



COUNTY COMMISSIONERS

John Hutchings  
District One

Gary Edwards  
District Two

Tye Menser  
District Three

**COMMUNITY PLANNING &  
ECONOMIC DEVELOPMENT DEPARTMENT**

*Creating Solutions for Our Future*

Joshua Cummings, Director

**MEMORANDUM**

**TO:** Planning Commission

**FROM:** Andrew Deffobis, Associate Planner

**DATE:** November 27, 2019

**SUBJECT:** **Review of Growth Management Hearings Board Decision Regarding Pierce County's 2013 Shoreline Master Program Update**

Introduction

The Planning Commission requested that staff provide an analysis of the Growth Management Hearings Board (GMHB) decision regarding aquaculture regulations in Pierce County's Shoreline Master Program (SMP) update (Case No. 18-3-0013c). Staff have prepared the following summary of the GMHB's Final Decision and Order, which has been reviewed by the Department's legal counsel. The intent is to provide an overview of the issues on appeal and how the GMHB decision may inform the current Thurston County SMP update process. Please refer to the full Final Decision and Order for more information on the GMHB's findings in this case.

Background and Summary of Pierce County SMP Appeal

Pierce County approved an amendment to their Shoreline Master Program in 2018 that included prohibitions on locations where aquaculture could be conducted, in response to public concerns related to aesthetics, property boundary accuracy, potential impacts to shoreline access, recreation, and residential uses. New aquaculture uses were prohibited adjacent to the Natural shoreline environment designation (SED).

Concerns were also expressed by the public prior to adoption by Pierce County, and included shoreline degradation, aesthetics, lack of monitoring, gear debris, impacts to surrounding wildlife, use conflicts, and dangers to boaters.

In response to these concerns, Pierce County stated, "the detailed regulatory requirements are intended to ensure proposals are consistent with the required mitigation sequencing, are consistent with State law and guidance, and represent a compromise between shellfish growers, property owners, and the public."

Ecology approved Pierce County Ordinance 2018-57s, a shoreline master program amendment, in October 2018. This decision was appealed by Taylor Shellfish Company, Inc., North Bay Partners, and Seattle Shellfish, LLC (Case No. 18-3-0013c).

The GMHB Final Decision and Order was issued on June 17, 2019, and is synopsisized as follows:

“The Board concluded that some aspects of the County’s action failed to comply with RCW 90.58.020, RCW 90.58.100, and the applicable Guidelines because of failures to give preference to aquaculture as a preferred use and failures to base the actions on scientific and technological information and management recommendations.

The Board finds that Ecology’s approval of the SMP, to the extent that it is based on an apparent determination that the County could adopt restrictions on aquaculture to “balance” the preferences of local citizens against the statewide interest in fostering aquaculture provided proof of Ecology’s failure to comply with RCW 90.58.020 and applicable Guidelines.”

The case hinged on two Shoreline Management Act (SMA) requirements: use preferences established in state law, and requirements that SMP provisions be based on the most current, accurate, and complete scientific and technical information and management recommendations. The GMHB did not agree that the County’s process satisfied state requirements that regulations be based on scientific and technical information.

Pierce County’s Compliance is due by November 25, 2019, and a hearing on whether Pierce County has achieved compliance with the GMHB’s order is scheduled for January 16, 2020.

#### Issues At Appeal

The GMHB organized the Petitioners’ issues it reviewed under eight major claims. They are included **in bold text** below as labeled within the GMHB’s Final Decision and Order, followed by a staff summary of the GMHB’s review.

**A. Prohibition of aquaculture activities in areas abutting the Natural shoreline environment designation is unsupported by science and fails to foster and give preference to aquaculture.**

*Decided in favor of Petitioner.*

The GMHB found Pierce County prioritized local interests over statewide interests, and that the prohibition was not specific enough to implement consistently. The GMHB agreed with Petitioners and Ecology’s own determination that there was no scientific basis for the prohibition. The GMHB found that the County maintains that a prohibition on aquaculture was designed to preserve the Natural shoreline, but simultaneously proposed to allow development that may ultimately require shoreline armoring.

