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BEFORE THE HEARING EXAMINER
OF PIERCE COUNTY

TAYLOR SHELLFISH FARMS,)	NO. AA16-07
)	
Appellant.)	APPELLANT TAYLOR
)	SHELLFISH FARMS
APPEAL APPLICATION NO. 612676)	PREHEARING BRIEF
)	
)	

I. INTRODUCTION

Appellant Taylor Shellfish Farms ("Taylor") requests that the Examiner reverse the County's "Administrative Determination, SD22-00, Taylor Shellfish (Foss Property)" ("Administrative Determination") dated August 8, 2007. Specifically, Taylor appeals the County's two fundamental conclusions that: (1) Taylor's geoduck operations on its Foss Farm are "development" under the Shoreline Management Act ("SMA") because they interfere with normal public use of surface waters; and (2) Taylor's permit SD 22-00 expired.

As explained in this prehearing brief, the County's conclusions are clearly erroneous. Taylor's operations do not interfere with normal public use of the water and are therefore not development. The County's contrary determination is based on a misapplication of the Court of Appeals' decision in *Washington Shell Fish v. Pierce*

1 County, 132 Wn. App. 239, 131 P.3d 326 (2006), copy attached hereto as Attachment 1.
2 The Court of Appeals concluded in *Washington Shell Fish* that, based on the facts of that
3 case, the geoduck farm in question constituted "development" because it interfered with
4 the public use of surface waters. The Court's decision in *Washington Shell Fish* does not
5 stand for the proposition that all geoduck farms interfere with normal public use of surface
6 waters. Indeed, as a recent Opinion of the Washington Attorney General ("AGO") makes
7 clear, deciding whether a geoduck farm constitutes "development" is a fact-specific
8 inquiry that requires determining whether a particular farm interferes with the public use
9 of surface waters. AGO 2007 No. 1 is attached hereto as Attachment 2. The evidence to
10 be presented at hearing will demonstrate that Taylor's Foss Farm is operated quite
11 differently than the farm in *Washington Shell Fish*. The Foss Farm does not interfere with
12 normal public use of surface waters.

13 The County also erred in finding that Taylor's shoreline substantial development
14 permit has expired. The County's conclusion is based on a misinterpretation of statutory
15 language and a permit condition that require completion of construction activities within
16 five years of permit issuance. Taylor satisfied those provisions when it established the
17 four corners of the farm and registered the farm with the Washington State Department of
18 Fish and Wildlife ("WDFW"). The County's conclusion that the permit expired is
19 inconsistent with the law and inconsistent with its own prior interpretations.

20 II. STATEMENT OF FACTS

21 The following facts will be established at hearing by presentation of exhibits and
22 witness testimony:
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1 **A. DESCRIPTION OF SUBJECT PROPERTY AND GEODUCK FARMING**
2 **OPERATIONS.**

3 Taylor's Foss Farm is located along a stretch of private tidelands approximately
4 one mile long in Case Inlet. In 2000, Taylor leased the Foss Farm site from the North Bay
5 Partnership. North Bay partnership also owns all of the undeveloped adjacent upland
6 parcels. With the exception of a rustic one-room summer cabin owned by the Foss family,
7 there are no homes on the upland parcels immediately adjacent to the Foss Farm. Taylor
8 leased the tidelands for the express purpose of establishing a commercial geoduck farm.
9 Specifically, Taylor intended to plant, cultivate, and harvest geoduck at the Foss Farm on
10 an ongoing basis.

11 The planting and harvesting cycle at the Foss Farm is similar to operations at other
12 geoduck farms in southern Puget Sound and uses methods developed by the WDFW. To
13 plant a crop of geoduck, Taylor employees insert 6-inch-diameter PVC pipe cut
14 approximately 9 inches long into the substrate at approximately one-foot intervals. The
15 PVC is pushed into the substrate such that only two to five inches remain exposed. The
16 employees then plant three juvenile geoduck by hand into each PVC pipe. The PVC pipes
17 are then covered with predator exclusion nets.

18 The PVC pipe and cover nets temporarily protect the vulnerable juvenile geoduck
19 from predators. Taylor employees remove the pipes and nets from the sand after
20 approximately one to two years, when the geoduck have burrowed sufficiently into the
21 sand to avoid predation and drying out at low tide.

22 The geoduck continue to grow for two to four years after the cover nets and PVC
23 pipes are removed. Taylor employees then harvest the geoduck, using a low pressure
24 (~20 psi), high-volume (~40 gpm) water hose to loosen the sand around the geoduck and
25 remove them from their burrows. This is the same method employed by divers to harvest

1 wild geoduck from subtidal beds, except that it occurs predominantly at extremely low
2 tide when the water is out and the tidebeds are exposed. This harvest takes place five to
3 six years after the initial planting.

4 Taylor plants and harvests the Foss farm on a rotation, farming it in segments.
5 Taylor planted a portion of the farm in 2001, another portion in 2002, another in 2003, and
6 so on. After the harvest of each portion, Taylor replants that segment of the farm such
7 that the farm is in a perpetual cycle of planting, cultivation and harvesting.

8 Taylor's practices at the Foss Farm, as described above, are consistent with the
9 Environmental Code of Practice ("ECOP") that was adopted by the Pacific Coast Shell
10 Fish Growers Association, with three exceptions:

- 11 1. On the Foss farm, Taylor has used 6-inch (as opposed to 4-inch) diameter
12 tubes.
- 13 2. On the Foss farm, Taylor has used canopy nets for predator exclusion which
14 cover the whole field of tubes as opposed to individual tube nets and rubber
15 bands, unless an eagle nest is found in the vicinity. If an eagle nest is found in
16 the vicinity, Taylor will use individual tube nets and rubber bands, pursuant to
17 an agreement with the Tahoma Audubon Society.
- 18 3. On the Foss farm, Taylor has not used the Harvest by Hand method of harvest
19 described in ECOP.

17 **B. Permit History.**

18 Pierce County Code ("PCC") purports to require that all geoduck farms obtain a
19 Shoreline Substantial Development Permit ("SSDP"). PCC 20.24.030. In deference to
20 the County's regulation, in 2000, Taylor applied for an SSDP to construct and operate the
21 Foss Farm. Taylor did not challenge the County's SSDP requirement at the time because
22 Taylor saw the permit process as an opportunity to work with the regulators and the
23 community and avoid future conflict.

