



Mystery Bay Management Plan

Executive Summary

Background

Mystery Bay is located on the west side of Marrowstone Island in Jefferson County, in the northern half of the Puget Sound, just inside Admiralty Inlet. Mystery Bay, like other areas of the Puget Sound, has multiple and sometimes competing uses. Mystery Bay is a prolific shellfish area and is the site of many tribal shellfish beds and commercial shellfish operations. Mystery Bay is also a popular destination harbor for traveling boaters, visited almost continually since at least the late-1700s. It serves as a homeport for many upland landowners and other Marrowstone Island residents and includes Mystery Bay State Park, a 10-acre marine park. The number of boats using Mystery Bay has increased over the past several years, to the point where they are impacting commercial shellfish operations.

Shellfish

In 2009, the Washington State Department of Health (DOH) imposed a boating-season shellfish bed closure over the majority of Mystery Bay due to the number of boats moored and anchored in the bay. The number of boats exceeded National Shellfish Sanitation Program (NSSP) standards that must be adopted by states that export shellfish commercially. Among other requirements, the NSSP requires the closure of commercial shellfish areas when the number and density of boats exceeds specified numerical limits called the "marina threshold levels."

Along with privately owned companies, western Washington's tribes are also active in commercial shellfish operations and have treaty rights providing access to shellfish beds. Shellfish have been harvested by northwest tribes for thousands of years and shellfish have been farmed commercially for more than 150 years. The shellfish industry represents a significant portion of Washington State's economy and provides thousands of family-wage jobs in coastal communities. Not only do shellfish bed closures affect commercial companies, but are also a direct impact to the Treaty Tribes' ability to access shellfish beds and infringes upon their treaty rights. To learn more about the specific issues and concerns, a *Question and Answer Factsheet* on Mystery Bay was developed in 2008, and has been recently updated (see Appendix A).

The Plan

To address the problem of too many boats anchored or moored near shellfish beds in the bay and the threat of shellfish harvest closures, a group of stakeholders began to meet in 2008, to find a workable and sustainable solution. The group's goal is to manage boater usage in a manner that ensures year-

round harvest of commercial shellfish while balancing that interest with the legitimate use of the bay for public recreation. The stakeholder group includes local, state, and federal agencies; four treaty tribes; commercial shellfish interests; and a local community organization (see Appendix B).

This management plan is the result of the collaborative efforts of the stakeholder group and provides a unique model to help resolve multiple use conflicts in manner that may have broad application throughout Puget Sound. The group was guided by and operates under the legal framework and regulatory authority currently in place (see Appendix C).

The Mystery Bay plan contains the following major elements:

1. Permitting and managing future boat moorage to ensure that commercial shellfish beds do not have to be closed.
2. Removal of buoys that are unpermitted by Jefferson County and unauthorized by the Washington Department of Natural Resources (DNR).
3. Providing a method of exempting the boats (and mooring buoy) owned by shoreline property owners toward the NSSP marina threshold level.
4. Manage transient boaters through voluntary "No Anchor Zone" and developing information for transient boaters to direct them to dock or moor their boats in Mystery Bay State Park.
5. Establish long-term boat monitoring plan. Developing a monitoring plan to assure that the numbers and densities of boats do not exceed the marina threshold counts.
6. Develop adaptive management to address ongoing changes.

In order to determine the success level of the plan, the stakeholder group will convene, at a minimum, once in the fall of 2010, after the boating season ends and once in the spring of 2011, before the boating season begins. The success of the plan will be ranked as follows:

- A complete success if there are no closures because of too many boats;
- A significant success if closures (due to boats) are no more than two and limited in duration to no more than 14 days total and the bay is quickly re-opened to harvest.

Note - If closures (due to boats) number greater than two or if closures last longer than 14 days cumulatively, the stakeholder group will reconvene as soon as practical, but no later than 45 days after notification, to evaluate the problem and take action, if necessary.

As of January 2010, all of the following activities have begun:

- Numerous unauthorized buoys have already been removed.
- A draft notification plan is being developed to inform transient boaters of the importance of docking or mooring within the State Park.
- DOH has developed a strategy for exempting shoreline residents' boats from the marina threshold counts.
- Jefferson County and the DNR have developed plans to ensure that future mooring buoys are properly permitted.
- The Jefferson County Marine Resource Committee and the stakeholder group have begun to develop a monitoring plan.



Mystery Bay Management Plan

Shellfish Protection

Objective 1 - Maintain an "Approved" classification of the Mystery Bay shellfish growing areas to allow continued harvest.

Because shellfish are filter feeders and can concentrate disease-causing organisms and because they are commonly eaten raw or minimally cooked, the Washington Department of Health (DOH), in accordance with the National Shellfish Sanitation Program (NSSP), maintains strict sanitation standards for the areas where shellfish are grown. These standards include limits on the presence of pollution sources such as boats. The NSSP is managed nationally by the US Food and Drug Administration (FDA). The NSSP definition of a marina is any water area with a structure (docks, basin, floating docks, etc.) which is used for docking or otherwise mooring vessels; and is constructed to provide temporary or permanent docking space for more than ten boats. The FDA has stated, "any area which has buoy moorage for at least 10 boats is also considered a marina" under their marina definition.

When an area surpasses the marina threshold level, the surrounding waters cannot be considered safe for shellfish harvesting. In interpreting the NSSP Guide marina definition, the DOH uses a density threshold of one boat per acre as a screening tool to count boats towards the marina threshold. The density threshold may need to be decreased in water bodies that have poor dilution characteristics (like a shallow enclosed embayment). A map of current locations and status of buoys and boats in Mystery Bay is included in Appendix D.

The DOH will consider exempting boats towards the marina threshold count if:

- (1) The mooring buoy owner's residence is directly upland of the mooring buoy and a home toilet can easily be used, and
- (2) The owner submits a signed affidavit that any boat using their mooring buoy is under their ownership or control and will not discharge wastewater or other substances into Mystery Bay and will properly dispose of waste in an upland sewage system or boat pump-out station (see Appendix E for affidavit form).

Note - The DOH rationale for allowing an exemption under these criteria is that if the mooring buoy owner is directly upland, they have control over and can easily monitor boats attached to the buoy and any persons on the boat can access upland toilet facilities. By using these exemption criteria, areas of Mystery Bay that would otherwise be closed to shellfish harvest can remain open.

Management of transient boaters to ensure boat densities are below marina threshold levels, as well as notification and response procedures when the threshold is exceeded are detailed in a later section of this plan.

Mooring Buoy Management- Permitting and Enforcement:

Objective 2 - Continue necessary permitting and enforcement measures to ensure the number of boats in Mystery Bay is below the marina threshold levels by May 1, 2010.

Since February 2008, the DNR has stopped processing applications and registrations for mooring buoys in Mystery Bay pending identification of a strategy to avoid future closures of Mystery Bay to commercial shellfish harvest.

Since March 2008, the DNR and Jefferson County have collaborated to inventory boats and mooring buoys in Mystery Bay. The List and Map showing the status of mooring buoys in Mystery Bay can be found in Appendix C. Note – this information can frequently change.

On November 23, 2009, Jefferson County approved and adopted a moratorium on new mooring buoy applications in Mystery Bay (see Appendix F). This moratorium effectively limits the number of mooring buoys in Mystery Bay to those buoys that are already permitted or are in the process of a permit decision under the Shoreline Management Program (SMP).

The U.S. Army Corps of Engineers (Corps) has honored the DNR stoppage of processing applications and registrations for mooring buoys and has not verified the use of any Nationwide Permit 10 (NWP 10) for mooring buoys in Mystery Bay. The Corps is also reviewing their permitting process in Mystery Bay, for mooring buoys and moorage structures in particular, for compliance with the tribal treaty rights, including the harvesting of shellfish. See Adaptive Management section for more details regarding this review. The Corps should be notified of any mooring buoy applications for compliance with their regulatory requirements pending the outcome of this review.

Objective 2a - Proceed with authorization process for mooring buoys that have been or will be permitted by the county under the SMP and can be authorized by the DNR.

Jefferson County will continue processing the applications that were submitted prior to November 23, 2009, the effective date of the moratorium.

The DNR will move forward with processing applications or registrations that have been on hold, assuming:

1. The applicant possesses a valid SMP permit or is otherwise in good standing with Jefferson County,
2. The mooring buoy density remains below the threshold for which a DOH closure would occur, and
3. The use meets all other conditions and criteria as required by DNR for recreational buoys. For example, state law prohibits commercial use of the buoy, as well as living on boats moored to the buoy. It also limits boats to sixty feet or less in length.

