at one dollar per tube, was
10 unrelated to the potential clean-up costs and that equipment marking was excessively
11 costly and impracticable. But the Board did not find a clear factual record supporting
12 Petitioners' concerns, notwithstanding more than two years of public debate and
13 opportunity for input.¹⁰⁸ Further, Ordinance 2009-26 allows the bond to be set "at such
14 lower amount determined adequate by the hearing examiner."¹⁰⁹ The Board concludes
15 that Petitioners have failed to carry their burden with respect to these particular
16 requirements, noting that the SMA Guidelines provide that aquaculture, as a preferred
17 use, is subject to proper management so as to control pollution and protect the
18 environment.
19
20
21
22
23
24
25
26

27 As for the setback requirement, unlike the bond and marking requirements, a 10-foot
28 setback is not necessarily grounded in environmental protection but, like all setbacks,
29 seeks to provide a buffering between adjacent uses and is required for other uses
30 within the shoreline environment.¹¹⁰ Petitioners' argument is that the setback will
31 preclude the use of some of a farmer's land, thus economically impacting the potential
32 revenue stream from that farming operation. However, the Board notes that
33 variances to setbacks are available to allow for the reasonable use of property.¹¹¹
34
35
36
37
38
39
40
41
42

43
44 ¹⁰⁸ HOM Transcript, at 85-86, 88.

45 ¹⁰⁹ HOM Transcript at 88.

46 ¹¹⁰ Ecology Exhibit 45; PCC, Table 18A.17.030 B.2.-1: Moderate Density residential zoning district,
47 Pierce County requires a single family residence and its appurtenant structures to be set back a minimum
48 of 25 feet from the road, 10 feet in the rear, and 5 feet on the side. See also Table 18A.17.030 B.2.-2 for
49 rural standards of 25 feet, 10-30 feet, and 5-10 feet, respectively.

50 ¹¹¹ PCC 20.72.020 Shoreline Variances – acknowledging that regulations may cause unnecessary
hardships in particular situations or that regulations might be unreasonable in light of new evidence,
technology, or other special circumstances; HOM Transcript at 95.

1 **Conclusion**
2
3

4 The Board concludes, for the reasons stated above, that Petitioners have failed to carry
5 their burden of proof in demonstrating Pierce County's adoption and Ecology's approval
6 of Ordinance 2009-26 violated the SMA, RCW 90.58's, policy of fostering preferred,
7 water-dependent uses. The Board further finds and concludes that Petitioners have
8 failed to carry their burden to show inconsistency with respect to the restrictive
9 regulations adopted in Ordinance 2009-26. Thus, Ordinance 2009-26 does not violate
10 the GMA, RCW 36.70A.040(4), as it does not create inconsistency.
11
12

13 **D. Consultation under the SMA [Issues 1 and 2]**
14
15

- 16
17
18
19
20 1. Does the SMP Amendment fail to comply with the requirements of
21 the Shoreline Management Act (SMA), RCW Chapter 90.58, including
22 RCW 90.58.100, and applicable guidelines, including WAC 173-26-
23 100 and WAC 173-26-176 because in preparing the SMP
24 Amendment the County and Ecology failed to follow the required
25 process outlined in RCW 90.59.100, WAC 173-26-100 and WAC-26-
26 176 for the preparation of master programs?
27
28
29 2. Does the SMP Amendment fail to comply with the requirements of
30 the SMA, including RCW 90.58.130, because in developing the SMP
31 Amendment the County and Ecology failed to invite and encourage
32 participation by all agencies of federal, state, and local government
33 having interests or responsibilities relating to the shorelines of the
34 state?
35
36
37

38 Positions of the Parties
39

40 Petitioners assert both Pierce County and Ecology were required to consult with
41 governmental agencies having interests in the subject matter of the SMP
42 Amendment.¹¹² According to Petitioners, consultation should have occurred with the
43 National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS) as
44 both of these agencies were conducting environmental review on all shellfish farming in
45
46
47
48
49
50

¹¹²Petitioners' HOM Brief, at 29.