1 As will be demonstrated through evidence presented at the hearing, Taylor's intent
2 was to create the Foss Farm and operate that farm on an ongoing basis. Specifically,
3 Taylor made clear its intention of farming the property in segments on different cycles.
4 The County's review and approval of the permit took into consideration the ongoing
5 nature of the operation.

6 The Pierce County Hearing Examiner granted the permit in December 2000. *See*
7 Shoreline Substantial Development Permit SD 22-00 ("Permit"), attached hereto as
8 Attachment 3. The Permit authorizes Taylor to "cultivate the intertidal zone of private
9 tidelands for the commercial production of geoduck clams along the east shore of Case
10 Inlet/North Bay." Since obtaining the permit, the County repeatedly confirmed, to both
11 Taylor and the general public, that the permit did not expire and allowed continued
12 operation of the Foss Farm.

13 With increasing pressure from several vocal citizens, some of whom have
14 appeared in these proceedings as Intervenors, the County revisited its interpretation of the
15 permit this summer. That review led to the Administrative Determination that is the
16 subject of this appeal. In its Administrative Determination, the County reaches two key
17 conclusions, both of which are challenged in this appeal. First, the County concludes that
18 Taylor's activities at the Foss Farm interfere with normal public use of the water such that
19 they constitute "development" requiring a SSDP. Second, the County reversed its
20 previous position and concluded that the Foss Farm permit expired and that Taylor must
21 obtain a new SSDP to continue operation of its geoduck farm. Taylor timely filed this
22 appeal of the Administrative Determination.

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III. ARGUMENT

A. STANDARD OF REVIEW

Appellant bears the burden of proving that the County's administrative determination is "clearly erroneous." PCC 1.22.090(G). A decision is "clearly erroneous" when the Examiner is left with the firm and definite conviction that a mistake has been made. *See Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993) *aff'd*, 511 U. S. 700 (1994).

The Code typically requires the Examiner to give "substantial weight" to the department's interpretation of the Code it administers. PCC 1.22.090(G). Nevertheless, the Department's decision that the Foss Farm permit expired is not entitled to this deference because that decision is inconsistent with prior County interpretations. Adjudicative bodies are not required to give deference to an agency interpretation that is inconsistent with the agency's prior interpretations. *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 418 (1993) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."). *See also Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 54, 26 P.3d 241 (Agency's interpretation of an ambiguous statute is not entitled to deference when it is inconsistent with the agency's prior administrative practice). As is further explained in Section III(C), below, the County's interpretation that the Foss Farm permit expires is inconsistent with its prior interpretations and is therefore not entitled to deference.

B. TAYLOR'S GEODUCK FARMING OPERATIONS DO NOT CONSTITUTE DEVELOPMENT.

The Shoreline Management Act ("SMA") governs "developments" on the

1 shorelines.¹ The SMA defines development as:

2 a use consisting of the construction or exterior alteration of structures;
3 dredging; drilling; dumping; filling; removal of any sand, gravel, or
4 minerals; bulkheading; driving of piling; placing of obstructions; or any
5 project of a permanent or temporary nature *which interferes with the
normal public use of the surface of the waters* overlying lands subject to
this chapter at any state of water level.

6 RCW 90.58.030(3)(d) (emphasis added). *See also* WAC 173-27-030(6); PCC 20.04.130.

7 Accordingly, a project can be development if: (1) it interferes with normal public use of
8 surface waters; or, (2) it constitutes one of the listed activities.

9 Recently, two legal authorities have considered the applicability of this definition
10 in the context of geoduck farming operations. In 2006, the Court of Appeals upheld the
11 Hearing Examiner's decision that a particular geoduck operation interfered with normal
12 public use of surface water such that it constituted development and required a shoreline
13 substantial development permit. *Washington Shell Fish v. Pierce County*, 132 Wn. App.
14 239, 131 P.3d 326 (2006). In reaching its decision, the Court in *Washington Shell Fish*
15 reviewed the facts specific to the particular operation at issue. The Court did not
16 determine that all geoduck operations interfere with normal public use of surface waters.

17 More recently, the Attorney General has reviewed geoduck operations on a
18 broader scale and in light of the Court's holding in *Washington Shell Fish*. *See* AGO
19 2007 No. 1 ("AGO").² The AGO first determined, consistent with *Washington Shell*

20 ¹ The SMA requires applicants to obtain permits for "substantial development." The SMA defines
21 substantial development as "any development of which the total cost or fair market value exceeds
22 five thousand dollars, or any *development which materially interferes with the normal public use of
the water or shorelines* of the state." RCW 90.58.030(3)(e). Accordingly, there can be no
"substantial development" without "development."

23 ² An AGO is entitled to considerable weight. *See, e.g., Bowles v. Washington Dept. of Retirement*
24 *Systems*, 121 Wn.2d 52, 63, 847 P.2d 440 (1993); *Holbrook, Inc. v. Clark County*, 112 Wn. App. 354, 362-
25 63, 49 P.3d 142 (2002). Moreover, the Attorney General opinion constitutes notice to the Legislature of the
interpretation of the law, and the Legislature has not acted since the AGO to overturn that interpretation.
Greater weight attaches to an interpretation when the Legislature acquiesces in that interpretation. *Id.*

1 *Fish*, that the question of interference with normal public use of surface waters is the
2 fundamental inquiry in reviewing whether a geoduck farm is development. *Id.* at 7. This
3 is a fact-specific inquiry. *Id.* at 7. The AGO specifically notes that “nothing in the
4 description of geoduck aquaculture necessitates such interference [with surface waters].”
5 *Id.* at 8.³ The Attorney General then concluded that geoduck farming activities do not
6 constitute any of the activities specifically listed in the definition of development. *See Id.*
7 at 8-10.

8 As described in further detail below, unlike the operation in *Washington Shell*
9 *Fish*, the Foss Farm does not interfere with public use of surface waters. Accordingly,
10 Taylor is not required to obtain an SSDP to continue its operations at the Foss Farm. The
11 County’s conclusion to the contrary is in error and should be reversed.