Furthermore, if issuance of any one or more mooring buoy authorizations by DNR would cause the number of boats to go above the marina threshold level and result in a closure of Mystery Bay, then DNR would only issue authorizations up to the threshold number established by DOH. For purposes of prioritization, if the number of buoy applications exceeds the threshold number, DNR will process applications in the order in which they were received.

Objective 2b - Proceed with enforcement process for mooring buoys and boats that have not been permitted by the county under the SMP, or otherwise cannot be authorized by DNR.

For mooring buoys currently in Mystery Bay that cannot be authorized by DNR based upon the criteria above, the following action will be taken:

- i. Buoy owners who have applied to the DNR for an authorization, but cannot be authorized, will be sent a letter denying their application. If the DNR determines that any buoy owners with prior authorizations do not meet the criteria, DNR will send notice revoking the authorization. These letters will provide 30 days for users to vacate use of Mystery Bay. Failure to vacate would result in the DNR proceeding with trespass actions. If the DNR is denying or revoking authorization due to the user having no county permit; then the DNR and Jefferson County will collaborate on the enforcement process.
- ii. Vessels that have been anchored or moored to a buoy for longer than 30 days, and whose owners are unknown, will be tagged with a 30-day notice and will be reported to the DNR's Derelict Vessel Program as an abandoned vessel. The DNR may proceed under the Derelict Vessel statutes, or in some case file a trespass action. If the owner fails to remove the boat, it may be removed as an abandoned vessel and sold at auction

or disposed. The DNR, Jefferson County, and other stakeholders will collaborate in this effort.

- iii. Existing, unapproved mooring buoys whose owners are unknown would be tagged with a 30-day notice, after which time they will be removed. The DNR, Jefferson County, and other stakeholders will collaborate in this effort.

Objective 3 - Identify process for future permitting and enforcement measures to ensure number of mooring boats in Mystery Bay remain below the marina threshold levels.

The primary permitting and authorizing agencies for mooring buoys in Mystery Bay are the DNR, Jefferson County, the Washington Department of Fish and Wildlife (WDFW) and the US Army Corp of Engineers (Corps). A description of the authority and responsibility of these agencies can be found as the Mystery Bay Legal Framework document in Appendix C.

Future permitting process- Jefferson County will not accept new buoy permit applications until the county lifts the moratorium on mooring buoys in Mystery Bay. At that time, the permitting process would proceed in accordance with the standards and criteria set by the individual permitting authorities. The DNR and Jefferson County will consider granting use authorizations for new buoys if the proponents obtain all regulatory permits and do not cause the marina threshold level to be exceeded.

Future enforcement actions- Jefferson County and other regulatory agencies, along with the DNR, will work collaboratively using their individual authorities to address unpermitted and unauthorized uses in Mystery Bay. Jefferson County and the DNR may, from time to time, conduct surveys of boat use in the bay, but will predominately rely upon the monitoring protocol of this plan for determining when enforcement action is needed in Mystery Bay.

Transient Vessel Management

Objective 4 - Minimize or eliminate transient anchoring in Mystery Bay, outside of the State Park

Aquatic lands in Mystery Bay (outside the boundaries of the State Park) are managed by the DNR and are subject to the Public Trust Doctrine, which gives the public the right to engage in navigation. Navigation is construed by the DNR to include the temporarily anchoring of a vessel. Transient boaters can legally anchor in the same area for periods up to 30 consecutive days and for a total of up to 90 days in any 365-day period, without needing to obtain authorization from the DNR. Note - "in the same area" means within a radius of five miles of any location where the vessel previously anchored.

In determining whether the marina threshold level is exceeded, the DOH counts all boats — both those moored as well as those temporarily anchored in the bay. This creates a management challenge. In an effort to avoid promulgating and enforcing new regulations that would formally designate Mystery Bay as a no anchorage zone, the Transient Vessel Management section has been developed. Note - Vessels remaining in Mystery Bay longer than 30 days without an authorization are in trespass and subject to enforcement action.

Objective 4a - Establish a Voluntary "No Anchor Zone" In Mystery Bay, Outside of the State Park and Direct Transient Boaters to the State Park.

The Jefferson County Marine Resources Committee (MRC) has proposed implementing a voluntary "No Anchor Zone" in Mystery Bay, to protect shellfish by keeping boat numbers below marina threshold levels. This is similar to what has been successfully implemented along the Port Townsend waterfront to protect eelgrass. This voluntary "No Anchor Zone" will be established within the entire bay through the placement of marker buoys, except for the designated area of the bay that is within the State Park. Marker buoys designating the area as a no anchorage zone will have a picture of an anchor in a circle with a line through it to designate the area as a no anchorage zone and would read, "Shellfish Protection Zone" and "Transient Moorage at State Park" (see figure at right for an illustration of the marker buoy).



Five such marker buoys will be installed in the bay—two at the entrance, two in the central portion of the bay just beyond the state park area, and one in the inner bay. These marker buoys would be strategically placed to help define an informal navigation channel and where transient vessels may otherwise be enticed to anchor their vessels.

Objective 4b- Mark the Corners of the State Park, Better Control Dinghy Storage, and Enhance Transient Moorage at the State Park.

State Parks will place buoys at the southwest and southeast corner of the state park boundary in order for boaters to understand where transient moorage is allowed in Mystery Bay. As resources become available State Parks will enhance moorage for transient vessels in the park boundaries, in order to maximize the number of transient vessel use. In addition, State Parks will work to control long-term moorage of dinghies on the state park dock.

Objective 4c- Establish Interpretive Displays and Material and Conduct Outreach for the Public to Learn and Understand how the Bay is being Managed.

The Jefferson County Marine Resources Committee will establish interpretive displays on or near the State Park dock and if permission is granted at the Nordland Store dock. Brochures will also be available at these locations for distribution to the public. The display and brochures will educate the public about Mystery Bay and explain how the bay is being managed. It will

include a map showing the State Park, shellfish beds, mooring fields, and the voluntary "No Anchor Zone." Additional outreach will be conducted through various means including bulletin boards, local publications, applicable web sites, and direct outreach to relevant interest groups such as boating clubs.

Monitoring Plan

Objective 5 - Monitor Mooring Buoy Usage and Transient Anchorage in Mystery Bay to Determine if Marina Threshold Levels are Exceeded.

The monitoring should focus on anticipated high use periods during the boating season (May 1 – September 30), especially on weekends and known high use events (e.g., regattas and the Wooden Boat Festival).

The WSU Beachwatchers, under the lead of the Jefferson County MRC, will conduct monitoring and will coordinate monitoring with the following groups:

- Mystery Bay State Park Host – may do daily boat counts in State Park area
- DOH will count boats when conducting bi-monthly water quality sampling and may also count boats during periods of concern
- State Park – will patrol conditionally approved (closed) areas, such as the area around the State park, during the summer to prevent unauthorized harvest and assist with boat counts in the bay.
- Tribal Surveys – site visits during summer to take boat counts from approved areas.

The WSU Beachwatchers, under the lead of the Jefferson County MRC, will focus their monitoring efforts on weekends from May 1st through September 30th, but will also ensure consistent monitoring by coordinating with the above mentioned groups to provide monitoring during anticipated high use periods. WSU Beachwatchers will receive a training module from the DOH during the annual spring classes to provide an overview of the purpose, need, and methods for Mystery Bay monitoring. Using panoramic photographs and a map of Mystery Bay with existing boat/buoy locations, the Beachwatchers will record boat counts on a standardized data collection sheet. The WSU Beachwatchers' coordinator will be responsible for scheduling and collecting data sheets which will be transmitted to DOH on a monthly basis from May 1 through September 30 and quarterly thereafter.

What Can the Average Citizen Do?. – The public can also help in the monitoring and enforcement process by voluntarily keeping records documenting transient vessel use in Mystery Bay. As described above, if any vessel has anchored in the same area longer than 30 days, or for more than 90 days in any 365-day period, without DNR authorization, they are in trespass ("in the same area" means within a radius of five miles of any location where the

vessel previously anchored). The public can assist enforcement agencies by keeping written records documenting:

- 1) identifying characteristics of the vessel,
- 2) the location it is anchored or moored, and
- 3) the dates the vessel is present.

Once the vessel has remained longer than the time allowed, the public may notify DNR or Jefferson County of the unauthorized use. In the case of legal proceedings, it may be necessary for volunteers to sign an affidavit attesting to the fact that the information is true and correct.

