



# Common Questions and Answers

February 2001

When shellfish beds around Puget Sound are closed or threatened by pollution, local governments are responsible for taking action to protect and restore those waters. State law Chapter 90.72 RCW encourages, and in some cases requires, counties to establish shellfish protection districts and programs to curb the loss of shellfish beds by sources of nonpoint pollution. "Nonpoint pollution" refers to pollution caused by one or many activities that take place across the landscape. Sources include stormwater runoff, failing on-site sewage systems, and runoff from farm animal wastes.

In October and November of 2000, the state Department of Health closed shellfish harvesting in two areas of Thurston County. The state closed nine acres in Henderson Inlet and 74 acres in Nisqually Reach. These closures mean Thurston County must create a shellfish protection district by July, 2001.

This publication, excerpted from a Puget Sound Water Quality Action Team document, answers common questions about shellfish protection districts.



## Creating a shellfish protection district

### What is a shellfish protection district?

A shellfish protection district is a geographic area designated by a county to protect water quality and tideland resources. The district provides a mechanism to generate local funds for water quality services to control nonpoint sources of pollution. The district also serves as an educational tool, drawing attention to the pollution sources that threaten shellfish growers.



### Are there areas where shellfish are not plentiful or valuable enough to justify the creation of a shellfish protection district?

Virtually all areas of Puget Sound and the outer coast have sufficient shellfish resources to justify the creation of shellfish protection districts. The decision to create a shellfish protection district, however, will depend not only on the character of the resource itself, but on a number of other factors which are outlined in this fact sheet.



THURSTON COUNTY  
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## **Are there special rules or procedures counties must follow in creating shellfish protection districts?**

Chapter 90.72 RCW lists only a few requirements for counties to follow as they create the districts. The county legislative authority (council or board of commissioners) may create a district by its own motion, or it may submit the question to voters in the proposed district for majority approval. Whichever method the county uses, public involvement and education are needed to generate support for the proposed district and accompanying services. (Counties are also now required to create shellfish protection districts in response to growing area downgrades. This requirement is addressed separately in the following section.)

There are no state regulations (WACs) that govern the procedure used to create shellfish protection districts. Counties should follow the intent and requirements of Chapter 90.72 RCW as well as any established procedures used by the local jurisdiction.



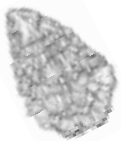
## **What flexibility do counties have in naming their districts?**

In drafting an ordinance creating a shellfish protection district, counties should clearly site the authority of Chapter 90.72 RCW, Shellfish Protection Districts. Once this legal basis is established, counties may refer to the districts and accompanying fees and services by other names. If another name is used, it should clearly reflect the broad benefits of the district and the intent of the statute to protect water quality, shellfish tidelands and other aquatic resources.



## **Is the creation of a district limited by any prerequisites, such as watershed planning?**

No. Although watershed planning may provide an ideal springboard for creating a shellfish protection district, water quality problems and funding needs are apparent throughout the region, including areas not yet covered by watershed management plans. The statute encourages counties to establish districts and take action as soon as possible to prevent the contamination of shellfish tidelands. Early creation of shellfish protection districts will enable counties to address problems that are already evident, and provide them with funding to more quickly develop and implement watershed management plans.



# **Growing area downgrades**

In addition to the voluntary methods described above, counties are required to create shellfish protection districts within 180 days of growing area downgrades or closures caused by nonpoint source pollution. This provision is designed to generate greater action by local agencies and residents to correct pollution problems and restore water quality in affected growing areas. It applies only to nonpoint-related downgrades carried out by the state Department of Health after June, 1992, the effective date of the legislation.



## **What's the starting date for the 180 days given to counties for creating districts in response to growing area downgrades?**

The time period begins when the state Department of Health issues the administrative order reclassifying the growing area. Once the order is issued, growing areas are managed under the requirements of the new classification.

## **Does this provision apply to both commercial and recreational beds?**

The statute calls for the creation of a district when either a commercial or recreational bed is downgraded because of ongoing nonpoint source pollution. The state Department of Health currently classifies both commercial growing areas (WAC 246-282) and recreational beds (WAC 246-280).



## **If contamination from more than one county contributes to a downgrade, is each county required to create a district and program?**

Again, it is important to point out that the statute calls upon all counties and residents to take action to protect and restore water quality in shellfish tidelands. In the event of a growing area downgrade, however, the language in Chapter 90.72.045 RCW indicates that mandatory creation of a shellfish protection district and program is based on the location of the downgrade, not on the location of the pollution sources. Therefore, if the area of the downgrade crosses county lines, more than one county would be required to establish a district and program.