12 1. **Taylor’s operations at the Foss Farm do not interfere with normal**
13 **public use of the water and are therefore not development.**

14 Taylor will demonstrate at the hearing, through witness testimony and
15 documentary evidence, that the Foss Farm does not substantially interfere with the
16 public’s use of surface waters. Witness testimony will establish that, over the more than
17 six years the Foss Farm has operated, there have been no accidents or other incidents
18 involving recreational users of water, nor have there been any safety concerns expressed
19 by recreational users.

20 The County’s determination that the operation interferes with normal public use of
21 the surface waters is in error because it is not supported by evidence. In spite of its
22 acknowledgement that the determination of whether a farm interferes with public use of
23 the surface waters is a fact-specific determination, the County, in its Administrative
24 Determination, does not consider any facts at all. Instead, the County relies only on the

25 ³ See AGO at 8. (“The PVC pipes protrude only inches and have no more interference with use of the surface waters than bags of oysters, clam nets, or a small rock on the shoreline.”)

1 Court of Appeal's decision in *Washington Shell Fish* to support its conclusion that the
2 Foss farm interferes with normal public use of the surface waters. However, as noted
3 above, the Court's decision in *Washington Shell Fish* is based on the particular facts of
4 that case and cannot be applied to the Foss Farm without a factual review to determine
5 whether the Foss Farm operations are similar to those at issue in *Washington Shell Fish*.
6 See AGO at 7 ("the Court of Appeals opinion answers your question only in the context of
7 the facts of that case, and it fails to offer an analysis applicable to all geoduck tube
8 aquaculture.")⁴

9 The operation under review in the *Washington Shell Fish* case was unique and is
10 distinguishable from Taylor's operation at the Foss farm. Specifically, the Court in
11 *Washington Shell Fish* reviewed evidence of seven specific aspects of the farm at issue in
12 that case that led to the conclusion that the farm interfered with normal public use of
13 surface waters: (1) the farm's location in proximity to points of access of public use; (2)
14 the extent and duration of the operator's use of boats for harvesting activities; (3) the
15 operator's use of thousands of feet of rope; (4) the operator's use of cement-filled garbage
16 cans and signs as boundary markers; (5) the operator's use of sharp steel pins; (6)
17 operator's use of a specific type of cover netting; and (7) the operator's deliberate and
18 apparently malicious efforts to exclude the general public from the surface waters. The
19 evidence at the hearing will show that these specific aspects of *Washington Shell Fish's*
20 practices are not present at Taylor's Foss Farm. Based on this evidence, the Examiner

21 _____
22 ⁴ The only time the County reviewed the Foss Farm operation was when the permit application for the Foss
23 Farm was pending. At that time, the County determined, and this Examiner agreed, that the Foss Farm
24 operations did not interfere with public use. See Staff Report on Application SD22-00, attached hereto as
25 Attachment 4, at 6. (The farm is "located in the intertidal area where navigational access would not be
restricted. Further, the Applicant would be leasing the private beach from the upland property owner.");
Hearing Examiner's Decision on Application SD22-00, attached hereto as Attachment 5 at 5 ("No conflicts
will occur between the aquaculture use, navigation, boating, commercial fishing, and commercial traffic.
The applicant has leased shorelines from property owners.")

1 should reverse the County's conclusion that Taylor's farm interferes with normal public
2 use of the surface waters.

3 1. Location in proximity to public use points of public access.

4 In *Washington Shell Fish*, the Examiner and the Court found that there was
5 sufficient evidence of an established normal public use of the surface waters in the
6 immediate vicinity of the farm and that the farm's location inhibited that use. The
7 Washington Shell Fish ("WSF") farm was located immediately in front of prime public
8 points of access for recreational use of the water. See AGO at 6 ("The neighboring public
9 park appears to trigger the interference with public use of the surface waters"). Some of
10 the parcels of the WSF farm were on County property. However, even those parcels that
11 were on private tidelands had a history of public access. For example, the WSF farm was
12 a premier windsurfing location in the Washington. The conditions of that location are
13 unmatched in the Puget Sound so it is an incredibly popular windsurfing location. The
14 access point for windsurfers was directly upland of the farm. To get into Puget Sound,
15 windsurfers would have to go out over the tube fields and past WSF's moored boats, ropes
16 and buoys. The WSF farm was only several hundred feet away from a public boat launch.
17 There was testimony that WSF used the boat launch for its commercial operations and
18 blocked other vehicle access to the boat launch.

19 There is no comparable evidence that the waters in the vicinity of the Foss Farm
20 are used for similar recreational uses or that the location of the Farm interferes with any
21 recreational uses of the surface waters. Case Inlet/North Bay, where the Foss Farm is
22 located, has a large surface area and is not a constricted bay. All of the upland areas at the
23 Foss Farm are privately owned by the same entity that owns the leased tidelands. The
24 Foss Farm is more than twice as far from the nearest boat launch than the WSF farm was.
25 Taylor does not use that public boat launch for any of its activities. And, as noted in the

1 sections that follow, because of the way Taylor conducts its operations at the Foss Farm,
2 there is significantly less potential for the Farm to interfere with public use of surface
3 waters.

4 2. Extent and duration of the operator's use of boats for harvesting activities.

5 In reviewing WSF's operations, the Examiner considered testimony about WSF's
6 boats interfering with public use of surface waters. WSF's use of boats is unique to its
7 operation. WSF relied exclusively on dive harvests. During a dive harvest, boats stay
8 moored in the water above the divers, thereby blocking passage. Flags are flown to notify
9 the public of the divers below and that the area should be avoided. By contrast, Taylor
10 relies predominantly on low-tide harvests at the Foss Farm. Harvesters are on the
11 tidelands during extremely low tides and do not need to use boats to the same degree as
12 required for exclusively dive harvests. Boats are used only for transportation of supplies
13 and tubes during planting, tube removal, to operate water pumps and occasionally for dive
14 harvests only during the limited times when low tides are not as common in order to
15 ensure continuous supply of product.