To facilitate monitoring efforts the following materials have been developed:

- A map of Mystery Bay with existing boat/buoy locations, annotated with number of boats in each area which will necessitate a closure.
- Calendar to be developed with anticipated high boat use periods, volunteer monitoring schedule.
- Boat count sheet template.

These monitoring documents are included in Appendix G.

Objective 6 - Provide immediate notification to the DOH when boat numbers exceed marina threshold levels.

When a monitor discovers boat numbers that could exceed marina thresholds, WSU Beachwatchers will contact the DOH Shellfish Program at (360) 236-3330 during normal working hours or the pager at (360) 786-4183 outside of normal working hours. A map and table showing how many boats are allowed in each area of Mystery Bay are included in Appendix G. Monitors should include the following information:

- The date and time boat count was done,
- The number and location of transient boats (see Appendix G for area location map), and
- A photograph of the area (if a camera is available).

Note - In counting boats towards the NSSP marina threshold level, only boats large enough to accommodate a marine toilet will be counted; small boats that cannot reasonably accommodate a marine toilet such as open skiffs, kayaks, etc. will not be counted.

Upon notification, the DOH will:

- Assess the necessity for harvest restrictions,

- Attempt to contact the boat owner(s) responsible for the potential harvest restrictions and attempt to convince them to move their boat(s). This may also be attempted by local entities on behalf of the DOH.

If harvest restrictions are necessary, the DOH will:

- contact commercial shellfish operations as soon as practical and
- contact other stakeholders within 24 hours of notification by monitors, and
- if unauthorized moorage is long term (>30 days), contact the DNR and Jefferson County to notify them of unauthorized use so that they can begin the process of enforcement.

Adaptive Management and Effectiveness

In order to determine the success level of the Mystery Bay management plan, the stakeholder group will convene, at a minimum, once in the fall of 2010, after the boating season ends and once in the spring of 2011, before the boating season begins. Additional meetings will be scheduled if necessary. The success of the plan will be ranked as follows:

- A complete success if there are no closures because of too many boats;
- A significant success if closures (due to boats) are no more than two and limited in duration to no more than 14 days total and the bay is quickly re-opened to harvest.

If closures (due to boats) number greater than two or if closures last longer than 14 days cumulatively, the stakeholder group will reconvene as soon as practical, but no later than 45 days after notification, to evaluate the problem and take action, if necessary. The request to reconvene must come from one (or more) of the stakeholders. The DOH will be the point of contact for this request. Possible actions are, but not limited to, the following:

- Increase Public Outreach and Education
- Evaluation of monitoring data
- Try different voluntary strategies (see #1 below)
- Implementation of a mandatory "No Anchor Zone" (see #2 below)
- Impose Moratorium
- Increase Formal Federal Agency Action (see #3 below)
- Change County Enforcement Codes
- Seek Legislative Relief and/or State Agency Action

(1) As possible, move permitted and authorized mooring buoys into mooring field areas around the perimeter of the bay and out of the central corridor to help demarcate an informal navigation channel.

Moving mooring buoys to the perimeter of the bay and outside of the informal navigation channel and into mooring field areas, would reduce the use of the bay by transient vessels through displacement rather than by regulation. Transient users

would be less likely to anchor within a mooring field area because they would not have the space to anchor and they would be less likely to anchor in an area commonly used for navigation out of courtesy toward other transient vessels. Note – this strategy may actually tend to move buoys towards shellfish beds and the challenge will be to strike a balance between protecting shellfish beds from transient boaters, while keeping buoy densities within permissible limits.

It is recognized that achieving this objective is contingent upon finding additional funding. Moving existing mooring buoys that are currently permitted and authorized requires additional time and expense both in re-permitting and moving costs. Passing these costs onto individual users would likely be unpopular and public funds to implement this strategy are not readily available. It is recommended that existing buoys be moved in accordance with these objectives as public funds become available or as authorizations expire. This will be considered when authorizing new mooring buoys in accordance with section on permitting above.

(2) If necessary, promulgate regulation that would designate Mystery Bay as a no anchorage zone and formally establish a navigation channel.

Transient uses can be regulated by Jefferson County under local ordinance. DNR also has the ability to promulgate no anchorage regulations. If the voluntary no anchorage zone is not successful, then DNR and Jefferson County will coordinate to determine the most appropriate regulatory options to institute a formal no anchorage zone.

(3) As described in Appendix C, the Corps' Regulatory Program requires permits for the construction of any structure or the placement of any fill in the Nation's waters.

In Mystery Bay, the typical projects authorized in the past include the construction or installation of moorage facilities, mooring buoys, bank protection, and aquaculture related activities. The most common method for authorizing the installation of mooring buoys is Nationwide Permit (NWP) 10, which does not always require notification to the Corps. However, all permits issued by the Corps must not impact tribal treaty rights. In the summer of 2009, the Corps was notified by the Treaty Tribes of concerns to tribal treaty fishing rights related to the number of mooring buoys and moorage facilities in Mystery Bay. After meeting with various Tribal, Federal, state, and local agencies, the Corps issue a special public notice on Friday, January 22, 2010, regarding the use of Nationwide Permit 10 in Mystery Bay and possibly other parts of Puget Sound. As described in the public notice, the Corps has the option of leaving NWP 10 as is, adding regional conditions such as pre-construction notification in all instances or in certain areas, or revocation of NWP 10 completely or in certain areas. The Corps is currently reviewing the comments received from the public notice and will make a final decision based on the analysis of the issues. Future versions of this management plan could include any changes made by the Corps.

State Environmental Policy Act

If a lead agency sought to adopt this plan as an action under the State Environmental Policy Act (SEPA), first the proposal or adoption of rules, regulations and resolutions of any plan or program relating solely to governmental procedures containing no substantive standards would be exempt under SEPA, see WAC 197-11-800(19). Along with this exemption and in consideration of the programmatic overview provided by this management plan, the following existing environmental documents could be incorporated by reference per WAC 197-11-600 and 635 being available at the Jefferson County Department of Community Development for public inspection: Draft and Final Environmental Impact Statements (DEIS/FESIS) and addenda prepared in anticipation of adoption of the Comprehensive Plan in 1998. The DEIS and FEIS, dated February 24, 1997 and May 27, 1998, respectively, examined the potential cumulative environmental impacts of land use alternatives at the non project level in preparation of a comprehensive plan for Jefferson County. Finally, any proposals involving natural resource management such as issuance of leases for, and/or placement of mooring buoys designed to serve pleasure craft, are exempt from SEPA review under WAC 197-11-800(24).

Appendices

- Appendix A Q&A Factsheet
- Appendix B Introduction to Participating Stakeholders
- Appendix C Mystery Bay Legal Framework
- Appendix D Map(s) of Mystery Bay and List of Mooring Buoys
- Appendix E DOH Affidavit Form
- Appendix F Jefferson County Moratorium on new Mooring Buoys in Mystery Bay
- Appendix G Monitoring documents

Endorsements

The Mystery Bay Stakeholder Group has worked on this Management Plan since early 2008. Our goal has been to work collaboratively to develop a strategy to avoid future closure of Mystery Bay to shellfish harvesting while considering all uses of the bay. The undersigned acknowledge their participation in, and contribution to, the development of the Mystery Bay Management Plan.

Brady Scott Date
Washington State Department of Natural Resources

Bob Woolrich Date
Washington State Department of Health

Mark Toy Date
Washington State Department of Health

Mike Zimmerman Date
Washington State Parks

Kelly Toy Date
Jamestown S'Klallam Tribe

Al Scalf Date
Jefferson County Community Development Director

Gabrielle LaRoche Date
Jefferson County Marine Resources Committee

Jake Johnson
Marrowstone Island Shellfish Company

Date

Carl H. Johnson
Carl H. Johnson Clams & Oysters

Date

Hank Hazen
Marrowstone Island Community Association

Date

Rick Kirkwood
Marrowstone Island Community Association

Date

David Fyfe
Northwest Indian Fisheries Commission

Date

Alan Bogner
Office of Regulatory Assistance

Date

Robin Downey
Pacific Coast Shellfish Growers Association

Date

Amanda Stock
Plauché & Stock LLP

Date

Randy Hatch
Point No Point Treaty Council

Date

Paul McCollum Date
Port Gamble S'Klallam Tribe

Jessica Coyle Date
Port Gamble S'Klallam Tribe

Tamara Gage Date
Port Gamble S'Klallam Tribe

Alison O'Sullivan Date
Suquamish Tribe

Tom Ostrom Date
Suquamish Tribe

Viviane Barry Date
Suquamish Tribe

Michelle Walker Date
US Army Corps of Engineers

Rich Childers Date
Washington State Department of Fish and Wildlife

Margie Schirato Date
Washington State Department of Fish and Wildlife



Q&A Factsheet: Mystery Bay

Q. What is the issue and goal in Mystery Bay?

A. The issue is the threat of closure of shellfish harvesting in Mystery Bay because of too many boats anchored or moored near shellfish beds. The goal is to develop a strategy prior to May 1, 2010, that will avoid closure of Mystery Bay to shellfish harvesting. The strategy must consider all uses in the bay and include a long-term approach for the whole bay that allows sustainable coexistence of commercial shellfish operations, boat moorage, and other appropriate uses.