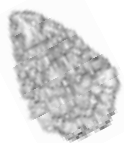
## **Are counties liable if they fail to create shellfish protection districts and programs in response to growing area downgrades? Who has responsibility or authority to enforce this provision?**

Yes. Counties are liable if they fail to comply with the statute. Shellfish growers and other affected parties have the right to hold counties accountable for the creation of legitimate districts and programs in response to growing area downgrades caused by ongoing nonpoint source pollution. The statute does not assign authority to any particular agency to enforce this provision or to judge the adequacy of the local programs.



## **Can citizens repeal, by referendum, districts created in response to growing area downgrades?**

No. Citizens may repeal only those districts created voluntarily by the county legislative authorities.



## **District boundaries**

Chapter 90.72 RCW gives counties tremendous flexibility in establishing district boundaries. The districts may cover individual watersheds, entire counties or, by interjurisdictional agreement, cross into neighboring counties. Counties may create more than one district, and the districts may include any areas within the counties.



## **What factors, institutional or geographic, should be taken into consideration in establishing district boundaries?**

As a general rule, shellfish protection districts should include all areas and pollution sources contributing to the nonpoint water quality problems. In a number of areas, the key pollution sources are concentrated in the lower watersheds. Other factors to consider include terrain and drainage patterns, needs and attitudes of area residents, land uses, population base, revenue potential, anticipated program costs, desired service area, and overlap with other special purpose districts.

## **What are the pros and cons of creating a shellfish protection district that covers a watershed versus one that covers a larger area, perhaps an entire county?**

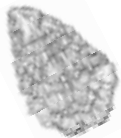
For some counties, creating districts in individual watersheds will be the best approach. The advantages of creating smaller watershed districts include use of the natural watershed boundary, a close relationship between area residents and water quality issues, likelihood of support and commitment from the local community, focused attention on specific problems, and assurance to residents that revenues will be reinvested in their watershed. By comparison, larger districts have their own set of advantages including administrative efficiencies and other economies of scale, larger population and revenue base, and the ability to provide much needed services to a broader area.

Counties will have to decide on the best approach for a given area, and will doubtless develop other options that work from the strengths of these two approaches. One option would be to establish a countywide district that recognizes differences in individual watersheds. Rates could be structured, for instance, to provide basin services on a countywide basis while providing additional services in particular areas, perhaps to implement watershed plans.



## **Can districts include cities and towns within the boundaries? If so, how is it managed?**

Yes. Shellfish protection districts can include incorporated areas. According to the statute: “A district may include any area or areas within the county, whether incorporated or unincorporated. Counties shall coordinate and cooperate with cities, towns and water-related special districts within their boundaries in establishing shellfish protection districts and carrying out shellfish protection programs. Where a portion of the proposed district lies within an incorporated area, the county shall develop procedures for the participation of the city or town in the determination of the boundaries of the district and the administration of the district, including funding of the district’s programs.” (Chapter 90.72.040 RCW).



# **Creating a shellfish protection district program**

**B**efore discussing different aspects of the shellfish protection program, it may be useful to clarify its relationship with the shellfish protection district. Simply stated, the district describes the geographic service area and serves as the funding mechanism for the accompanying shellfish protection program. The program, on the other hand, is the package of services provided by the county to protect water quality and shellfish resources. The program includes those activities carried out with district funds plus any other services provided in the area that are consistent with the goals of the district. The shellfish protection program will typically, but not necessarily, involve new or enhanced services financed with district revenues.

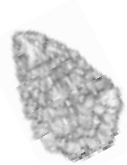


## **What flexibility do counties have in designing their programs?**

Chapter 90.72.030 RCW gives the county legislative authority “full jurisdiction and authority to manage, regulate and control its programs.” A county’s shellfish protection program might include such diverse activities as water quality monitoring, low-interest loans for on-site system repairs and agricultural best management practices, on-site maintenance and inspections, installation of boater pumpout facilities, technical assistance to commercial and noncommercial farmers, construction and maintenance of stormwater facilities, and public education campaigns. The county may appoint a local advisory council to help prepare and implement the shellfish protection program.