1 Washington State under the Endangered Species Act and the Magnuson-Stevens
2 Fishery Conservation and Management Act.¹¹³
3

4
5
6 In their responses, Pierce County states that it sent notice to the U.S. Army Corps of
7 Engineers and Ecology indicates it notified NMFS but NFMS did not file any
8 comments.¹¹⁴
9

10
11
12
13 In reply, Petitioners contend that merely sending a notice does not amount to
14 consultation as this requires that the County and Ecology should have both "consulted
15 with and obtained comments."¹¹⁵
16

17 Board Analysis and Findings

18
19
20 The Petitioners assert that the County and Ecology failed to consult with the federal
21 agencies that have special expertise on the environmental effects of aquaculture
22 activities and failed to consider pertinent studies being conducted by those agencies in
23 the Puget Sound.
24

25
26
27 Petitioners assert that failure to consult violates both the SMA and SMP Guidelines.
28
29 RCW 90.58.100 provides: (In relevant part)

30
31
32
33 In preparing the master programs and any amendments thereto, the
34 department and local governments shall to the extent feasible: ...
35 (b) Consult with and obtain the comments of any federal, state, regional,
36 or local agency having any special expertise with respect to any
37 environmental impact;
38 (c) Consider all plans, studies, surveys, inventories, and systems of
39 classification made or being made by federal ... agencies ... dealing with
40 pertinent shorelines of the state; ...
41

42 The SMP Guidelines at WAC 173-26-100 provide: (In relevant part)

43
44 At a minimum, local government shall: ...
45 (3) Consult with and solicit the comments of any persons, groups, federal,
46 state, regional, or local agency, and tribes, having interests or any special
47 expertise with respect to an environmental impact. ...
48

49 ¹¹³ Petitioners' HOM Brief, at 30; Petitioners' Reply Brief at 30-31.

50 ¹¹⁴ County HOM Brief at 35-37; Ecology HOM Brief at 30-32.

¹¹⁵ Petitioners' Reply Brief, at 35.

1
2 And, WAC 173-26-186(10) reiterates: (In relevant part)
3

4 Local governments, in adopting and amending master programs, and the
5 department in its review capacity, shall, to the extent feasible, as required
6 by RCW 90.58.100(1): ...

7 (b) Consult with and obtain the comments of any federal, state, regional,
8 or local agency having any special expertise with respect to any
9 environmental impact;

10 (c) Consider all plans, studies, surveys, inventories, and systems of
11 classification made or being made by federal ... agencies ... dealing with
12 pertinent shorelines of the state; ...
13

14 Having reviewed the record, the Board finds the following facts: The County's Shoreline
15 Master Program Submittal Checklist includes an "interested parties list" which was used
16 throughout the amendment process to provide notice of proposed action and public
17 hearings. The U.S. Army Corps of Engineers (Corps of Engineers) is the only federal
18 agency on the County's notice list.¹¹⁶ At a January 23, 2007, public hearing, a
19 representative of Taylor Shellfish informed the Planning Commission that the Corps of
20 Engineers was undertaking a "federal process ... for all shellfish farming in the region
21"¹¹⁷
22
23
24
25
26
27

28 Ecology provided notice to NMFS and to the U.S. Department of Agriculture (USDA), but
29 received no comments from the federal agencies. Biological Opinions concerning the
30 environmental impact of geoduck operations on endangered salmon and bull trout in
31 the Puget Sound have since been issued by NMFS and USFWS respectively. This Board
32 has previously found that these Opinions were requested after Pierce County's final
33 submittal of the SMP Amendment to Ecology. Thus, "the body of work between the
34 County and Ecology was completed prior to both the request for preparation and the
35 issuance" of the NMFS and USFWS reports.¹¹⁸
36
37
38
39
40
41
42
43

44 On these facts, did the County and Ecology comply with the requirement to "consult
45 with and solicit the comments" of the federal agencies with the relevant responsibility
46
47
48

49 ¹¹⁶ SMP IR 4-83, at 3.

50 ¹¹⁷ SMP IR 9-173, at 6 (Diane Cooper).

¹¹⁸ Order on Request for Official Notice and Motion to Supplement the Record (Oct. 13, 2009), at 4.