Q. Why the concern about shellfish safety?

A. Shellfish (oysters, clams and mussels) feed by filtering the water in which they live. One oyster can filter 50 gallons in a day. These animals ingest and concentrate whatever is in the water, which can include bacteria and viruses when they are present. Because people often eat shellfish raw or lightly cooked, shellfish harvested from polluted areas can be hazardous to eat. Because of these factors, shellfish are a highly regulated food.

Q. Why are we protecting commercial shellfish operations in Mystery Bay?

A. Mystery Bay shellfish operations are important to Jefferson County's economy and the bay's ecology. Eleven of Jefferson County's 26 shellfish companies do business in Mystery Bay. Operations include shellfish farms, seed sales, harvest and processing, with estimated sales of \$7 million annually—roughly 32 percent of the county's annual shellfish sales. At least 37 individuals are employed through Mystery Bay shellfish operations, not including local services providers or suppliers. Environmentally, shellfish are a key species that graze down phytoplankton as they eat, keeping marine waters clean.

Q: Why keep Mystery Bay open to shellfish harvest during the summer when conflicts with increased boating traffic might occur?

A. Summer is the busiest season for Mystery Bay shellfish farmers as this is when the greatest number of tourists come to the area – tourists hungry for fresh, local seafood! More than half of Mystery Bay's estimated \$7 million annual sales take place during this busy boating season.

Q. What is the concern about boat discharges?

A. There are two concerns. (1) Septic or other discharges from boats (intentional or unintentional) can concentrate in shellfish and, if ingested, make people ill. The more boats present, the higher the likelihood of discharges occurring. (2) Like all shellfish-producing states, Washington must comply with the shellfish growing water standards of the National Shellfish Sanitation Program (NSSP), as established by the US Food and Drug Administration, and administered here by the Department of Health (DOH).

Under the NSSP a "marina" is defined as any water area that is used for temporary or permanent docking or mooring for more than 10 boats. When an area meets this threshold, the DOH is required to develop a management plan to assure that shellfish in the area or adjacent to it are safe for consumption. The plan can include permanent or temporary closures and other protective measures.

Q. Why are the Tribes concerned about Mystery Bay?

A. Historically, Tribes have harvested shellfish for ceremonial, subsistence, and trade purposes. Commercial shellfish harvesting continues to be an important source of income for many Tribal citizens. Closures due to pollution or other environmental degradation are a direct impact to the Tribes' ability to access shellfish beds and violate their treaty rights. Treaty Tribes are also co-managers of fish and shellfish resources, along with the State of Washington. One of these co-management responsibilities is to ensure that shellfish harvested is safe for human consumption by following the NSSP guidelines.

Q. Water quality results have been fine. Why close the shellfish beds?

A. NSSP determines health risks by the number and location of boats, not water sample results. This is because marine toilets, as opposed to septic

systems, provide only limited or no treatment and the discharge can reach shellfish quickly and with little dilution. Because the discharges are sporadic, water samples rarely capture boating waste, especially considering that marine water is sampled only once every 60 days.

Q. Does Mystery Bay meet the NSSP definition of a marina?

A. DOH has determined that, at times, parts of Mystery Bay meet the NSSP definition of a marina. NOTE - DOH counts only boats that can accommodate a marine toilet.

Q. Will DOH exempt some boats from being counted in Mystery Bay?

A. Yes, the DOH will exempt a boat if it belongs to a property owner that lives immediately upland of their moored boat, and if the owner agrees that the boat will not be used overnight and will not discharge wastewater (documented by submission of a signed affidavit authorized by the DOH). This is the first time DOH has considered exempting boats from being counted.

Q. How many buoys/vessels are in Mystery Bay? How many of these uses are authorized?

A. As of May 2009, there were 59 mooring buoys in Mystery Bay, not counting the State Park buoys. There were 30-40 vessels moored year-round in the bay. Naturally, the bay sees increased uses in the spring and summer and the exact number of vessels changes frequently during this time.

Q. How many buoys/vessels are in Mystery Bay? How many of these uses are authorized?

A. According to the DNR's May 2009 report, of the 59 buoys in the bay:

- 25 were fully authorized or have pending applications in good standing
- 19 have been issued authorizations or pending applications that have questionable standing.
- 5 no longer apply or are incidental to other uses not involving mooring buoys
- 10 buoys not in good standing have been identified for removal.

As new information is received, these numbers will change.

Q. So, how many vessels can stay in Mystery Bay?

A. This has not been determined. This depends upon the long term plan for the bay, including the number of boats DOH can exempt. Efforts will be made to maximize the number of vessels while maintaining a viable commercial shellfish operation. Other factors—including protecting eelgrass, designating navigation channels, and controlling transient use—also will be involved in determining the carrying capacity of the bay.

Q. What is the DNR’s responsibility and how will they determine what buoys remain in Mystery Bay?

A. The DNR is the land manager (in this case, the bedlands under Mystery Bay) and, as such, is responsible for determining appropriate uses in the bay on behalf of all citizens of the state. The other agencies and Tribes involved with the stakeholder group act in a regulatory and stewardship capacity.

DNR, in coordination with the County, has determined the authorization status of buoys in Mystery Bay. Some are fully authorized, while others are in various stages of the authorization process. Some buoys are simply not authorized.

DOH regulations, along with other stakeholder input, will help determine the authorization status of buoys in the bay. If there is an eventual determination that there are too many buoys for non-exempt vessels, DNR will develop an equitable process for buoy authorization.

Q. What authorizations are necessary in order to have a fully legal mooring buoy in Mystery Bay?

A. The DNR requires either a registration, a license or a lease depending on individual factors. Jefferson County requires a shoreline development permit or exemption. WDFW requires a Hydraulic Project Approval. The U.S. Army Corp of Engineers automatically covers permitting of mooring buoys under Nation Wide Permit 10 if the use meets the terms and conditions covered by that general authorization.

Introduction to Participating Stakeholders:

- The Washington State Department of Natural Resources (DNR) manages state-owned aquatic lands on behalf of the citizens of the state. DNR serves in a proprietary capacity as a landlord, requiring leases or other authorizations for any exclusive use (e.g., mooring buoys) of submerged lands when such uses exceed the scope of navigational activities.
- The Washington State Department of Health (DOH) serves in a regulatory capacity and monitors and certifies both water quality and the suitability of shellfish harvested for human consumption.
- The Washington State Department of Fish and Wildlife (WDFW) serves in a regulatory capacity and requires a hydraulic project approval (HPA) for any construction or other work in the water, including mooring buoys.
- The Washington State Parks and Recreation Commission (State Parks) manages state parks for the benefit of all citizens. State Parks operates Mystery Bay State Park, which includes a dock and approved moorage area.
- Mystery Bay lies within Jefferson County and the County exercises all traditional land use authority over the waters of the Bay. The County administers the Shoreline Master Program and has the authority to regulate all uses of the surface waters to protect human health and safety.
- The Treaty Tribes are co-managers of fish and shellfish resources, along with the state of Washington. The Jamestown S'Klallam, Port Gamble S'Klallam, Lower Elwha Klallam, and Suquamish Tribes exercise treaty-reserved rights to harvest fish and shellfish in Mystery Bay.
- Jefferson County Marine Resources Committee - The Marine Resources Committee (MRC) is an advisory group to the Board of County Commissioners and their mission is to protect Jefferson County marine resources. The MRC members are citizen volunteers who are committed to work closely with other community members - homeowners, business owners, recreational enthusiasts, and commercial and sport fishers - to reduce or stop the decline of the marine habitat.
- Pacific Coast Shellfish Growers Association (PCSGA) - Founded in 1930, the PCSGA represents growers in Alaska, Washington, Oregon, California, and Hawaii. PCSGA works on behalf of its members on a broad spectrum of issues, including environmental protection, shellfish safety, regulations, technology, and marketing. The mission of PSI is to conduct research on shellfish and disseminate scientific and technical information to growers, regulators and others in the research community.
- Office of Regulatory Assistance - ORA is a small government office with a big agenda—improve regulatory systems and assist the citizens who work with those systems. ORA helps businesses and citizens navigate complex permitting and licensing systems and works to improve those systems. As a part of the Governor's Office, ORA is uniquely positioned to lead collaboration between agencies and governments. ORA's success to date is due to strong support from partners who share Governor Gregoire's vision of improved and simplified systems that achieve better results.