## **Would the development of a shellfish protection program require new efforts that might duplicate other programs already in place?**

It's important to understand that the "shellfish protection program" described in the statute is not some new initiative or set of activities that counties are expected to implement alongside such programs as watershed management and stormwater management. The statute simply provides counties with the added means to carry out these and other programs. Counties can use the districts to generate much needed revenue to carry out the work of local health departments, public works departments, conservation districts and other agencies to address the problems associated with on-site sewage systems, stormwater runoff, farm animal wastes, boater wastes and other sources of nonpoint pollution.



## **Program revenues**

Counties may finance their shellfish protection programs with taxes, fees, rates, charges or grants or loans from other sources. Chapter 90.72.030 RCW says, "The county legislative authority shall have full jurisdiction and authority to .... fix, alter, regulate and control the fees for services provided and charges or rates as provided under those programs." Chapter 90.70.070 RCW adds, "counties may collect charges or rates in the manner determined by the county legislative authority."



## **In creating shellfish protection districts, are counties required to assess fees or generate new revenues?**

No. Counties are not required to collect new revenues, but they are required to institute credible districts and programs. The primary reason for creating a district is to protect water quality and tideland resources by controlling nonpoint pollution. This is accomplished by fostering lasting changes in personal behavior and land use practices. In most cases, this will require additional funding as, for example, on-site systems are inspected and repaired, stormwater facilities are constructed and maintained, and farm conservation plans are developed and implemented.



## **Are district revenues limited by any taxing restrictions?**

County tax revenues are limited by ceilings placed on local tax assessments. Fees, rates and charges, on the other hand, are not subject to such restrictions, but they must be reasonable and commensurate with the services provided, and they must be managed as efficiently as possible to achieve the goals of the district.



## **Can district revenues be used on properties located outside the boundaries of the district? What about properties included within the district, but not assessed fees under the district?**

The boundaries of the district define the service area for the accompanying shellfish protection program. Therefore, district funds cannot be used to finance services outside the district. It would be inappropriate for example, to use district revenues to finance a sanitary survey outside the shellfish protection district.

Within the district, all properties are eligible for the services and benefits of the shellfish protection program, including properties not assessed fees. For example, although confined animal feeding operations may not be subject to district fees and charges, they are important land uses and potential sources of pollution that counties may choose to include in their shellfish protection programs.

## **Can counties collect fees from tribal lands?**

No. Counties have no authority to assess or collect fees from tribal lands. Counties are encouraged, however, to establish cooperative and complementary programs with tribes to help focus attention on the goals of the districts and to strengthen the respective efforts to protect water quality and tideland resources.



## **Can counties include tidelands within the districts? Can they collect revenues from these properties?**

Counties can and probably should include tidelands within the districts. According to Chapter 90.72.040 RCW, “a district may include any area or areas within the county.” And yes, counties can collect revenues from these properties. Perhaps a better question is whether counties *should* collect revenues from these properties. As counties establish the programs and accompanying rate structures, an important factor to consider is the pollutant loading coming from each land use. With most tideland properties, the issue is not the pollution generated in these areas, but the damage incurred by these properties as a result of pollution from upland activities.



## **Are public properties, such as schools and public office buildings, subject to district fees?**

Chapter 90.72 RCW does not address this issue. Based on the application of other funding authorities, we can say that county and city properties are subject to district fees while federal properties are not. As for state lands, Chapter 90.72 RCW does not restrict the collection of fees from these properties.



## **Can district revenues be used to finance sanitary sewers or wastewater treatment facilities?**

Yes, as long as the measures help to remedy a nonpoint pollution problem. For example, district funds can be used to correct problems associated with failing on-site systems which, in some instances, will result in the construction of sewerage systems. In contrast, it would be inappropriate to use district funds to upgrade or maintain a sewerage system that existed prior to the formation of a district.



## **Can district funds be used to address the problem of fecal contamination from seals and other marine mammals?**

The statute does not address this issue. Nonpoint source pollution generally pertains to contamination from human activities and land uses. Marine mammals are, however, a source of fecal contamination in some shoreline areas and may be considered a type of nonpoint source pollution. Therefore, counties would seem to have the flexibility to include the safe and legal management of marine mammal populations in their shellfish protection programs.



## **Can funds generated under a shellfish protection district be used for activities that benefit other water resources, such as groundwater or lakes?**

Yes, to the extent that the activities are part of the shellfish protection program and are consistent with the goals of the district. It can be expected that the services of a shellfish protection district, while designed to protect water quality in shellfish tidelands, will provide benefits to other parts of the natural environment.