16 In addition to the fact that WSF's harvesting activities themselves were more
17 likely to interfere with normal public use, the duration of WSF's harvesting activities was
18 significantly longer than the harvest activities at the Foss Farm. WSF was harvesting wild
19 geoduck in addition to their cultured geoduck. During wild harvest, the harvesters are in
20 the water for long periods of time searching for mature geoduck. Their boats and
21 equipment were used weeks and even months at a time. Indeed, testimony indicated that
22 WSF kept boats moored at the site even when operations on the farm were not occurring.

23 By contrast, Taylor harvests only cultured geoduck. The geoduck mature at
24 largely the same time, such that the harvest of a particular tract occurs at extremely low
25 tide and lasts for three to four hours each. Because of the way it operates the Foss Farm,

1 Taylor does not moor boats at the farm overnight. With regard to scows or barges, Taylor
2 does not leave those moored at the Foss Farm for more than a week, and it is unusual that
3 scows or barges are moored continuously for a week.

4 3. Use of thousands of feet of rope.

5 There was evidence presented that WSF utilized “thousands of feet” or “miles” of
6 nylon rope at its farm. There was testimony that the rope, which was left in the water,
7 would frequently come loose and float in the water, entangling windsurfers and boaters.
8 As will be demonstrated by testimony at hearing, Taylor only uses a very limited length of
9 rope in its operations and does not leave it in the water. During planting, Taylor uses 100
10 feet of bailing twine to measure out rows for tubes and ensure that they are planted in
11 straight lines. The twine is not left at the site. Because planting occurs at extremely low
12 tides, the twine does not enter the water nor does Taylor ever leave the twine at the site.
13 In the rare instances that Taylor conducts dive harvests, Taylor also uses lengths of rope
14 as a guide on the bottom to keep the diver from straying out of the vicinity of the planted
15 tract, but those ropes are also removed after the harvest. Accordingly, Taylor’s operations
16 at the Foss Farm do not create the same risk as the WSF farm because Taylor does not
17 leave “miles” of nylon rope in the water.

18 4. Use of cement-filled garbage cans and signs used as boundary markers.

19 WSF marked its farm with navigational hazards. Specifically, there was testimony
20 that WSF dropped garbage cans filled with cement to mark the boundaries of the farm.
21 Additionally, WSF used “signs” consisting of smaller cement-filled cans with five-foot
22 long PVC pipes sticking out. The sole purpose of these markers was to exclude other
23 users from the surface waters above the farm. There was testimony that these objects
24 posed a severe hazard to recreational users of the waters. In particular, at higher tides,
25 these objects would sit just below the surface of the water and could harm boats and

1 windsurfers. There was testimony that the objects could potentially kill recreational users.
2 By contrast, Taylor makes no efforts to exclude people from using the surface waters
3 above the farm. Taylor does not use any objects to mark the bounds of the farm that would
4 cause interference with public use or that could potentially cause harm to recreational
5 uses.

6 5. Use of sharp steel pins.

7 The Examiner considered testimony that WSF used steel pins to mark the bounds
8 of the individual beds and that these sharp straight pins would be left in the tidelands
9 causing injury to people when they stepped on them. As will be demonstrated by
10 testimony at hearing and through exhibits, Taylor does not use any similar pins or metal
11 that could harm pedestrians if left in the water. Taylor uses surveyor's pins to mark its
12 geoduck beds. These pins are capped and do not pose a threat to pedestrians or
13 swimmers. Taylor uses only bent rebar to hold its exclusion nets in place. The bent rebar
14 is buried leaving only the curved surface exposed. The impact of stepping on this bent
15 rebar would be no different than stepping on a rock on the beach.

16 6. Type of cover netting.

17 The Examiner considered testimony that the cover nets used by WSF were
18 different than those typically used by geoduck farms. There was testimony that these
19 different type of nets were more likely to become loose under water and entangle boats,
20 windsurfers, swimmers or other recreational uses of the surface water. There is no
21 evidence that the netting used by the Foss Farm has or is likely to present a similar safety
22 risk to the public. Indeed, the testimony at the hearing will demonstrate that the net
23 system at the Foss Farm is designed so that it will not become loose such that the nets
24 would interfere with recreational use of surface waters.

1 7. Deliberate and apparently malicious efforts to exclude the general public from
2 the surface waters.

3 Finally, in *Washington Shell Fish*, there was substantial testimony that WSF
4 purposefully excluded the public beyond what was necessary to conduct its farming
5 operations. WSF's boats stayed moored in the water even when they were not in use.
6 WSF flew diver flags, even when there were no divers in the water. One witness testified
7 that WSF flew the flags seven months straight, such that the public was effectively
8 excluded from the waters overlying the WSF farm for the entire seven months. There was
9 testimony that WSF was openly hostile to windsurfers and testimony that WSF
10 purposefully created safety hazards for recreational users to exclude those users from the
11 surface waters in the vicinity of the farm. Taylor has never engaged in such actions at the
12 Foss Farm.

13 Based on the foregoing, the Court of Appeals' conclusion that WSF's operations
14 interfered with normal public use of surface waters are not applicable to Taylor's Foss
15 operations. The County's conclusion that the farm interferes with surface waters on the
16 basis of the Court's holding in *Washington Shell Fish* is contrary to the facts that will be
17 presented at the hearing, is inconsistent with the AGO, and is reversible error. The
18 County failed to consider the facts specific to the Taylor's farm. In light of the evidence
19 to be presented at hearing, the Examiner can conclude that Taylor's farm does not
20 interfere with public's use of surface water such that it is not development.

21 2. Geoduck farming operations are not development because they do not
22 constitute any of the other activities listed in the statutory definition of
23 development.

24 The Attorney General concluded that geoduck farming activities do not constitute
25 any of the other activities listed in the definition. AGO at 8-10. Specifically, the AGO
determined that geoduck aquaculture does not constitute dredging, construction of

1 structures, drilling, removal of materials, or placing obstructions. *Id.* The County's
2 Administrative Determination is consistent with this interpretation. Accordingly, the
3 Examiner need not consider whether the geoduck farming operations at the Foss Farm
4 constitute any of the listed activities. However, if the Examiner chooses to address these
5 arguments, the Examiner should adopt the AGO's conclusion and determine that geoduck
6 farming does not meet any of the other elements of the SMA's definition of development.