- Point No Point Treaty Council - The Treaty Council was created in 1974, shortly after the landmark court decision, *U.S. v. Washington*, commonly called the "Boldt Decision" (see Legal Framework in Appendix C) which restored harvest rights to western Washington treaty tribes. The Treaty Council confirms the reserved rights established in the 1855 Treaty of Point No Point and implements the goals set by member tribes for resource conservation, fisheries management, and protection of natural resources.

The Treaty Council serves two federally recognized treaty tribes – the Port Gamble S’Klallam and the Jamestown S’Klallam Tribes. The Treaty Council’s primary purpose is to assist member tribes in exercising their treaty-reserved rights to harvest finfish and shellfish. Treaty Council staff, including finfish and shellfish biologists, wildlife biologists, habitat biologists, and fisheries planners work together to ensure that treaty rights are preserved and treaty fisheries and harvests occur in a biologically sound manner.

- Northwest Indian Fisheries Commission (NWIFC) - The NWIFC is a support service organization for 20 treaty tribes in western Washington. Headquartered in Olympia, the NWIFC employs approximately 65 people with satellite offices in Mount Vernon and Forks. The NWIFC was created following the *U.S. v. Washington* ruling (Boldt Decision) that re-affirmed the tribes’ treaty-reserved fishing rights and established them as natural resources co-managers with the State of Washington. The commission is composed of representatives from each member tribe who elect a chair, vice chair and treasurer. The role of the NWIFC is to assist member tribes in their role as natural resources co-managers. The NWIFC also provides a forum for tribes to address shared natural resources management issues and enables the tribes to speak with a unified voice in Washington, D.C.
- Marrowstone Island Community Association (MICA) - The mission of MICA is to provide a common meeting place for residents and landowners on Marrowstone Island, to assist in the orderly and planned development of the Island, and to serve as a forum for education and information. MICA meets about 6 times throughout the year at the Nordland Garden Club Building and has a broad range of interests and projects, from hosting the yearly Strawberry Festival to petitioning the EPA Region 10 to designate Marrowstone Island as a Sole Source Aquifer.
- US Army Corps of Engineers (Corps) - The mission of the Corps Regulatory Program is to protect the Nation's aquatic resources, while allowing reasonable development through fair, flexible, and balanced permit decisions. The Corps evaluates permit applications for essentially all construction activities occurring in the Nation's waters, including wetlands. The Corps has two main regulatory authorities. Section 10 of the Rivers and Harbors Acts of 1899 covers the construction, excavation, or deposition of materials in, over, or under navigable waters of the US, or any work that would affect the course, location, condition, or capacity of those waters (this includes mooring buoys). Section 404 of the Clean Water Act covers the discharge of dredged or fill material into waters of the United States, including wetlands.

Mystery Bay Legal Framework

Treaties and Subsequent Court Decisions

Treaty of Point No Point, 1855

ARTICLE 4 - The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens.

Boldt Decision

On February 12, 1974, in U.S. v. Washington, Federal Judge George Boldt issued a ruling that affirmed the right of most of the tribes in the state of Washington to continue to harvest salmon up to 50% of the harvestable number of fish. Many opponents of this case couch it as a "grant" of rights to the tribes. More accurately, the decision was simply affirming that when the Tribes released their interest in the millions of acres of land in Washington State through a series of treaties signed in 1854 and 1855, they reserved the right to continue fishing. For example, the Treaty of Point No Point (1855) includes the following language: "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with* all citizens of the United States " Most of the treaties negotiated by Territorial Governor Isaac Stevens included this, or very similar, language.

In 1979, the Ninth Circuit Court of Appeals upheld Boldt's ruling, and on July 2, 1979, the U.S. Supreme Court largely affirmed it. Principles established by the Boldt Decision have since been applied to other resources, including shellfish.

*To interpret this article of these treaties, United States District Court Judge Boldt looked at the minutes of the treaty negotiations to determine the meaning of "in common with" as the United States described it to the Tribes, and determined that the United States intended for there to be an equal sharing of the fish resource between the Tribes and the settlers. Of this, Judge Boldt wrote, "By dictionary definition and as intended and used in the Indian treaties and in this decision, 'in common with' means sharing equally the opportunity to take fish.

Rafeedie Decision

After hearing testimony from tribal elders, biologists, historians, treaty experts, as well as testimony from private property owners and non-Indian commercial shellfish growers, Federal District Court Judge Edward Rafeedie followed in the footsteps of the Boldt Decision. He ruled the treaties' "in common" language meant that the tribes had reserved harvest rights to half of all shellfish from all of the usual and accustomed places, except those places "staked or cultivated" by citizens – or those that were specifically set aside for non- Indian shellfish cultivation purposes.

"A treaty is not a grant of rights to the Indians, but a grant of rights from them," Rafeedie wrote in his December 1994 decision, adding that the United States government made a solemn promise to the tribes in the treaties that they would have a permanent right to fish as they had always done. Rafeedie ruled all public and private tidelands within the case area are subject to treaty harvest, except for shellfish contained in artificially created beds.

Since the U.S. Supreme Court's final refusal in 1999 to hear the case, several parties, including the tribes and shellfish growers, have been working on an implementation plan under the guidance of Seattle Federal Court Judge Robert Lasnik.

The Public Trust Doctrine

The Public Trust Doctrine is a legal principle derived from English Common Law that has been adopted by Washington courts. The essence of the doctrine is that the navigable "waters of the state" are a public resource owned by and available to all citizens equally for the purposes of navigation, conducting commerce, fishing, recreation, and similar uses. This trust is not invalidated by private ownership of the underlying land.

The doctrine limits private use of tidelands and other shorelands to protect the public's right to use the waters of the state. The Public Trust Doctrine does not allow the public to trespass over privately owned uplands to access the tidelands. It does, however, generally protect public use of navigable water bodies below the ordinary high water mark.

Protection of the trust is a duty of the State, and the Shoreline Management Act (SMA) is one of the means by which that duty is carried out. The doctrine requires a careful evaluation of the public interest served by any action proposed. This requirement is fulfilled in large part by the planning and permitting requirements of the SMA.

Local governments should consider public trust doctrine concepts when developing comprehensive plans, development regulations, and shoreline master programs. There are few

"bright lines," however, as the Public Trust Doctrine is common law, not statutory law, the extent of its applicability can only be determined by state court decisions.

Public Trust Doctrine – Navigational Uses

- The government has power to regulate the public's right to navigation and anchorage.
- The aquatic lands managed by the DNR are subject to the Public Trust Doctrine, which gives the public the right to engage in navigation, together with incidental rights regarded as corollary to navigation, without authorization from the DNR.
- The right to navigate includes the right to incidental anchorage. However, if a vessel remains anchored in one place too long, it is no longer engaged in navigation.

Transient uses (e.g., anchorage zones) can be regulated under county ordinance. The DNR also has the ability to promulgate regulation in this regard under the new Recreation WAC, although the DNR's process is more cumbersome than the County process.

Jefferson County and the Shoreline Management Act

Shoreline Management Act (SMA)

Washington's SMA was passed by the Legislature in 1971 and adopted by the public in a 1972 referendum. The goal of the SMA is "to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines."

The Act establishes a broad policy giving preference to uses that: protect the quality of water and the natural environment, depend on proximity to the shoreline ("water-dependent uses"), and preserve and enhance public access or increase recreational opportunities for the public along shorelines.

The SMA establishes a balance of authority between local and state government. Cities and counties are the primary regulators but the state (through the Department of Ecology) has authority to review local programs and permit decisions.

Shoreline Master Program (SMP)

Under the SMA, each city and county adopts an SMP that is based on state guidelines but tailored to the specific needs of the community. More than 200 cities and all 39 counties have SMPs. Local SMPs combine both plans and regulations. The plans are a comprehensive vision of how shoreline areas will be used and developed over time. Regulations are the standards that shoreline projects and uses must meet. Note - On December 7, 2009, after 30 hours of deliberations and weighing hundreds of public comments, Jefferson County commissioners

unanimously approved a an update to the SMP. The next step is submittal to Department of Ecology for final review and approval.