1 and expertise? The parties have not cited nor has the Board found any case law
2 shedding light on these provisions of the SMA and SMP Guidelines.¹¹⁹ On its face, the
3 requirement of consultation would appear to require more than mere notice. Common
4 definitions of “notice” are “an announcement, a mention, or the report of an
5 occurrence.”¹²⁰ By contrast, consultation implies a two-way communication. “Consult”
6 means “to ask the advice or opinion of; to confer,” and “confer” means “to exchange
7 views.”¹²¹

8
9
10
11
12
13
14 The common understanding that “consultation” requires more than mere notice is
15 supported by the Pollution Control Hearings Board in a case construing the consultation
16 requirement in the State’s water permit regulations.¹²² In the *Yakama* case, the PCHB
17 stated:
18
19

20
21
22 We conclude consultation does not require negotiations. On the other
23 hand, it requires more than a letter of notice of the possibility of
24 consultation. ... We construe [the water permit regulation] as requiring
25 Ecology to engage in a meaningful, continuing consultation with the listed
26 agencies, including the appropriate Indian tribes.
27

28 The water permit regulations at issue in *Yakama* can be distinguished, however,
29 because tribal and agency evaluation of permit conditions is a prerequisite of permit
30 approval.¹²³ There is no similar requirement in the SMA.
31
32

33
34 Notwithstanding the weight of the SMA requirement to consult and solicit comments
35 from relevant federal agencies, the Board concludes that Petitioners in the present case
36 have not carried their burden of proving non-compliance. Petitioners base their
37 argument narrowly on the County and Ecology’s failure to involve NMFS and USFWS,
38 which allegedly were undertaking relevant studies concurrently. But, in fact, the NMFS
39
40
41
42

43
44 ¹¹⁹ SEPA rules distinguish between agencies with specialized expertise and responsibility which must be
45 “consulted” (WAC 197-11-724) and others which must merely be “notified.” A “consulted” agency has “a
46 responsibility to respond in a timely and specific manner to requests for comments” (WAC 197-11-502(2))
47 and is barred from alleging non-compliance if it fails to respond or comment. WAC 197-11-545.

48 ¹²⁰ Miriam-Webster Collegiate Dictionary 1998.

49 ¹²¹ *Id.*

50 ¹²² *Confederated Tribes and Bands of Yakama Nation, et al v. Department of Ecology, et al* PCHB Case
No. 03-030 through -036 (Oct. 2003) (affirmed in an unpublished opinion of the Court of Appeals, Division
III – *Kennewick Public Hospital District v. PCHB, et al* 2005 Wash. App. LEXIS 454 (March 17, 2005).

1 and USFWS Biological Opinions were not even initiated until after the County's revised
2 SMP Amendment was submitted. Under the SMA, Ecology and local governments shall
3 "to the extent feasible ... consult with and obtain the comments of [federal agencies] ...
4 [and] consider all ... studies ... made or being made by [federal agencies]." ¹²⁴
5

6
7
8 Petitioners have not pointed to anything in the Record, beyond bare assertions,
9
10 indicating the feasibility of obtaining opinions and studies about geoduck farming from
11 NMFS and USFWS (or the U.S. Army Corps of Engineers) in the necessary time period.
12
13 As Ecology points out, "[I]t is not incumbent on Ecology or local government to
14 consider information that was not in existence at the time the agency's substantive
15 action was taken."¹²⁵
16
17

18 19 **Conclusion**

20
21 The Board concludes that Petitioners have failed to carry their burden of proof in
22 demonstrating Pierce County's adoption and Ecology's approval of Ordinance 2009-26
23 violated the requirements of RCW 90.58.100(1) and WAC 173-26-186(10).
24
25
26

27 28 **E. Property Rights and Constitutional Limitations under the SMA [Issue 5]**

29
30 The relevant portion of Legal Issue 5 is as follows:
31

32
33 Does the SMP amendment fail to comply with the SMA, including the
34 policy of RCW 90.58.020 and applicable guidelines ... because the county
35 in preparing the SMP amendment ... failed to design and implement
36 regulations and mitigation standards in a manner consistent with all
37 relevant constitutional and other legal limitations on the regulation of
38 private property?

39 Board Findings and Analysis

40
41
42 RCW 90.58.020 enunciates the overall policy of the SMA. Regarding private property
43 rights, Section .020 states:
44

45 [C]oordinated planning is necessary in order to protect the public interest
46 associated with the shorelines of the state, while, at the same time,
47
48

49 ¹²³ WAC 173-531A-060, WAC 173-563-020(4).