7 a. Geoduck Operations do not constitute dredging.

8 As noted in the AGO, geoduck operations do not constitute "dredging."
9 According to Webster's II New College Dictionary, dredging means "to clean, deepen, or
10 widen *with a dredge*" or "to bring up *with a dredge*." No dredge is used in geoduck
11 operations. During harvesting, geoduck farm operators loosen the substrate. However, as
12 will be established at hearing, the effects are temporary and the tidelands are restored
13 within one to two tidal cycles. Geoduck farming clearly does not constitute dredging.

14 A holding that harvesting constitutes dredging would be inconsistent with the
15 AGO and would lead to absurd and overly broad conclusions. As noted by the AGO:

16 disruption of substrate around a geoduck, considered in isolation,
17 cannot be legally distinguished from general clam digging or raking.
18 Any clam harvest disrupts the substrate around the buried clam. We
19 find no indication that the SMA has ever treated clam harvesting,
20 alone, as development. Moreover, it would lead to a burdensome and
21 apparently unintended consequence where substantial development
22 permits would be required for all significant clam beds, both
23 commercial and recreational.

24 AGO at 8. The Examiner should adopt the Attorney General's conclusion.

25 b. Geoduck Farming Operations do not constitute construction of structures.

RCW 90.58.030(3)(d) includes "the *construction* or exterior alteration of
structures" as "development." The Attorney General determined that geoduck tubes do
not constitute construction of "structures" under the SMA. AGO at 9.

1 Geoduck operations do not constitute "construction." Webster's II New College
2 Dictionary defines "construct" as "to put together by assembling parts: BUILD." Thus,
3 "construction" focuses on joining constituent parts together to form a single structure, not
4 the disconnected placement of PVC pipes in intertidal areas, as is done in geoduck culture.

5 Also, as noted in the AGO, geoduck tubes are not "structures." AGO at 9.

6 Ecology's regulations define "structures" as:

7 a permanent or temporary edifice or building, or any piece of work
8 artificially built or composed of parts joined together in some definite
9 manner, whether installed on, above or below the surface of the round or
10 water, except for vessels.

11 WAC 173-27-030(15). The use of the term "structure" in the SMA was intended to cover
12 items like buildings and docks, which are constructed out of individual constituent parts to
13 create a new object. That is clear from the definitions of the other terms used in
14 Ecology's definition of structure. Webster's II New College Dictionary defines "edifice"
15 as "a building, especially one of imposing size or appearance." "Building" is defined as
16 "a structure that is built." "Build" is defined as "to form by combining materials or parts."
17 These definitions refer to the joining together of parts to create something new.

18 Ecology's definition of structure includes "a piece of work artificially built." As
19 stated above, Webster's II New Riverside University Dictionary defines "build" as "to
20 form by combining materials and parts." *See also* Webster's Ninth New Collegiate
21 Dictionary (defining "build" as "to form by ordering and uniting materials by gradual
22 means into a composite whole"). The key in determining whether something is "built" is
23 the joining materials together to form a whole.

24 Placing individual PVC pipe into the intertidal area as part of a geoduck farming
25 operation does not meet the definition of "structure" because the tubes are not joined
together to form something new. While Taylor covers the tubes with canopy nets, the

1 purpose of the canopy netting is to exclude predators. The netting does not “join” the
2 tubes together in a definite manner to create a “composite whole” or a structure, as the
3 term is defined.⁵

4 Thus, the statutory coverage of structures that are “constructed,” as well as
5 Ecology’s definition of “structure,” demonstrate that the structures regulated as
6 “development” under the SMA are structures where constituent parts are assembled or
7 joined together in some ordered manner to create a new item – a “composite whole.” The
8 PVC pipes used in geoduck farming are not joined together in any way – they are placed
9 independently into intertidal areas (and then individually removed after one to two years).
10 As such, as the Attorney General recognized, geoduck farming does not involve “the
11 construction or exterior alteration of structures.”

12 c. Geoduck Operations do not constitute drilling.

13 As noted in the AGO, geoduck farming does not constitute drilling. According to
14 Webster’s II New College Dictionary, drilling is “to make a hole in with a drill.” A drill
15 “is an implement with cutting edges or a pointed end for boring holes in hard materials,
16 usu. by a rotating abrasion or repeated blows.” The placement of tubes does not meet the
17 dictionary definition of “drilling,” because no hole is created. The tube constitutes a
18 temporary barrier to protect the juvenile geoduck. Nor does the use of low-pressure water
19 jets during harvesting constitute “drilling,” as that term is commonly defined and
20 understood. Geoduck farmers use the low-pressure water jets to loosen substrate so that
21 the mature geoduck can be extracted. The tidelands return to their pre-harvest condition

22 ⁵ Taylor has switched to canopy nets instead of smaller cover nets for each individual tube because
23 neighbors, including those represented by the intervenor interest-groups, prefer canopy nets. The canopy
24 nets reduce the visual profile of the operation. The canopy nets are easier to secure, thereby decreasing the
25 probability of nets coming loose and creating marine debris. If the Examiner were to determine that the use
of canopy nets joined tubes together in a definite manner such that they constitute a “structure,” the likely
result would be that geoduck farmers would return to the practice of individual tube nets to avoid being
defined as a “structure.”

1 within one to two tidal cycles. Therefore, the use of a low-pressure hose does not
2 constitute drilling.

3 d. Geoduck Farming does not involve removal of materials.

4 As noted by the AGO, geoduck farming operations do not involve the removal of
5 materials. During the geoduck harvest, the substrate is softened, but not removed. To the
6 extent that any sediment is removed with the removal of each clam, the amount is
7 minimal. As noted by the AGO, such a “minimal amount of materials does not comport
8 with a reasonable interpretation of the statutory language concerning ‘removal of
9 materials. See *Black’s Law Dictionary* 464 (8th ed. 2004), “*de minimis non curat lex*” (the
10 law does not concern itself with trifles).” AGO at 9.

11 An interpretation to the contrary that the mere loosening of the substrate would
12 constitute “removal” of materials is unworkable. Such a conclusion would require clam
13 digging and raking to constitute “development.” See AGO at 8 (“We conclude that
14 disruption of substrate around a geoduck, considered in isolation, cannot be legally
15 distinguished from general clam digging or raking.”).