Shoreline permits

Each local government has established a system of permitting for shoreline development. Substantial Development Permits are needed for projects costing over \$2,500, or those that materially interfere with the public's use of the waters. Some projects and activities are simply prohibited by local SMPs or under the policy of the Act. However, it is far more common that the issue is how a development should be done - not whether or not it should be done. Local governments may also issue Conditional Use or Variance permits to allow flexibility and give consideration to special circumstances. Ecology must approve all conditional use and variance permits. Local governments issue approximately 1,000 permits every year.

State Agency Responsibilities

Washington Department of Natural Resources (DNR)

Aquatic Land Ownership and Management Authority

Washington State took absolute title to the beds and shores of navigable waters under the Equal Footing Doctrine when it was admitted to the Union in 1889 and the State Legislature has delegated the proprietary authority over state-owned aquatic lands to DNR [RCW 79.105.010 – 030]. Anyone wishing to use state-owned aquatic lands in a way that will interfere with the use by the general public will require authorization from the DNR by way of agreement, lease, permit, or other instrument [WAC 332-30-122]. All uses must comply with statutory requirements [RCW Chapters 79.105 through 79.140].

Point at which DNR Asserts its Proprietary Interest

The DNR asserts its proprietary interest against vessels at the point the vessel ceases navigating and engages in long term moorage or anchoring over state-owned aquatic lands [WAC 332-30-122(1)(a)]. The DNR regards 30 days as the outer limit of transient moorage and anchoring— stays longer than that requires authorization from the DNR by way of agreement, lease, permit, or other instrument [See, e.g., WAC 332-52-155].

Leases and Licenses:

For leases and licenses, the DNR follows its general authority regarding authorizing uses of state-owned aquatic lands. The general process after receiving an application is as follows:

1. The DNR considers:
 - if the use is appropriate at the requested location,
 - whether applicant has secured all regulatory permits, and
 - if applicant addresses any other concerns
2. The DNR then decides whether to process or deny application.
3. If the application is NOT denied, then the DNR will issue an authorization contract.

NOTE - Licenses are revocable authorizations; Leases are not.

Registrations:

People may register their mooring buoy for a free use (RCW 79.105.430 below), if they meet the following standards:

1. They are abutting (waterfront) residential landowners.
2. It is not in a harbor area and there are no prior rights to the land.
3. The boat moored is for private recreational use of the occupant of the abutting waterfront property.
4. The boat is not used commercially or for a residence (i.e. a live-aboard).
5. The boat is not over 60 feet in length.
6. The use meets all other local, state and federal rules and regulations.

The general process after receiving a registration form (similar to Leases and Licenses above) is as follows:

1. The DNR considers:
 - if the use is appropriate at the requested location,
 - whether applicant has secured all regulatory permits, and
 - if applicant addresses any other concerns
2. If the above conditions are met, the DNR will assign an authorization number and notify the user that the registration has been processed. The DNR does not issue written lease or license documents for mooring buoys registered under authority of RCW 79.105.430.

NOTE - Registrations can be revoked by the DNR through a "Finding of Public Necessity" [RCW 79.105.430(3)].

Excerpts from RCW 79.105.430 - Mooring buoys

The abutting residential owner to state-owned shorelands, tidelands, or related beds of

navigable waters, other than harbor areas, may install and maintain a mooring buoy without charge if the boat that is moored to the buoy is used for private recreational purposes, the area is not subject to prior rights, including any rights of upland, tideland, or shoreland owners and the buoy will not obstruct the use of mooring buoys previously authorized by the department.

The buoy cannot be sold or leased separately from the abutting residential property. The buoy cannot be used to moor boats for commercial or residential use, or to moor boats over sixty feet in length.

The permission granted for installing a mooring buoy is subject to applicable local, state, and federal rules and regulations governing location, design, installation, maintenance, and operation of the mooring buoy, anchoring system, and moored boat.

The permission to install and maintain a recreational dock or mooring buoy may be revoked by the DNR, or the DNR may direct the owner of a recreational dock or mooring buoy to relocate their dock or buoy, if the DNR makes a finding of public necessity to protect waterward access, ingress rights of other landowners, public health or safety, or public resources. Circumstances prompting a finding of public necessity may include, but are not limited to, the dock, buoy, anchoring system, or boat posing a hazard or obstruction to navigation or fishing, contributing to degradation of aquatic habitat, or contributing to decertification of shellfish beds otherwise suitable for commercial or recreational harvest. The revocation may be appealed. Nothing in this section authorizes a boat owner to abandon a vessel at a recreational dock, mooring buoy, or elsewhere.

Unauthorized uses:

The following process has been used to address unauthorized mooring buoys:

1. The DNR places tag on buoy, notifying owner that buoy is not authorized and that the owner needs to contact the DNR to seek authorization or remove the buoy;
2. If the DNR receives contact, they proceed with the appropriate process as described above; if the DNR does not receive contact, a second tag is placed that provides 30-day notice of removal unless the owner makes contact with the DNR;
3. Proceed with enforcement, which may involve removal or trespass action in court.

Washington Department of Fish and Wildlife (WDFW) - Hydraulic Project Approval (HPA)

WDFW review and approval is needed for all structures proposed and activities conducted in the water, including mooring buoys. The WDFW reviews applications to ensure the protection of fish and shellfish and their habitats and has specific requirements for structures in or near water through their HPA. The WDFW may require mitigation for damage to fish life or habitat resulting from project installation and construction. Construction on your project can only

occur during designated timeframes or work windows. Contact the Area Habitat Biologist to determine specific requirements for your location and to determine work windows. Note - If your buoy has been installed longer than 2 years, you do not need an HPA from the WDFW.

Federal Agency Responsibilities

U.S. Army Corps of Engineers (Corps) – Section 10

The mission of the regulatory program of the U.S. Army Corps of Engineers (Corps) is to protect the nation's aquatic resources, while allowing reasonable development through objective permit decisions. The Corps permit evaluation process balances the need for proposed project with protection of the nation's aquatic environment. The Corps evaluates permit applications for essentially all construction activities occurring in the nation's waters under Section 10 of the Rivers and Harbors Acts of 1899. Section 10 covers the construction, excavation, or deposition of materials in, over, or under navigable waters of the U.S., or any work that would affect the course, location, condition, or capacity of those waters. Under Section 10, the Corps also maintains and protects navigation of the nation's waters and finally, Section 10 is the Corps regulatory authority related to mooring buoys.

The level of the Corps permit evaluation is commensurate with the level of the environmental impacts and the aquatic functions and values involved in the particular area being impacted. All permit decisions made by the Corps follow an evaluation process involving avoidance, minimization, and compensation for unavoidable losses of aquatic functions and values. All permit decisions are subject to various other Federal laws and the Corps consults with other agencies for compliance. Important among these other laws are the Endangered Species Act, the National Historic Preservation Act, the Magnuson-Stevens Fisheries Conservation and Management Act (involving protection of essential fish habitat), Water Quality Certifications, Coastal Zone Management Consistency Determinations, and Tribal trust issues. Compliance with each of these authorities often requires consultation with other agencies and results in additional restrictions on the proposed work and compensatory mitigation for impacts to the resources protected by these Federal laws.