50 ¹²⁴ WAC 173-26-186(10).

¹²⁵ Ecology's HOM Brief, at 32.

1 recognizing and protecting private property rights consistent with the public
2 interest.
3

4
5 WAC 173-26-186 provides the "Governing Principles" of the SMP Guidelines. One of
6 these principles, repeated in Sub-sections (5) and (8)(b) (i), is that planning policies
7 and regulations shall be "consistent with all relevant constitutional and other legal
8 limitations on the regulation of private property."
9
10

11
12
13 Petitioners assert that the State Callow and Bush Acts, adopted in 1895,¹²⁶ provided for
14 private purchase of tidelands for the sole purpose of shellfish farming.¹²⁷ Ownership of
15 purchased tidelands reverts to the state if the lands are used for any purpose other
16 than shellfish farming. Petitioners argue: "The County's prohibition of the only possible
17 use of these Bush and Callow tidelands results in an unconstitutional regulatory taking
18 of property."¹²⁸ At the Hearing on the Merits, Petitioners expanded their argument to
19 assert that the County has a duty to inventory its shorelines to determine where Bush
20 and Callow ownerships might be impacted by the new aquaculture restrictions in order
21 to avoid unconstitutional limitations on use of private property.¹²⁹ None of the parties
22 provided any information from the record as to whether there are, in fact, Bush and
23 Callow ownerships in the Pierce County Shorelines Natural Environment.
24
25
26
27
28
29
30
31
32

33
34 The Growth Management Hearings Boards have long recognized that determinations of
35 constitutional rights are within the jurisdiction of constitutional courts, not quasi-judicial
36 administrative agencies.¹³⁰ In the Central Board's cases under the GMA, the Board
37 declines to address constitutional "takings" claims. Instead, the Board applies the
38 criteria of the property rights goal of the GMA – RCW 36.70A.020(6) – which protects
39
40
41
42
43

44
45 ¹²⁶ Chapter 24, Laws of 1895 (Bush Act); Chapter 25, Laws of 1895 (Callow Act).

46 ¹²⁷ Petitioners' HOM Brief, at 31-32.

47 ¹²⁸ Petitioners' HOM Brief, at 32.

48 ¹²⁹ HOM Transcript, at 39-40, 91-92.

49 ¹³⁰ See, e.g., *Dudek/Bagley v. Douglas County*, EWGMHB Case No. 07-1-0009, Order on Motions (Sep.
50 26, 2007), *Roth, et al v. Lewis County*, WWGMHB Case No. 04-2-0014c, Order on Motions (Sep. 10,
2004), *Gutschmidt v. Mercer Island*, CPSGMHB Case No. 92-3-0006, Final Decision and Order (Mar. 16,
1993), at 10.

1 property owners from “arbitrary and discriminatory” actions.¹³¹ Are there comparable
2 criteria in the SMA or in Ecology’s SMP Guidelines which the Board should apply? The
3 Board finds none.
4
5

6
7
8 In the case before us, the Petitioners have not pointed to any standard in the SMP
9 Guidelines short of the constitutional standard. WAC 173-26-186 provides, in both
10 Sections (5) and (8)(b)(i), that planning policies and regulations shall be “consistent
11 with all relevant constitutional and other legal limitations on the regulation of private
12 property.”¹³² But no criteria are provided, other than constitutional compliance, which
13 the Board lacks jurisdiction to review.
14
15
16
17
18

19
20 Accordingly, the constitutional component of Legal Issue 5 must be dismissed.
21
22

23 **Conclusion**

24 The Board finds and concludes that it has no jurisdiction to decide the question of
25 property rights raised in Legal Issue No. 5. The constitutional component of Legal Issue
26 5 is dismissed.
27
28
29

30 **VI. ORDER**

31
32 Based upon review of the Petition for Review, the briefs and exhibits submitted by the
33 parties, the Growth Management Act, the Shoreline Management Act and related
34 administrative regulations, prior Board Orders and case law, having considered the
35 arguments of the parties, and having deliberated on the matter, the Board finds and
36
37
38
39
40
41

42 ¹³¹ See, e.g., *Cave/Cowan v. City of Renton*, CPSGMHB Case No. 07-3-0012, Final Decision and
43 Order (July 30, 2007), at 16; *Camwest III v. City of Sammamish*, CPSGMHB Case No. 05-3-0045, Final
44 Decision and Order (Feb. 21, 2006), at 41-43; *Keesling v. King County*, CPSGMHB Case No. 05-3-0001,
45 Final Decision and Order (July 5, 2005), at 32.

