

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
2 CENTRAL PUGET SOUND WASHINGTON REGION
3 STATE OF WASHINGTON
4

5 TAYLOR SHELLFISH COMPANY, INC., et al.,
6

7 Petitioners,

8 v.
9

10 PIERCE COUNTY AND ECOLOGY
11 (AQUACULTURE II),

12 Respondents.
13

Case No. 18-3-0013c

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

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15 This matter came before the Board on the Department of Ecology's (Ecology's)
16 Motion for Reconsideration¹ of the Board's Final Decision and Order (FDO)² and Petitioners'
17 joint letter requesting an order to correct scrivener's errors.³ The Board also had before it
18 Petitioners' Response to Ecology's Motion for Reconsideration.⁴
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20 **I. SCRIVENER'S ERRORS**

21 Petitioners represent that they have consulted with Respondents and that all parties
22 concur with the request that the Board correct the following errors:
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- 24 • In addressing Petitioners' challenge to 18S.40.040.C.11 (raised in Issue 17), the
25 Board analyzed restrictions on gear use in section implicating Issues 5, 9, 17, and
26 21.⁵ However, elsewhere the FDO mistakenly indicates that 18S.40.040.C.11 is
27 challenged under Issue 15.⁶ Later the FDO mistakenly states that Petitioners
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30 ¹ Received June 27, 2019.

² Issued on June 17, 2019.

31 ³ Received June 27, 2019.

⁴ Received July 8, 2019.

32 ⁵ FDO at 63.

⁶ FDO at 36, line 13 and 53, line 23.

1 abandoned Issue 17 without noting that the Petitioners' abandonment was limited
2 to the portion of Issue 17 that challenged 18S.40.040.D.5.⁷
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4 Petitioners' identification of scrivener's errors is well-taken. The Board concludes that
5 its FDO should be revised as follows:

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

17 A motion for reconsideration of a final decision of the Board is governed by WAC
18 242-03-830. WAC 242-03-830(2) provides that a motion for reconsideration shall be based
19 on at least one of the following grounds:
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- 21 (a) Errors of procedure or misinterpretation of fact or law, material to the party
22 seeking reconsideration; or
- 23 (b) Irregularity in the hearing before the board by which such party was
24 prevented from having a fair hearing.

25 Ecology does not ask the Board to reconsider "any of its substantive findings of
26 noncompliance" but instead asks the Board to delete or modify specific language in the
27 FDO that Ecology believes might be interpreted (and cited) by a future litigant in a manner
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⁷ FDO at 36, line 13.

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

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4 Priority of SMA and SSWS

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

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

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

21
22 However, the Board disagreed that the County’s legislative discretion is sweeping
23 with regard to a preferred use in a SSWS. Thus, on page 8 of the FDO, the Board quotes
24 directly from the guidelines¹³ and statute:¹⁴

25
26 Land use policies and regulations should protect preferred shorelines uses
27 from being impacted by incompatible uses. The intent is to prevent water-
28 oriented uses, especially water-dependent uses, from being restricted on

29 ⁸ Motion for Reconsideration at 1-2.

30 ⁹ Differences exist as to the standard of review, Board’s jurisdiction, and use priorities.

31 ¹⁰ FDO at 6 citing *Ex. E3257* at 0529-32.

32 ¹¹ Motion for Reconsideration at 5 citing WAC 173-26-201(2)(d)(i).

¹² FDO at 6, footnote 24.

¹³ WAC 173-26-211(3)(b) citing RCW 90.58.340.

¹⁴ WAC 173-26-176(2) citing RCW 90.58.020.

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

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

5 On page 10, the Board goes into greater detail regarding the SMA's "concept of
6 preferred shoreline uses which are defined as consistent with controlling pollution,
7 preventing damage to the natural environment, or unique to/dependent upon use of
8 Washington's shorelines,"¹⁵ and states:¹⁶

9
10 Unlike the Growth Management Act (GMA), which identifies 13 non-
11 hierarchical goals to guide planning but leaves it to local governments to
12 balance competing priorities, the SMA begins with a legislative declaration
13 that, in developing and approving shoreline master programs (SMPs), local
14 governments and the Department of Ecology ... shall (1) plan for and foster all
15 reasonable and appropriate uses; and (2) protect the interest of the people of
16 the state by adhering to a hierarchical list of preferred uses in shorelines of
17 statewide significance.

18 Next the Board further quotes the statute relating to SSWS, which emphasizes that,
19 "local government, in developing master programs for shorelines of statewide significance,
20 shall give preference to uses . . . which: (1) Recognize and protect the statewide interest
21 over local interest".¹⁷

22 The Board concluded:¹⁸

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

25 Role of Science

26 Ecology complains that the FDO overstates the role of science in planning for water
27 dependent uses in a Shoreline Master Program (SMP) and fails to acknowledge what it
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31 ¹⁵ FDO at 10 citing RCW 90.58.020.

32 ¹⁶ FDO at 10-11, citing RCW 90.58.020 and WAC 173-26-201(2)(c).

¹⁷ RCW 90.58.020.

¹⁸ FDO at FDO at 11 citing WAC 173-26-201(2)(c).

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

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

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

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

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

²⁰ Motion for Reconsideration at 6-7.

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

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

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

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

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

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

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

10 11 Justification for SMP amendment

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

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

22 **III. ORDER**

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

- 25 1. The request for correction of scrivener's errors is granted;
- 26 2. Ecology's Motion for Reconsideration is granted, in part;
- 27 3. The Board will amend its Final Decision and Order to read as follows:
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32 ²² Motion for reconsideration at 9.

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

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

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

Entered this 7th day of August 2019.

Cheryl Pflug, Board Member

Deb Eddy, Board Member

William Roehl, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.²⁴

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