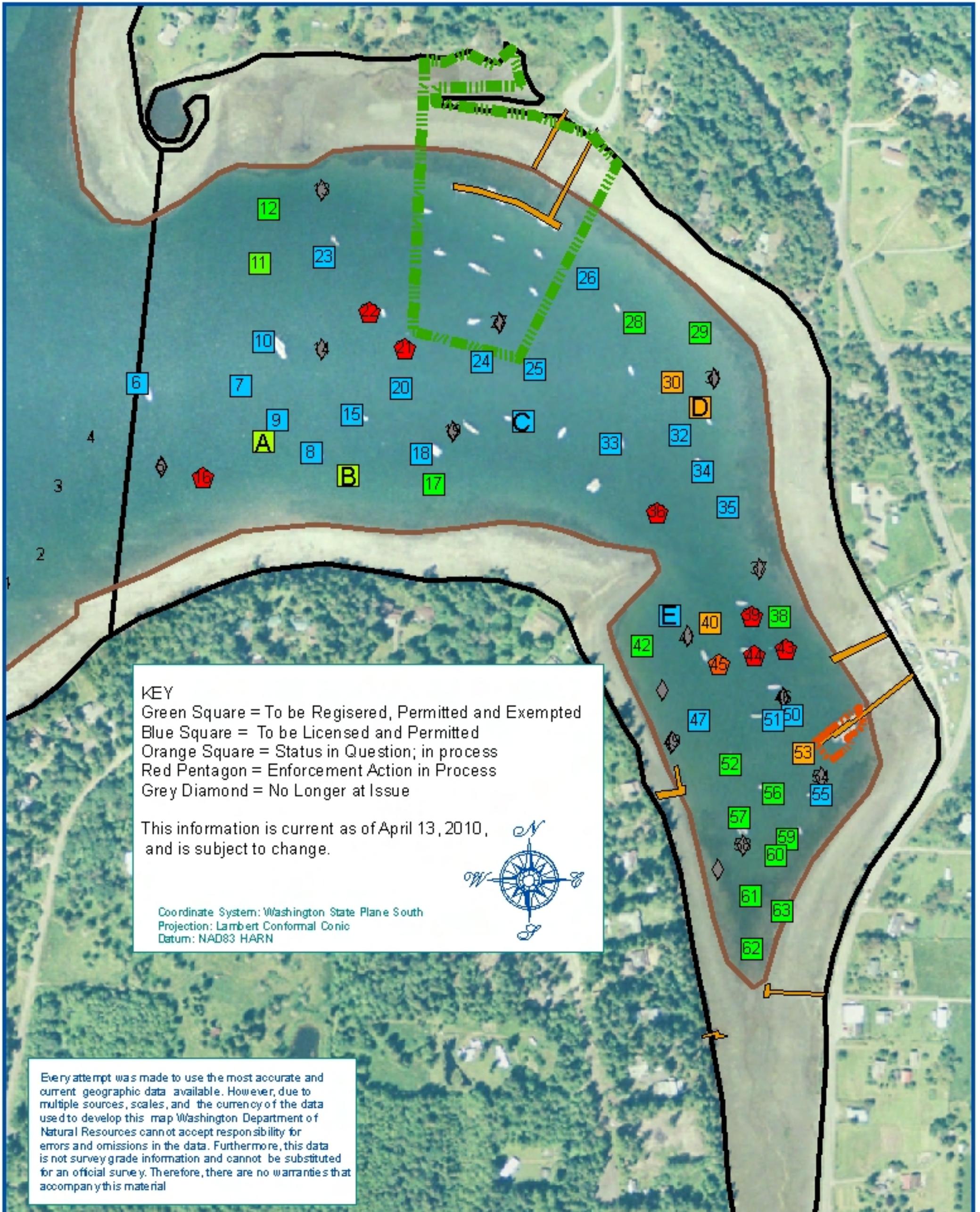
The type of permit review process used by the Corps to issue a permit depends on the design and location of the project. The different processes include standard individual, letter of permission (LOP), nationwide (NWP), and regional general (RGP) permits, in order of most to least complex and/or impacting project. The standard individual permit is for larger, more complex or controversial projects and includes a 30-day public notice comment period. The LOP is for Section 10-only projects that do not meet the terms and conditions of a NWP/RGP, but are not controversial. Typically, this is for individual pier, ramp, or float moorage facilities.

NWPs and RGPs must be minimally impacting, both individually and cumulatively, and are issued on either a national or regional basis. Projects must meet all the terms and conditions of

the NWP/RGP. Verification letters are issued for those requiring a pre-construction notification to the Corps or for those projects submitted to the Corps for review. Most NWPs require notification to the Corps because of the presence of ESA listed species or critical habitat. Relative to mooring buoys, two common NWPs are the NWP 10 for construction and installation of mooring buoys (non-commercial, single boat) and the NWP 3 for the repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure.

Note – The Corps' authorities also include Section 404 of the Clean Water Act that covers the discharge of dredged or fill material into waters of the United States, including wetlands. As this does not pertain to mooring buoys, please visit the Corps' web site for details regarding this authority.

Mystery Bay Management Plan- Appendix D



Tag #	Jefferson County SMP #	DNR Authorizaion #	Current Standing with DNR	DNR Priority Date
5				
6	SDP00-00018	23-077913	Issued License	2/1/2001
7	XMP99-00055	23-077912	Issued License	2/1/2001
8	XMP 99-0045	23-077911	Issued License, Extension in process	12/1/2000
9	SDP 05-00007	23-077832	Issued License, Extension in process	9/15/2005
10	SDP89-00013.12 SDP 05-36	23-164001	Expired License, Extension in Process	7/20/1992
11	XMP99-00049	23-085522	Issued Registration	n/a
12	XMP93-00023	23-085523	Issued Registration	n/a
13			Not at Issue	n/a
14			Not at Issue	n/a
15	XMP99-00056	23-077938	Issued License	2/1/2001
16			Owner planning to vacate use	n/a
17	XMP92-00049	23-085524	Issued Registration	n/a
18	SPD93-00008	23-085715	Pending License in process	1/17/2008
19	SDP 91-0038		Not at Issue	n/a
20	XMP99-00058	23-077940	Issued License	2/1/2001
21			Owner planning to vacate use	n/a
22	SDP 92-00010		DNR Scheduled to Pull Buoy	n/a
23	Non-Conforming Use	23-085602	Pending License in process	5/8/2008
24	SPD91-00009	23-085533	Pending License in process	11/24/2008
25	SPD96-0003	23-085714	Pending License in process	1/8/2008
26	SPD89-0013	23-085532	Pending License in process	10/24/2007
27			Not at Issue	n/a
28	XMP93-00015	23-081816	Issued Registration	n/a
29	XMP96-00029	23-081820	Issued Registration	n/a
30	?		Need Additional Information	5/1/2009
31			Not at Issue	n/a
32	SDP90-00011	23-085534	Pending License in process	10/7/2008
33	SDP 92-0009	23-085713	Pending License in process	9/2/2008
34	SDP-89-0013.1-12	23-164002	Expired License, Extension in Process	7/1/1992
35	SDP 89-0013.1	23-077537	Issued License, Extension in process	5/23/2005
36			Owner planning to vacate use	n/a
37			Not at Issue	n/a
38	XMP-930012	23-085717	Issued Registration	n/a
39		23-83659	DNR Scheduled to Pull Buoy	n/a
40	SDP 89- 13.1		Need Additional Information	?
41			Not at Issue	n/a
42	XMP 94-00013	23-085525	Issued Registration	n/a
43			Owner planning to vacate use	n/a
44			Owner planning to vacate use	n/a
45			Relocating Use to 'A' (see below)	n/a
46	SDP 90-0002	23-081995	Not at Issue	n/a
47	SDP 08-0025	23-085531	Pending License in process	1/15/2008
48			Not at Issue	n/a
49			Not at Issue	n/a
50	Non-Conforming Use	23-085716	Pending License in process	8/27/2008
51	SDP96-0008	23-085530	Pending License in process	11/20/2007
52	Non-Conforming Use	23-081817	Issued Registration	n/a
53	Non-Conforming Use		Need Additional Information	?
54			Not at Issue	n/a
55	XMP 87-0034	23-085529	Pending License in process	10/18/2007
56	SDP-89-0013.1-12	23-085521	Issued Registration	n/a
57	Non-Conforming Use	23-085526	Issued Registration	n/a
58			Not at Issue	n/a
59	Non-Conforming Use	23-085527	Issued Registration	n/a
60	Non-Conforming Use	23-081819	Issued Registration	n/a
61	XMP 88-00031	23-085528	Issued Registration	n/a
62	Non-Conforming Use	23-081992	Issued Registration	n/a
63	Non-Conforming Use	23-081822	Issued Registration	n/a
A	SDP 08-00060	23-085617	Issued Registration	n/a
B	SDP- 09-00047	23-085642	Issued Registration	n/a
C	Non-Conforming Use	23-85601	Pending License in process	11/8/2007
D	XMP 93-0017	Pending	Need Additional Information	?
E	SDP- 89-0013.1, 1-12	23-164003	Pending License in process	7/1/1992

MOORING BUOY AFFIDAVIT

State of Washington)
) SS: Mystery Bay mooring
 County of Jefferson)

I _____, residing at

_____ being first duly sworn on oath deposes and says: that I own a mooring buoy in Mystery Bay with the following description:

Location:	Latitude _____		
	Longitude _____, NAD 83		
DNR Authorization No.:			
Description of boat usually moored there:			
Type of toilet facilities on boat (check one):			
<input type="checkbox"/>	I have no toilet facilities on the boat	<input type="checkbox"/>	I have a portable toilet
<input type="checkbox"/>	I have a holding tank with a dye tablet	<input type="checkbox"/>	I have another type of toilet

I certify under penalty of perjury that any boat moored to this buoy will

- Not have overnight occupants
- Not discharge any toilet waste into Mystery Bay
- Not allow gray water (from showers, laundry or kitchen) or other substances to drain into Mystery Bay
- Dispose of all toilet waste and gray water properly in upland sewage systems or at a boat pump-out station

_____ Date _____
 Name:

I certify that I know or have satisfactory evidence that _____ is the person who appeared before me, and is the owner of the mooring buoy described above. I further certify that said person acknowledged the foregoing statement to be the free and voluntary act of said person.