46 ¹³² WAC 173-26-186(5) explains the phrase “other legal limitations” with a parenthetical – “other legal
47 limitations (where applicable, statutory limitations such as those contained in chapter 82.02 RCW and
48 RCW 43.21C.060) on the regulation of private property.” Petitioners are not alleging that the other
49 referenced statutes are applicable here. Indeed, the Boards lack jurisdiction to review compliance with
50 these other statutes, even though they are referenced in Ecology’s SMA guidelines. *Citizens for Rational
Shoreline Planning, et al. v. Whatcom County*, WWGMHB Case No. 08-2-0031, Order on Dispositive
Motion, (Jan. 16, 2009), at 5-8.

1 concludes that **Petitioners have failed to demonstrate** that Pierce County's and
2 Ecology's actions in adopting and approving the amendments to the County's Shoreline
3 Use Regulations, Chapter 20, as enacted by Ordinance 2009-26 violated the provisions
4 set forth in Petitioners' issue statements. Therefore, CPSGMHB Case No. 09-3-0010 is
5
6
7 **dismissed.**
8

9
10 So ORDERED this 19th day of January, 2010.
11

12
13 CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD
14

15
16
17
18 _____
19 Dave Earling, Board Member
20 Presiding Officer
21

22
23 _____
24 Margaret Pageler, Board Member
25 *Except as to Issue 3 in relation to*
26 *WAC 173-26-201(1)(c), see Dissenting Opinion*
27 *below.*
28

29
30 *Dissent, in Part, by Boardmember Pageler*
31

32 I concur in most part in the Final Decision and Order of the Board. With regard to the
33 Limited Amendment analysis under Legal Issue 3, I respectfully dissent as to one
34 element of the decision. I would find that the SMP amendment will affect a substantial
35 portion of the County's shorelines, and thus I would conclude that a Limited
36 Amendment is not allowable.¹³³
37
38

39
40
41
42 The County's early proposal – Ordinance 2008-25 - prohibited intertidal geoduck farms
43 in the Urban and Rural-Residential Environments as well as the Natural Environment.¹³⁴
44

45 In reviewing the proposed ban in the Urban and Rural-Residential Environments,
46
47
48

49 ¹³³ WAC 173-26-201(1)(c).
50

¹³⁴ Urban and Rural-Residential Environments constitute 30% of Pierce County's saltwater shorelines; the Natural Environment constitutes 20%. Declaration of Aaron Michael, Attachment B.

1 Ecology concluded that it was improper to prohibit allowed uses through a limited
2 amendment process. Ecology pointed out that no inventory or characterization had
3 been completed for these areas, and therefore the amount and location of potential
4 sites suitable for intertidal aquaculture was unknown.¹³⁵ "This lack of information makes
5 it unclear whether prohibiting the activity within Urban and Rural-Residential
6 environments will remove some or all of the potential area feasible for intertidal
7 geoduck aquaculture... Ecology believes that without the inventory and analysis,
8 prohibitions on these activities cannot be supported." *Id.*

9 Ecology therefore informed the County that a full SMP process was required before
10 these water-dependent activities could be barred in the Urban and Rural-Residential
11 Environments.

12 Ecology did not apply the same analysis to the ban on intertidal aquaculture in the
13 Natural Environment. Ecology indicates that Pierce County's pre-amendment SMP
14 barred these practices, so that the amendment was only a clarification. Board member
15 Earling correctly emphasizes the deference that is owed to Ecology in its interpretation
16 and application of its own regulations and guidelines. However, we owe Ecology no
17 deference in its interpretation of Pierce County's regulations, and in my opinion, Ecology
18 clearly erred.