# Exemptions

Chapter 90.72.070 RCW lists two activities that are not subject to the fees or charges of a shellfish protection district: facilities and operations permitted for wastewater discharged under the National Pollutant Discharge Elimination System (NPDES), and timber and forest lands.



## **Why are confined animal feeding operations exempt from district fees? How broad is this exemption?**

Concentrated or confined animal feeding operations subject to the National Pollutant Discharge Elimination System (NPDES) are exempt from district fees and charges for two main reasons. One reason is to prevent charging duplicate fees for the purpose of controlling pollution. Owners of these businesses may already be required to pay permit fees and implement comprehensive waste management systems under the NPDES program. A second and related reason has to do with regulatory fairness. While farm animal wastes have traditionally been managed as nonpoint sources of pollution, confined animal feeding operations are increasingly regulated as point sources of pollution. In short, the Legislature inserted this provision to alleviate crossover fees and requirements.

As for the breadth of this exemption, large feedlots, dairies and fishnet pens are currently the only confined animal feeding operations permitted under the state's NPDES program. The state Department of Ecology continues to work on individual and general permits that may eventually exempt other animal production operations.



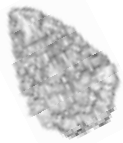
## **Why are forest and timberlands exempt?**

There are a couple of reasons for this exemption, one of which pertains to the relationship between forestlands and the classification of shellfish growing areas. Although sediments and increased runoff from forest practices may directly affect shellfish habitats and may transport bacteria and other contaminants to shellfish tidelands, forest and timberlands are not major sources of fecal coliform bacteria, the indicator organism currently used in determining growing area classifications. A second reason for the exemption is that it provides some incentive for maintaining these lands in their current uses.



## **Once properties are converted from an exempt status, are they then subject to district fees? Is it automatic?**

Within the boundary of the shellfish protection district, any property converted from an exempt status to a nonexempt status would be subject to district fees. Whether the conversion is automatic would depend on the language and structure of the ordinance creating the district. Counties should, therefore, anticipate and address this issue when drafting the ordinance.



# Stormwater facilities and other funding authorities

Several statutes provide counties with broad-scale authority to control pollution from such sources, such as on-site sewage disposal systems, farm animal wastes, and stormwater. They include stormwater utilities, conservation district special assessments and aquifer protection areas in addition to shellfish protection districts. The table featured further in this publication provides a brief comparison of the services counties can provide under these authorities.

“ **Shellfish protection districts** (Chapter 90.72 RCW) provide counties with the broadest authority for addressing different sources of nonpoint pollution. District funds can be used to finance services dealing with on-site sewage disposal systems, stormwater, boater wastes, animal waste and other nonpoint problems. Use of the funds for stormwater management is equally broad, but counties should recognize the statute’s emphasis on water quality. Stormwater services that focus exclusively on water quantity problems, such as drainage, should be funded by other means if they constitute a major portion of the county’s stormwater management program.

“ **Stormwater utilities** (Chapter 36.94 and 36.89 RCW) have a more limited overall scope, but they may provide counties with greater latitude in managing and controlling stormwater. Questions about the purpose and benefits of different services (i.e., quality versus quantity) are less relevant given the breadth of the authorizing statutes. In addition to stormwater management, Chapter 36.94 RCW authorizes counties to finance on-site system maintenance and inspection programs.

“ **Aquifer protection areas** (Chapter 36.36 RCW) provide counties broad and flexible authority to protect groundwater resources and drinking water supplies. The statute authorizes counties to address a wide range of issues, including stormwater management, on-site sewage disposal, sewage treatment, and any element of an approved groundwater management plan (e.g., underground storage tanks, spills, and solid and hazardous waste).

“ **Conservation district special assessments** (Chapter 89.08 RCW) provide counties with another important water quality funding authority. The special assessment is tailored to the needs of local conservation districts to help landowners protect soil, water and other natural resources. In terms of shellfish protection, conservation districts play particularly important roles in assisting landowners with animal waste issues.

For more information on these authorities, people should refer to the individual statutes. In addition, the Washington Conservation Commission can provide assistance on conservation district special assessments and the Washington Department of Ecology can provide additional information on stormwater utilities and aquifer protection areas. The Local Government Water Quality Finance Guidebook, a publication of the Puget Sound Water Quality Action Team, is also a good source of information on these and other funding authorities.