16 e. Geoduck Farming does not involve placing obstructions.

17 The Examiner should adopt the Attorney General’s conclusion that geoduck
18 farming does not involve placing obstructions. According to Webster’s II New College
19 Dictionary, to obstruct is “to clog or block (a passage) with obstacles.” As described in
20 further detail in section 1, above, the operations do not interfere with public use, in part,
21 because they do not obstruct the public’s use of the surface waters.

22 Culture that takes place on private tidelands does not block public passage. As
23 noted by the Attorney General:

24 Washington common law also shows that the private property
25 interest in a shellfish farm allows the farmer to restrain the general
public from interfering with the farm. Thus, even if the PVC tubes

1 might hypothetically affect a person crossing a shellfish farm, it is
2 not a cognizable obstruction of the public because the person is there
at the farmer's express or implied permission.

3 See AGO at 10, n. 8 (citations omitted).

4 Moreover, geoduck culture takes place on intertidal areas that are exposed only at
5 low tide and therefore are not areas that typically provide aquatic passage. The PVC tubes
6 protrude only several inches above the sand. Their impact is no different than rocks or
7 other naturally-occurring beach materials. Testimony will show that for the short time
8 tubes are actually in the ground, they are almost always covered by water. Moreover, the
9 mere fact that geoduck farms use predator exclusion netting does not constitute
10 obstructions. The inquiry is not whether predators are prohibited from capturing and
11 feeding on the juvenile geoduck. Instead, the question is whether passage over and
12 through the waters is obstructed by the operations. As indicated above, geoduck farming
13 operations do not obstruct passage.

14 The Hearing Examiner should conclude that geoduck farming operations do not
15 constitute any of the activities listed in the SMA's definition of "development." To hold
16 otherwise would be inconsistent with the AGO.

17 **C. THE COUNTY'S AUTHORIZATION TO CONDUCT THE ONGOING**
18 **CULTIVATING ACTIVITIES DOES NOT EXPIRE**

19 Even if the Examiner determines that Taylor's farm interferes with normal public use
20 and requires a SDP, the Examiner should overturn the County's Administrative
21 Determination that the Foss Farm permit expired after five years.

22 **1. The County's conclusion that the approval to conduct ongoing activities has**
expired is inconsistent with law.

23 The County's conclusion that the permit expired is based on provisions in the SMA
24 that are reflected in a condition of the permit. The SMA indicates that:

25

1 Authorization to conduct construction activities shall terminate five
2 years after the effective date of a substantial development permit.
3 However, local government may authorize a single extension for a
4 period not to exceed one year based on reasonable factors

5 RCW 90.58.143(3). *See also* WAC 173-27-090(3). Accordingly, the SMA requires
6 construction to be completed within five years. As noted earlier, the SMA does not define
7 "construction activities." However, according to Webster's II New Riverside University
8 Dictionary, "construct" means "build" or "to create." Webster's II New Riverside University
9 Dictionary.

10 Condition 5 of SD 22-00 reflects this statutory provision:

11 If a project for which a permit has been granted pursuant to the Act has
12 not been completed within five (5) years after the approval of the
13 permit by local government, the local government that granted the
14 permit shall, at the expiration of the five (5) year period, review the
15 permit, and upon a showing of good cause, do either of the following:

- 16 1. Extend the permit for one (1) year; or
- 17 2. Terminate the permit, provided that nothing herein shall
18 preclude local government from issuing Substantial Development
19 Permits with a fixed termination date of less than five years.

20 Contrary to the County's conclusion, this permit condition and the statutory provision
21 upon which it is based do not result in the permit's expiration. Instead, that condition and
22 statutory language require that the construction activities associated with the project for
23 which SD 22-00 was granted – creation of a geoduck farm on the Foss lease – be completed
24 within five years.⁶ Taylor has fulfilled that condition.

25 ⁶ It could be argued that the permit condition is seemingly broader than RCW 90.58.143 because of the
reference in the condition to "project" rather than "construction activities." However, the Shoreline Hearings
Board has rejected broad readings of similar permit conditions and has determined that the expiration provisions
in other seemingly broad permit conditions apply only to construction activities. *See Yale Estates Homeowners
Assoc. v. Cowlitz County*, SHB No. 03-012, 2003 WL 22813855 at *8 (2003). In that case, the Board examined
a permit condition that stated: "This permit is valid for five years from the date of final approval." *Id.* The
Board rejected the interpretation of the permit condition that the permit, itself, expired after five years.
According to the Board:

1 Taylor began constructing its geoduck farm on the Foss lease property in the summer
2 of 2001, shortly after SD 22-00 was granted, and completed construction of its farm shortly
3 thereafter. Specifically, Taylor established the boundaries of the Foss farm. Indeed, as will
4 be demonstrated by evidence and testimony presented at hearing, Taylor notified relevant
5 Native American Tribes at the outset of its operations that it intended to "create" a shellfish
6 farm on the Foss property. Taylor also registered the Foss Farm with the WDFW. Under
7 WDFW's regulations, the Foss farm is now an aquatic farm. WAC 220-76-015 ("An aquatic
8 farm is any facility or tract of land used for private, commercial culture of aquatic
9 products."). Over the past six years, Taylor has planted the entire farmable area with
10 geoduck seed. Thus, Taylor's current cultivation activities on the Foss farm constitute
11 operating an existing, established farm, and those activities are not prohibited by Condition 5
12 of SD 22-00. The completion of the construction of the farm occurred within the five year
13 timeframe established in Condition 5 of SD 22-00.

14 In its Administrative Determination, the County has taken the position that the
15 authorization to conduct geoduck farming activities, itself, expired pursuant to the permit
16 condition, county code provision and provisions of the SMA.⁷ In so doing, the County
17 compares the geoduck activities to some ongoing construction activities that are regulated as
18 "development" under the Shoreline Management Act. For example gravel extraction
19 operations and dredging operations constitute ongoing construction activities. Accordingly

20 it is obvious from reading the SMA and its regulations, this language may only apply to
21 the construction authorized under the permit. It does not and cannot limit the duration of
22 the permit for the authorization of the use proposed. If it did, a new shoreline permit
would have to be applied for every five years, to lawfully maintain a shoreline substantial
development on the shorelines.