The GMHB found that Pierce County failed to base its regulations on adequate scientific, technical, or other appropriate support, and that giving preference to local concerns failed to provide preference to aquaculture as required by the SMA. Further, GMHB concluded

that prohibitions on new or expanded aquaculture activities in the Aquatic SED failed to comply with state law.

**B. Required undisturbed buffer widths between aquaculture and aquatic vegetation are unsupported by science, fail to foster aquaculture, and should exclude non-native eelgrass.**

*Decided in favor of Petitioner.*

The proposed Pierce County SMP required aquaculture activities to maintain buffers of 25-180 feet from submerged aquatic vegetation and did not differentiate between native and non-native eelgrass. Ecology recommended minimum buffer widths of 16 feet, based on current federal guidelines.

The GMHB found that Pierce County did not provide scientific data in support of the proposed buffer widths. The GMHB found that by not specifying which species of eelgrass was to be protected, the proposed buffers lacked sufficient clarity to be implemented and failed to comply with state law. Also, the GMHB found that Pierce County failed to support the proposed regulations with scientific and technical information and failed to plan for or give preference to aquaculture as a preferred use.

**C. Restrictions on gear use fail to plan for, foster, and give preference to aquaculture.**

*Decided in favor of Petitioner*

The Pierce County SMP included a preference for aquaculture that does not involve placement of tubes, structures, or alterations to the shoreline, arguing a precautionary approach. However, the GMHB found the County had failed to support this preference, and a precautionary approach, with scientific and technical information, and failed to plan for or give preference to aquaculture as a preferred use.

The proposed Pierce County SMP also prohibited predator control that involves deliberate killing of invertebrates. Petitioners did not believe the regulation clarified restrictions on active predator control applied only to non-invasive species and were concerned about the implications on active control of the invasive oyster drill snail. The GMHB concluded the regulation lacked sufficient clarity to be implemented and failed to comply with state law under WAC 173-26-191(2)(a)(ii).

**D. Prohibition of aquaculture in tidal channels is unsupported by science.**

*Decided in favor of Pierce County in part, and in favor of Petitioner in part.*

The Pierce County SMP prohibited aquaculture from locating within tidal channel portions of streams used by anadromous fish, and where it might adversely impact connectivity between habitat conservation areas or interfere with navigation. The Petitioners asserted that these restrictions were not supported by scientific and technical information. The GMHB found Petitioners did not meet their burden of proof regarding habitat connectivity and navigation.

Regarding locating operations in tidal channels, Pierce County clarified this applied to the thalweg, or deepest channel of the stream bed. The GMHB found that the thalweg is more appropriate for drawing political boundaries than identifying areas where aquaculture is prohibited. The GMHB concluded that the proposed regulation was not supported by scientific and technical information and failed to plan for or give preference to aquaculture as a preferred use.

**E. Required separations between aquaculture projects and adjacent properties is unsupported by science and fails to give preference to aquaculture.**

*Decided in favor of Petitioner.*

The proposed SMP required separation between individual aquaculture uses/developments, and that aquaculture operations have a 10-foot parcel line setback. Although the GMHB agreed with the County that such uses should be separated to ensure no significant adverse cumulative effect occur, it nonetheless found the “one size fits all” minimum setback is not “tailored to address all aquacultural activities.” The GMHB concluded that the proposed regulation was not supported by scientific and technical information and failed to plan for or give preference to aquaculture as a preferred use.

**F. Additional violations of SMA and Guidelines.**

*Decided in favor of Pierce County in part, and in favor of Petitioner in part.*

The proposed Pierce County SMP required suspension of aquaculture activities during forage fish spawning periods unless a qualified professional confirms spawning is not occurring, or WDFW provided approval. The Petitioners argued that “qualified professional” was not adequately defined. The GMHB found that current practices were acceptable to federal and state agencies, and that requiring an independent professional to perform surveys was not supported by scientific and technical information and failed to plan for or give preference to aquaculture as a preferred use.