Water Quality Statute	Pollution Control Services	Key Features
Shellfish Protection District (Chapter 90.72 RCW)	<b>Nonpoint source pollution control</b> <ul style="list-style-type: none"> <li>.. stormwater management</li> <li>.. on-site system inspection, monitoring and repair</li> <li>.. animal waste management</li> <li>.. boater waste management</li> <li>.. other nonpoint sources</li> </ul>	<ul style="list-style-type: none"> <li>.. integrated authority for nonpoint source programs</li> <li>.. emphasis on protecting water quality and shellfish tidelands</li> </ul>
County Services Act (Chapter 36.94 RCW)	<b>Sewerage, water and stormwater</b> <ul style="list-style-type: none"> <li>.. stormwater management</li> <li>.. on-site system maintenance and inspection</li> <li>.. system of sewerage</li> </ul>	<ul style="list-style-type: none"> <li>.. comprehensive stormwater management – water quality, flood control and drainage</li> <li>.. on-site system maintenance and inspection programs</li> </ul>
Stormwater Facilities (Chapter 36.89 RCW)	<b>Stormwater control facilities</b> <ul style="list-style-type: none"> <li>.. stormwater management</li> </ul>	<ul style="list-style-type: none"> <li>.. emphasis on stormwater facilities</li> <li>.. no provision for on-site programs</li> </ul>
Aquifer Protection Areas (Chapter 36.36 RCW)	<b>Groundwater protection</b> <ul style="list-style-type: none"> <li>.. stormwater management</li> <li>.. onsite system monitoring and inspection</li> <li>.. system of sewerage</li> <li>.. activities of a groundwater management plan</li> </ul>	<ul style="list-style-type: none"> <li>.. emphasis on protecting groundwater and drinking water</li> <li>.. on-site monitoring and inspections based on compliance with relevant standards</li> </ul>
Conservation District Special Assessments (Chapter 89.08 RCW)	<b>Natural resource conservation</b> <ul style="list-style-type: none"> <li>.. animal waste management</li> <li>.. water quality protection</li> </ul>	<ul style="list-style-type: none"> <li>.. emphasis on soil, water and natural resource conservation</li> <li>.. tailored to the work of local conservation districts</li> </ul>



## Can shellfish district revenues be used for the purpose of flood control, drainage and other water quantity problems?

As noted above, the intent of Chapter 90.72 RCW is to protect and restore water quality in the state’s shellfish tidelands. It is acceptable to use district funds for projects and activities that address both quality and quantity concerns – which is the case with most stormwater management projects. Programs that focus exclusively on issues of water quantity, however, cannot be financed with shellfish district funds.

## Does this provision mean that a shellfish protection district cannot overlap with a stormwater-related district or utility?

No. Chapter 90.72.040(3) RCW says that the county legislative authority shall not impose fees, rates or charges for shellfish protection programs on properties on which fees, rates or charges are imposed under Chapters 36.89 or 36.94 RCW for *substantially the same services*.

Thus, the intent of Chapter 90.72.040(3) RCW is to prevent double charging for stormwater services. It does not prohibit the creation of shellfish protection districts in areas served by stormwater utilities.



## Given the structure of this provision, what are some options for using both a shellfish protection district and a stormwater-related utility?

Here are three approaches to consider for using the funding authorities separately or in concert. A variety of factors will obviously influence the practicality of these options as they are considered in different areas.

- 1. Manage stormwater under a shellfish protection district.** Given the broad authority of Chapter 90.72 RCW, the county could finance its stormwater management program through a shellfish protection district. If a stormwater utility already exists, the county could convert to the authority of a shellfish protection district. If the stormwater utility partially overlaps with the shellfish protection district, the county could convert to the shellfish authority in the overlapping area. In either situation, the county could continue to finance its stormwater services while broadening the program to include other nonpoint services.
- 2. Combine authorities.** A second option would be for the county to combine the different funding authorities under a single ordinance to create an integrated water quality or water resources program. The ordinance would cite different authorities and a single, comprehensive program would be created. The motivation for considering such an approach is not just the stormwater provision discussed here, but the broader need for counties to provide increasingly comprehensive services to control pollution and manage water resources. Counties are reluctant to establish independent and competing fees for different programs and services.
- 3. Use authorities independently.** A third and simpler option would be for the county to use the funding authorities independently – to collect a shellfish district fee only from those properties not assessed fees under the stormwater utility. The district boundaries would overlap, but the fees would not. This approach would be feasible only if a substantial portion of the shellfish protection district were located outside the boundaries of the stormwater utility.