23 *Id.*

24 ⁷ As is noted in further detail, below, the County's Administrative Determination marks a departure from the
25 County's prior interpretation. As will be demonstrated through witness testimony and documentary
evidence presented at hearing, the County previously determined that the permit did not expire and no new
permit is required to continue ongoing activities at the Foss Farm.

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1 the substantial development permits for these types of operations are subject to the time
2 limits in RCW 90.58.143(3). This is because mining and dredging are themselves included
3 in the statute's definition of "development." See RCW 90.58.030(3)(d). Thus, if mining or
4 dredging activities continue after five years, the mine or dredging area continues to expand
5 and construction is not "complete." See, e.g., *Yale Estates Homeowners Assoc. v. Cowlitz*
6 *County*, SHB No. 03-012, 2003 WL 22813855 at *8 (2003) (holding that 90.58.143(3),
7 WAC 173-27-090(3), and related permit conditions do not place a time limit on ongoing
8 activities, except those that constitute "construction" activities). The Foss farm, by contrast,
9 is now an established farm and, while farming operations continue, the size of the farm area
10 will not expand. In other words, construction of the Foss Farm is now complete.

11 As noted above, the only basis on which a geoduck farm could constitute
12 "development" is the interference with normal public use of the surface waters. Geoduck
13 farming is dissimilar from mining, dredging and other ongoing activities that are typically
14 subject to a five-year limitation in shoreline permits. See AGO at 8-10. It would be contrary
15 to the Attorney General's Opinion for the County to now determine that the Foss farm is
16 subject to a five-year permit limitation because it involves "dredging" or "mining" activities
17 that may be subject to such a time limit.

18 The Act does not place a five-year time limit on projects that are "development"
19 because they interfere with the public use of surface waters; indeed, the Act expressly
20 recognizes that such projects may be permanent. RCW 90.58.030(3)(d) (defining as
21 development "any project of a permanent or temporary nature which interferes with the
22 normal public use of surface waters. . . ." (Emphasis added.)).

23 Application of the County's reasoning to other shoreline developments would lead to
24 absurd results. For example, when local governments grant shoreline substantial
25 development permits for docks (which often interfere with the normal public use of surface

1 waters), the permit itself typically does not expire. That is true even though ongoing
2 activities may be occurring at the dock (boat moorage, swimming, or, in the case of
3 commercial docks, barge loading activities, etc.) Thus, the dock itself, along with the
4 associated activities, is permitted to continue in place so long as construction was completed
5 within the timeframe provided in the Act. Similarly, with respect to the Foss farm, having
6 completed the construction of the Farm within the time period provided in the Act (and the
7 permit), the farm is permitted to remain in place, and Taylor is permitted to continue the
8 farming activities associated with the farm.

9 **2. The County's conclusion that the approval to conduct ongoing activities**
10 **has expired is inconsistent with the County's prior interpretations.**

11 As will be demonstrated by evidence presented at hearing, prior to the issuance of the
12 Administrative Determination, the County embraced the interpretation of the permit
13 language and statutory provisions that Taylor is advocating in these proceedings. Taylor
14 made it clear that the permit was for "ongoing" activities. See JARPA Application, attached
15 hereto as Attachment 6, at 2. Staff acknowledged its understanding of the ongoing nature of
16 the activities in its Staff Report. See Attachment 4 at 3 ("The PVC pipe would be removed
17 approximately one year after the geoduck are planted. The pipe would not be reinstalled o
18 the beach for approximately four years, at the time when new geoduck are planted.")
19 Attachment 5 at 2 (staff description of project to Examiner notes that, after harvest, "they
20 [the applicant] will then repeat the process.") At the time of issuance of the permit, staff
21 made clear to Taylor that condition 5 was not a permit expiration provision, and that the
22 permit would allow continued re-planting and harvesting of the Foss Farm.⁸ Documentary
23 evidence and testimony will establish that staff's position was consistent with a broader
24 policy of the Planning Department. In fact, the County shared its earlier interpretation that

25 ⁸ Based on the County's assurances that the Foss Permit did not expire, Taylor did not appeal the December 28,
2000 shoreline substantial development permit.

1 the permit did not expire with the general public, including a member of the opponent
2 Intervenor Neighborhood Associations. See e-mail thread from V. Diamond to L. Hendricks,
3 attached hereto as Attachment 7 (“We have not placed an expirations of this particular
4 activity [geoduck farming] for several reasons. The aquacultural [sic] is to be an ongoing
5 activity and once the seeds are planted, it would take up to approximately 7 years for the
6 geoduck to reach a size to harvest for market.”).

7 Nevertheless, when planting its farm after receiving the permit, Taylor's
8 representatives repeatedly confirmed with staff responsible for implementing and overseeing
9 the Foss Permit that the Permit did not expire and authorized Taylor to continue planting the
10 farm. Taylor repeatedly confirmed this interpretation because it is an extremely significant
11 issue -- Taylor has planted a considerable amount geoduck seed in the farm each year. If the
12 permit expired after five years, Taylor would not be allowed to harvest its product and would
13 lose tens of millions of dollars in unharvested geoduck.

14 As will be demonstrated by evidence presented at hearing, the County began to
15 deviate from its earlier interpretation that the permit did not expire in response to political
16 pressure. Several neighbors, represented in these proceedings by the Intervenor
17 Neighborhood Associations, began to bombard the County with complaints about geoduck
18 farming. Ultimately this resulted in the County reversing itself and issuing the
19 Administrative Interpretation that is the subject of this appeal.

20 The County’s more recent Administrative Determination is not supported by law or
21 principles of statutory interpretation. Condition 5 of SD 22-00 does not place a time limit on
22 ongoing activities at the Foss Farm. Rather, as discussed in detail above, the more
23 reasonable interpretation of that condition is that it requires, pursuant to the Shoreline
24 Management Act’s statutory language, construction of the farm be completed within five
25 years of permit issuance. Taylor has satisfied that condition.