The proposed Pierce County SMP provided that if a nonconforming use is abandoned or discontinued for more than 3 years, nonconforming rights expired. Pierce County’s prohibition of aquaculture adjacent to the Natural SED renders it a nonconforming use, and shellfish operations often remain fallow or dormant for extended periods. The GMHB stated “the County errs when it insists on regulatory structures that are ill-suited to the essential requirements of aquaculture, such as the need to allow fallow or dormant periods.” The GHMB found the County’s adoption of this regulation failed to plan for and give preference to aquaculture as a preferred use.

The proposed Pierce County SMP prohibited the use of supplemental feed, pesticides, herbicides, antibiotics, etc., for shellfish farms, which Petitioners stated applying to projects above the ordinary high water mark (OHWM) was unclear and not supported by science. Operations below OHWM do not use the listed items, but upland shellfish hatcheries do, and are subject to regulatory requirements. Pierce County stated that the

language was intended to apply below the OHWM. The GMHB found this was not clear enough and violated state law by not being sufficient in scope and detail.

The proposed Pierce County SMP prohibits aquaculture activities from substantially and materially conflicting with established water dependent uses, such as navigation, moorage, and recreation. The Petitioners argued that “substantially and materially” differs from “significantly conflict with” language in the SMA and Guidelines. The GHMB found Petitioners did not meet their burden of proof, and this issue was dismissed.

**G. Monitoring and permit application requirements are unsupported and hinder aquaculture.**

*Decided in favor of Pierce County in part, and in favor of Petitioner in part.*

The Petitioners allege that aquaculture applications in the proposed Pierce County SMP are excessive and more onerous than those for other shoreline activities, redundant in light of other permit requirements, and prohibitively expensive for establishing new operations. The GMHB found that the SMP’s Performance Standards and Monitoring Plan (Section E) was not supported by scientific and technical information, and failed to plan for, foster and give preference to aquaculture as a preferred use. However, the GHMB dismissed Petitioners’ claim that the SMP’s cumulative impacts analysis requirement failed to comply with state law.

The Pierce County SMP requires aquaculture farms to comply with a monitoring plan. The Petitioners complained that aquaculture is the only use subject to additional monitoring requirements prepared by third parties, which increases costs. The GHMB found Petitioners did not meet their burden of proof, and this issue was dismissed.

The Pierce County SMP states that permits shall be rescinded if activities do not comply with approval conditions, though another section allows rescission but does not require it. Petitioners argue this results in internal inconsistency. The Board found that a policy of mandatory rescission of permits for any violation does not comport with the SMA’s goals of providing for preferential use, and that adoption of this section failed to plan for, foster and give preference to aquaculture as a preferred use.

**H. The SMP was not coordinated with other relevant programs and is externally inconsistent.**

*Decided in favor of Pierce County.*

The Petitioners assert that the adopted Pierce County SMP does not consider federal and state programs that encourage aquaculture. Ecology points to its approval findings, which reference programs of, and comments from, several state, federal, and Tribal entities. The GHMB found Petitioners did not meet their burden of proof, and this issue was dismissed.

The Petitioners assert the SMP update must be consistent with constitutional and other legal limits on regulation of private property, a claim that the GMHB dismissed based on a lack of authority to rule on constitutional issues.

**I. Aquaculture restrictions are not based on all available scientific and technical information and an analysis of the total impact of all restrictions.**

*Decided in favor of Pierce County.*

The remaining complaint from Petitioners is that restrictions on aquaculture were added to the SMP late in the process, which seems to be a response to concerns of local residents over Ecology's and other scientific and technical recommendations. The GMHB shared Petitioners' concerns, finds that Pierce County failed to comply in multiple provisions of its SMP update, but dealt with these issues individually elsewhere in their decision. This specific issue was dismissed.

Analysis of Proposed Thurston County SMP

Staff have reviewed proposed aquaculture provisions in the draft Thurston County SMP in light of the recent GMHB decision. The purpose of this review is to ensure that the draft Thurston County SMP does not include provisions found by the GMHB to not comply with requirements in the SMA and Master Program Guidelines. The analysis is included below, organized by letters that correspond with the issues described above in the GMHB decision. Note: This section only reports on those portions of the Pierce County SMP found not to comply with state law.