19 Pierce County's pre-amendment SMP read, in relevant part:¹³⁶

20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50

Natural Environment. Aquaculture operations are limited to fishing and the *harvesting* of wild and *planted stocks* for recreation and *commercial* purposes. Operations which do not involve the placement of structures or fill in the aquatic or terrestrial environment will be allowed as a conditional use ... Operations involving structural developments are prohibited.

The plain language of the pre-amendment regulation allows commercial operations, including planting and harvesting of shellfish, which do not involve placement of

¹³⁵ Ecology Exhibit 49, Attachment A, at 6.

¹³⁶ PCC 22.24.030(D) (Pre-amendment language).

1 structures or fill. As evidence of the plain language of the regulation, at least one permit
2 for an intertidal geoduck operation was issued by Pierce County under this
3 regulation.¹³⁷ Further, the Court of Appeals in the *Washington Shellfish* case read this
4 provision as permitting intertidal geoduck operations, including planting and harvesting,
5 in the Natural Environment, noting that such operations, when not involving structures
6 or fill, are both a conditional use and subject to shoreline substantial development
7 permits.¹³⁸

8
9
10
11
12
13
14
15 During the SMP Amendment process, Pierce County indicated to Ecology that its
16 existing regulations previously banned intertidal geoduck farming in the Natural
17 Environment and merely needed to be clarified in light of the AGO Opinion defining
18 “structures.” Ecology apparently relied on this interpretation in concluding that a limited
19 amendment process was acceptable. This conclusion was not supported by the facts.
20
21
22

23
24 I would find as follows:

- 25 • Pierce County’s pre-amendment SMP allowed commercial intertidal geoduck
26 planting and harvesting in the Natural Environment.
- 27 • Ecology’s interpretation of Pierce County’s regulations was based on the
28 understanding that geoduck aquaculture was already banned in the Natural
29 Environment and that the SMP Amendment would preserve the status quo. This
30 interpretation was in error and is not entitled to deference.
- 31 • When Ecology applied its own regulations to Pierce County’s proposed ban of
32 intertidal geoduck farming in the Urban and Rural-Residential Environments,
33 Ecology concluded that a permitted, water-dependent use could not be
34 prohibited without an inventory and analysis; therefore a limited amendment was
35 not allowed for these changes.
- 36 • Pierce County has conducted no inventory and analysis of the Natural shorelines
37 to determine whether removing the activity will prohibit some or all of the areas
38 suitable for intertidal geoduck aquaculture; therefore a limited amendment
39 should not be allowed.

40
41
42
43
44 I would conclude that Ecology’s action in approving Pierce County’s SMP Amendment
45 through a limited amendment process was inconsistent with the guidelines of WAC 173-
46
47

48
49 ¹³⁷ See *Taylor Resources, Inc. v. Pierce County*, SHB Nos. 08-010 & 08-017, Order Denying Motion to
50 Dismiss (Nov. 7, 2008) at 12, n.3 (declining to give Pierce County’s changed interpretation of its shoreline
provisions substantial weight).

1 26-201(1), in particular -201(1)(c). I would remand to Pierce County for consideration
2
3 as part of the full SMP update process.
4

5 In all other respects, I concur with the Final Decision and Order.
6

7 **Pursuant to RCW 36.70A.300 this is a final order of the Board.**¹³⁹
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

33 ¹³⁸ *Washington Shellfish v Pierce County*, 132 Wn. App. 239, at 256-57, 131 P.3d 326, 334 (2006).

34 ¹³⁹ Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of
35 this Order to file a motion for reconsideration. The original and three copies of a motion for
36 reconsideration, together with any argument in support thereof, should be filed with the Board by
37 mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration
38 directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the
39 document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a
40 motion for reconsideration is not a prerequisite for filing a petition for judicial review.

41 Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior
42 Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a
43 petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial
44 Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the
45 appropriate Court and served on the Board, the Office of the Attorney General, and all parties within
46 thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be
47 accomplished in person or by mail, but service on the Board means actual receipt of the document at the
48 Board office within thirty days after service of the final order. A petition for judicial review may not be
49 served on the Board by fax or by electronic mail.

50 Service. This Order was served on you the day it was deposited in the United States mail. RCW
34.05.010(19).