SWORN AND SUBSCRIBED before me this _____ day of _____, _____ by

 Notary Public Name:

In and for the State of Washington

My Commission expires: _____

WHEREAS, Mystery Bay is a small bay located near Kilisut Harbor, near Port Townsend Bay, Admiralty Inlet and the Strait of Juan de Fuca, all being marine waters of the State of Washington;

WHEREAS, a small community named Nordland is located along Mystery Bay with rural residential as the primary zoning designation and this area includes a one acre commercial zone called a convenience crossroads;

WHEREAS, Mystery Bay, being a marine Shoreline of the State, is utilized by residential, recreational and commercial uses, contains a small salt marsh, eelgrass beds, spawning habitat for sand lance, and is an over wintering area for diving ducks;

WHEREAS, Mystery Bay has commercial shellfish beds, residential development with docks, mooring buoys and active use by the boating public;

WHEREAS, in 2008 Jefferson County Department of Community Development (DCD) in consultation with the Department of Natural Resources (DNR), Department of Health (DOH), Department of Fish and Wildlife (WDFW) and local Tribes began an investigation process to determine local circumstances as to the lawful installation of mooring buoys in Mystery Bay;

WHEREAS, there are competing interests in Mystery Bay between shellfish growers, boaters, near shore residential uses and upland uses;

WHEREAS, water dependent and related uses include recreational boating, recreational shellfish harvesting, commercial shellfish harvesting, transient boaters, moored vessels on mooring buoys, swimming docks, and a State Park on this water body;

WHEREAS, the annual growing area review report issued by Washington State Department of Health on December 31, 2008 noted the area is listed as “threatened” due to the potential of pollution from a large number of boats that moor or utilize the water areas of Mystery Bay;

WHEREAS, the Washington State Department of Health (DOH) Office of Shellfish and Water Protection issued their annual growing area review report stating that Mystery Bay meets water quality standards but is threatened with a downgrade in classification due to the amount of boating activity;

WHEREAS, a increase in the number of boats within Mystery Bay may adversely impact commercial shellfish harvesting operations;

WHEREAS, DOH has informed Jefferson County that under the National Shellfish Sanitation Program (NSSP) parts of the Approved classification of Mystery Bay may now meet the definition of a marina;

WHEREAS, if Mystery Bay is defined as a marina, it can not be approved under the DOH commercial shellfish classification system;

WHEREAS, DOH reclassified a portion of Mystery Bay from approved to conditionally approved on August 6, 2009 based upon a synopsis prepared by DOH staff;

WHEREAS, conditionally approved means a closure of shellfish harvesting during the boating season generally May 1 – October 1 of each year:

WHEREAS, a commercial shellfish closure has adverse economic impacts on local business;

WHEREAS, Jefferson County is currently updating their Shoreline Master Program including provisions for permitting and placement of mooring buoys;

WHEREAS, Jefferson County is participating in a stakeholders' group of agencies, tribes and shellfish growers in order prevent any closures of Mystery Bay;

WHEREAS, a bay management plan is one element of the work plan for the stakeholders group;

WHEREAS, a bay management plan would examine the competing interests for using Mystery Bay and would include evaluation of mooring buoy placements;

WHEREAS, permitting additional mooring buoys in Mystery Bay may exacerbate problems associated with over use of the bay and lead to potential shellfish closures;

WHEREAS, it is in the public interest to protect commercial shellfish harvesting in Mystery Bay;

NOW, THEREFORE, BE IT ORDAINED by the Board of County Commissioners of Jefferson County as follows:

SECTION 1. A moratorium is placed on submittals of shoreline permit applications to the Jefferson County Department of Community Development for placement of mooring buoys in Mystery Bay, except when: 1) the state Department of Health notifies the Jefferson County Shoreline Administrator that movement or placement of a mooring buoy would contribute to preventing or lifting a shellfish harvesting closure; or 2) the Jefferson County Shoreline Administrator determines that an application for the movement or placement of a mooring buoy must be accepted and reviewed by Jefferson County in furtherance of an adopted Mystery Bay Management Plan.

SECTION 2. Pursuant to the provisions of ESHB 1379 which amends and adds sections to Ch. 90.58 RCW, the Shoreline Management Act, this moratorium does not

affect any lawful mooring buoys in place at Mystery Bay on or before the date this Ordinance becomes effective.

SECTION 3. Severability.

If any provision of this ordinance or its application to any person or circumstance is held invalid, the remainder of the ordinance, or the application of the provision to other persons or circumstances is not affected.

SECTION 4. The work plan is hereby incorporated by reference, see Attachment A.

SECTION 5. Effective date.

This ordinance shall take effect immediately after passage and shall remain effective for six months or until repealed by the BOCC.

APPROVED AND ADOPTED this 23rd day of November, 2009

SEAL:

JEFFERSON COUNTY
BOARD OF COUNTY COMMISSIONERS
David Sullivan, Chair
Phil Johnson, Member

ATTEST:

Erin Lundgren
Deputy Clerk of the Board

John Austin, Member
APPROVED AS TO FORM:

David Alvarez
Deputy Prosecuting Attorney

Attachment A

Workplan

Issue: The issue is the threat of closure of shellfish harvesting in Mystery Bay because of too many boats anchored or moored near shellfish beds.

Solution: Considering all uses, develop a Mystery Bay Management Plan to manage the placement and location of boats, anchor/no-anchor zones, and mooring buoys and to protect water quality to resolve and avoid closures of the bay to shellfish harvesting.

Strategy: Continue collaborative efforts between tribal, federal, state and local governments, including local stakeholders; engage the public; promulgate new regulations for mooring buoys in the Jefferson

County Shoreline Master Program; and prepare a plan for Mystery Bay in partnership with stakeholders that achieves the following:

- a. Reduce the number of mooring buoys around shellfish harvest sites "below marina threshold levels"
- b. Make the entire bay a voluntary "No Anchor Zone" and direct transient boaters to the state park in order to prevent emergency closures due to number of transient moorages. (Note – this strategy would have the side benefit of maximizing the potential availability for mooring buoys)
- c. Remove mooring buoys and vessels not properly permitted or authorized. (Note – the Stakeholder group is using the mooring buoys currently permitted by the county as a baseline for authorized buoys)
- d. Strategically relocate as many mooring buoys as possible to open up an area for navigation and to further discourage transient use near shellfish beds, i.e., an array of mooring buoys in front of shellfish beds would deter transient boaters from anchoring in that area.
- e. Establish Community Monitoring/Education effort – Establish monitoring and reporting process to document boat use in Mystery Bay in order to maintain levels of use consistent with shellfish harvest regulations.

Calendar of events:

November 23, 2009	6-month Moratorium on mooring buoys placed by BOCC
December 7, 2009	Stakeholder sub-committee meeting to begin drafting Mystery Bay Management Plan
December 10, 2009	Stakeholder's group meeting
December 31, 2009	Jefferson County formally submits the locally approved Shoreline Master Program (SMP) to Washington State Department of Ecology (DOE)
January 2010	DOE begins formal review process on the locally approved SMP
January 14, 2010	Stakeholder's group meeting to finalize and release draft Mystery Bay Management Plan for public review (two weeks before public meeting)
January 28, 2010	Public Meeting at Fort Flagler State Park on the draft Mystery Bay Management Plan
February 11, 2010	Stakeholder's group meeting to finalize Mystery Bay Management Plan
February 23, 2010	Board of County Commissioners adopt the Mystery Bay Management Plan
February 24, 2010	Agency action begins to implement plan and achieve solution
March 11, 2010	Stakeholder's group meeting
March 15, 2010	DOH public notice on proposed Mystery Bay growing area classification
May 1, 2010	Mystery Bay Management Plan implemented and boating season starts
May 23, 2010	Moratorium lifted or extended depending on status of SMP

The remedy of the issues and circumstances:

The moratorium is effective from November 23, 2009 through May 23, 2010 and would be extended for a six month period and/or to the date that Ecology approves the SMP. Once Ecology approves the new SMP and Jefferson County enacts the SMP locally, the moratorium would be lifted and applications for mooring buoys would be processed under the new SMP to a decision point of approval or denial.