- A. Pierce County's prohibition of aquaculture in aquatic areas abutting shorelines designated Natural was found not to be supported by science, nor to give preference to aquaculture as a preferred use. The draft Thurston County SMP permits aquaculture in any shoreline environment designation (SED), subject to standards. New aquaculture activities may be required to obtain a substantial development permit or conditional use permit. **This is unlikely to be an issue in Thurston County.**
- B. Pierce County's SMP required that aquaculture operations be buffered from eelgrass beds by a distance found larger than that recommended by federal guidance and Ecology's recommendations. The draft Thurston County SMP does not prescribe a specific distance. However, Ecology recommends 16-foot buffer widths based on federal guidelines. The draft SMP requires that a vegetation habitat survey and list of probable impacts to aquatic/intertidal/upland vegetation be submitted. **This is unlikely to be an issue in Thurston County.**
- C. Pierce County's SMP gave preference to aquaculture operations that do not involve placement of tubes, structures, or alterations to shoreline. The GMHB found this was not supported by science, and did not give preference to aquaculture. The development standards in the Thurston County proposed SMP (19.600.115) do not contain this same language. The proposed SMP does require applicants to submit the following information: areas where substrate modification will take place or structures will be constructed/installed, a visual assessment that demonstrates visual impacts within 1,500 feet of the site, and description of methods for planting and predation control. However, Policy SH-33 in proposed Section 19.300.130 does give preference to projects involving little or no substrate modification. The draft also only allows commercial geoduck

aquaculture where significant clearing and grading is not required (19.600.115(C)(2)(a)). **This language may require further discussion in light of the GMHB decision.**

Pierce County's SMP prohibited deliberate killing of invertebrates as part of predation control, which the GMHB found to lack clarity given concerns that the language did not differentiate between non-invasive and invasive species, when removal of the latter is recognized as appropriate by other regulatory agencies and programs. **The draft Thurston County SMP states "Predator exclusion methods shall not be designed to intentionally kill or injure wildlife." (19.600.115(C)(1)(n)(vi)). This standard may require further discussion in light of the GMHB decision.**

- D. The Pierce County SMP prohibited aquaculture in tidal channel portions of streams and rivers used by anadromous fish, which the GMHB found unsupported by science and to not provide for aquaculture as a preferred use. The proposed Thurston County HCP does not include any such prohibition. **This is unlikely to be an issue in Thurston County.**
- E. The adopted Pierce County SMP required a minimum 10-foot setback from adjacent parcels not engaged in the aquaculture activity. Thurston County's proposed SMP says 5 feet, and thus may require revision in light of the GMHB decision. **This standard may require further discussion in light of the GMHB decision.**
- F. Pierce County's SMP required suspension of aquaculture activities during forage fish spawning unless qualified professional determines spawning not occurring or WDFW provides approval. Petitioners objected over who would be qualified. Thurston County's proposed SMP does not include this language. **This is unlikely to be an issue in Thurston County.**

Pierce County's SMP considered nonconforming uses abandoned after 3 years. Aquaculture was rendered a non-conforming use by Pierce County prohibiting it in the Natural SED. This is against Ecology's recommendation to plan for dormancy in aquaculture operations. **Staff are considering proposing language addressing dormancy of aquaculture in the draft SMP.**

Pierce County's SMP prohibits use of supplemental feed, pesticides, herbicides, antibiotics, vaccines, etc. on shellfish farms, but failed to clarify that this applied waterward of the ordinary high water mark. Thurston County's draft SMP does not have same language. However, there are federal regulations that prohibit use of these products in Puget Sound. **This is unlikely to be an issue in Thurston County.**

- G. The Pierce County SMP required aquaculture operators to demonstrate that operations would result in "no statistically significant changes to baseline conditions." This language was found to be inconsistent with state guidelines on no net loss and was "likely unachievable". Thurston County's draft SMP does not include this language. **This is unlikely to be an issue in Thurston County.**

One section of the Pierce County SMP required aquaculture permits to be rescinded if *any* violation of permit/approval conditions was noted, and the GMHB concluded this provision failed to plan for, foster and give preference to aquaculture. Thurston County's draft SMP does not include this language. **This is unlikely to be an issue in Thurston County.**

- H. All petitioner items under this category were dismissed.
- I. All petitioner items under this category were dismissed.