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1 3. **A Conclusion that Permit SD 22-00 Expired Would Render Geoduck**
2 **Farming Impossible.**

3 A conclusion that the permit expires in five years would render geoduck farming
4 impossible. Geoduck cultivation operations occur on a four-to-six-year crop cycle. That
5 means geoduck clams are harvested from four to six years after they are planted, with the last
6 of the crop being harvested in year six. Because it typically takes six years to fully harvest a
7 geoduck crop, geoduck farmers generally cannot harvest even a single crop cycle within five
8 years of commencing operations.

9 In addition, the Foss Farm, like many geoduck farms, contains more than a single
10 crop cycle. That is because geoduck farms, particularly farms the size of the Foss farm,
11 cannot be completely planted in a single year. On the Foss farm, approximately 1/6 of the
12 farm area was planted in 2001, another 1/6 planted in 2002, another 1/6 in 2003, and so forth.
13 Then, when the mature geoduck are harvested from a portion of a farm, the harvested area is
14 typically replanted with a new crop. As will be demonstrated by evidence at hearing, the
15 County was fully aware, and made the Hearing Examiner aware, that Taylor's proposed Foss
16 farm involved the repeated planting and harvesting of geoduck from the farm property. *See*
17 *JARPA Application, attached hereto as Attachment 6, at 2; Staff Report, Attachment 4 at 3;*
18 *Attachment 5 at 2.*

19 These geoduck farming practices would be completely impossible if permits for
20 geoduck farms expired in five years. Thus, interpreting Condition 5 of SD 22-00 as a five-
21 year term limit for the Foss permit would render impossible the project that the permit
22 ostensibly allows. Such a result is not only illogical, it would be contrary to state and local
23 shoreline guidelines. The Department of Ecology's shoreline guidelines make clear that
24 aquaculture is an activity of statewide interest and is a preferred use of shoreline areas.
25 WAC 173-26-241(3)(b). Pierce County's shoreline regulations are in accord. Pierce County

1 Code Section 20.24.020(A)(1) ("The use of shoreline areas for aquaculture shall be
2 encouraged for the production of commodities for human consumption and utilization.")
3 The Shorelines Hearings Board has made clear that any condition that makes it impossible to
4 use shoreline areas for a preferred shoreline use is contrary to the Shoreline Management
5 Act. *See, e.g., Sperry Ocean Dock v. City of Tacoma*, SHB Nos. 89-4 and 89-7, 1990 WL
6 151757 (Final Findings of Fact, Conclusions of Law and Order, 1990).

7 The only interpretation of Condition 5 that does not result in SD 22-00 essentially
8 prohibiting geoduck farming is to interpret Condition 5 as requiring that Taylor's Foss farm
9 be fully established no later than five years from permit issuance. That interpretation is
10 consistent with the Shoreline Management Act, it is how Pierce County has interpreted
11 Condition 5 to date, and it is the interpretation the County should continue to embrace.

12 **D. EQUITABLE ESTOPPEL PRECLUDES THE COUNTY FROM CHANGING**
13 **ITS INTERPRETATION**

14 The Examiner should reverse the County's interpretation that the permit expires
15 because the County is precluded from barring Taylor's continued operations at the Foss
16 Farm under the doctrine of equitable estoppel.

17 The elements of equitable estoppel are: (1) a party's admission, statement or act
18 that is inconsistent with its later claim; (2) action by another party in reliance on the first
19 party's act, statement or admission; and (3) injury that would result to the relying party
20 from allowing first party to contradict or repudiate prior act, statement or admission. *See*
21 *Kramarevcky v. Dept. of Social and Health Services*, 122 Wn.2d 738, 743, 863 P.2d 535
22 (1993) (citing *Robinson v. Seattle*, 119 Wn.2d 34, 82, 830 P.2d 318, *cert. denied*, 506
23 U.S.1028, 113 S. Ct. 676, 121 L. Ed. 2d 598 (1992)). *See, also Board of Regents of the*
24 *Univ. of Washington v. Seattle*, 108 Wn.2d 545, 551, 741 P.2d 11 (1987). To establish
25 injury, Taylor must establish its justifiably reliance worked to its detriment.

1 Because a claim of equitable estoppel against the government is not favored, a
2 party asserting the claim against a governmental entity must meet two additional
3 standards. *See Kramarevcky*, 122 Wn.2d at 743. First, equitable estoppel “must be
4 necessary to prevent a manifest injustice.” *Id.* Second, “the exercise of governmental
5 functions must not be impaired as a result of the estoppel.” *Id.*

6 As will be established through testimony and documentary evidence at hearing, all
7 elements of equitable estoppel are satisfied. Prior to the Administrative Determination
8 under review, the County repeatedly explained to Taylor that the permit allowed ongoing
9 geoduck aquaculture, without expiration. Taylor continued to plant and cultivate in
10 reliance on those prior County interpretations. Because the interpretation came from all
11 levels of the Department of Planning, Taylor’s reliance on those statements is justifiable.
12 Moreover, Taylor was injured by its reliance on County interpretation. Testimony will
13 show that if Taylor is unable to continue its operations at the Foss Farm, it will leave over
14 \$20 million in geoduck in the ground, incapable of harvest. Taylor’s injury is a direct
15 result of the Taylor’s justifiable reliance on the County’s prior interpretations.

16 Failure to grant the relief will result in “manifest injustice” to Taylor, as the injury
17 is based solely on the fault of the County. Finally, equitable estoppel against the County
18 will not impair its exercise of governmental functions. Even if the Examiner believes the
19 County’s Administrative Determination is substantively correct (and, as argued above,
20 Taylor believes the County’s Determination is clearly erroneous), a reversal of the
21 County’s Administrative Determination with respect to the Foss Farm will not prohibit the
22 County from enforcing its interpretation against other parties and new farms where it has
23 not made contrary representations.

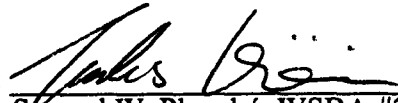
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IV. CONCLUSION

For the foregoing reasons, the County's Administrative Determination is clearly erroneous. Taylor requests that the Examiner reverse the County's Administrative Determination.

Dated this 19th day of October, 2007.

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