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BEFORE THE
PIERCE COUNTY HEARING EXAMINER

APPELLANT: TAYLOR SHELLFISH
FARMS

ADMINISTRATIVE APPEAL
AA11-07

APPEAL APPLICATION NO. 612676

INTERVENORS COALITION TO
PRESERVE PUGET SOUND
HABITAT, ET AL.'S OPENING
BRIEF

I. INTRODUCTION

This appeal presents two issues: (1) whether Taylor Shellfish's geoduck operations constitute "development," thus requiring a Shoreline Substantial Development Permit and, if so, (2) whether the permit Taylor obtained for its Foss Farm property in 2000 has expired. Planning and Land Services in a formal Administrative Determination, determined that the geoduck aquaculture operation requires a shoreline permit and also concluded that the permit issued in 2000 had expired.

This brief is filed on behalf of intervenors Coalition to Preserve Puget Sound Habitat, Case Inlet Shoreline Association, Henderson Bay Shoreline Association, Case Inlet Beach Association, and Protect Our Shoreline. These intervenors concur in the determination made by Planning and Land Services. These intervenors plan to present oral and documentary evidence as well as argument in support of the Administrative Determination.

INTERVENORS COALITION TO PRESERVE PUGET
SOUND HABITAT, ET AL.'S OPENING BRIEF - 1

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1 This brief is intended to represent an analysis of the legal issues and a preview of the
2 evidence anticipated to be introduced during the hearing. Like an opening statement at trial,
3 we do not view this memorandum at evidence itself. However, we do expect that the factual
4 statements made herein will be substantiated by the evidence submitted during the hearing.
5

6 II. BACKGROUND

7 A. Geoduck Aquaculture

8 Commercial geoduck cultivation and harvesting operations are essentially industrial
9 farming operations located in the intertidal shoreline habitat. These operations convert natural
10 beaches to agricultural use. The traditional, low density shellfish aquaculture methods of the
11 past have been replaced with new, intensive shellfish aquaculture operations.
12

13 Geoduck aquaculture on private tidelands in Puget Sound, particularly in South Puget
14 Sound, has been growing steadily over the last ten years. They often are located on the most
15 protected and sensitive coves. They are located on low-bank, sandy beach areas; on tidelands
16 that run in front of neighbors' upland properties; on tidelands owned by shellfish companies
17 or absentee landlords; and, potentially, on state-owned tidelands.
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19 The new, intensive industrial shellfish farming methods, documented in the
20 Washington State Geoduck Growers Environmental Codes of Practice (ECOP), are generally
21 the same for all commercial geoduck operations and include extensive use of boats, barges,
22 and work crews; night-time maintenance; placement of polyvinylchloride (PVC) tubes in the
23 substrate; canopy nets or individual net tops on the PVC tubes; metal or PVC stakes; and
24 water jet harvesting. In the PVC tube method, 43,500 PVC tubes are installed per acre. The
25 tubes and netting form a barrier or obstruction around the baby geoducks, protecting them
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1 from predators.¹

2 Geoducks naturally live for decades, but in the aquaculture setting they are harvested
3 young, approximately four to six years after planting. The common method, akin to dredging,
4 uses a pressure jet to liquefy the tidelands two to three feet deep. The liquefaction of the
5 tidelands allows easy removal of the geoducks, but destroys surface vegetation (if any remains
6 after the planting), affects the native shellfish populations, and impacts substrate composition
7 as much as three feet below the surface. Once the area is harvested, the area is replanted and
8 a new cycle of planting, growing, and harvesting begins anew.

9 During the grow out phase of commercial geoduck aquaculture, the abnormally high
10 density of a single bivalve species will change beach biology and dynamics.² Research also
11 indicates that bivalves (such as geoduck) consume fish eggs, shrimp and crab larvae and
12 copepods, thereby consuming the natural resource base and reducing on-site species diversity.³
13 This, in turn, can impact fisheries and the opportunities for those who use surface waters to
14 fish recreationally.

15 The appellant may claim that geoduck aquaculture is good for water quality because
16 the geoducks filter certain pollutants as they feed. But geoducks produce their own waste and
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21 ¹ An alternative technique employs Vexar tunnels in lieu of PVC tubes. In the Vexar
22 tunnel method, 200 very stiff plastic net (tunnels), like an oyster bag are placed per acre,
23 apparently with edges dug into the substrate to secure them. Taylor here proposes an operation
24 relying solely on PVC tubes so we will not address the Vexar alternative further.

25 ² Heather Deal M.Sc., *Sustainable Shellfish, Recommendations for Responsible*
26 *Aquaculture* (2005). <http://www.davidsuzuki.org/files/Oceans/Shellfish.pdf>,

27 ³ Canadian Science Advisory Secretariat,, *Effect of Shellfish Aquaculture on Fish*
28 *Habitat* (2006). http://www.dfo-mpo.gc.ca/csas/Csas/DocREC/2006/RES2006_011_e.pdf.

1 with up to 150,000 planted per acre, far more waste is generated than under natural conditions.
2 In the low flushing inlets of South Puget Sound, there is a significant question about the ability
3 of the culture site to process the excrement produced by the animals. "Potentially adverse
4 effects from both finfish and shellfish aquaculture facilities can result from excess deposition
5 of fecal material that may overload the underlying sediments with particulate organic matter.
6 Bacterial decomposition of this organic material can release more inorganic nutrients and in
7 extreme situations cause sediment anoxia, thereby reducing the biomass and species diversity
8 of benthic fauna."⁴

9
10 The tubes and nets employed in the operations create a physical obstruction in multiple
11 ways. The very purpose of both the tubes and nets is to obstruct predatory birds and marine
12 organisms that feed on small geoducks. They also obstruct natural currents which alters the
13 currents causing changes in sediment deposition.⁵ The tubes and nets also obstruct the
14 boaters, beach walkers, and others who seek to use the beach, access the water, and boat on
15 the water.
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19 ⁴ Dr. Roger I. E. Newell, University of Maryland Center for Environmental Science,
20 *A framework for developing "ecological carrying capacity" mathematical models for bivalve mollusk*
21 *aquaculture*, at 44 (2006). <http://www.fra.affrc.go.jp/bulletin/bull/bull19/07.pdf>.

22 ⁵ Heffernan, et al., *A Review of the ecological implications of mariculture and*
23 *intertidal harvesting in Ireland* (1999); www.protectourshoreline.org/studies/Review_Mariculture_Ireland.pdf. Georgina Willner, *The Potential Impacts of the Commercial Geoduck*
24 *(Panope generosa) Hydraulic Harvest Method on Organisms in the Sediment and at the Water-*
25 *Sediment Interface in Puget Sound*, (2006), www.protectourshoreline.org/ThesisGeoduckHarvestImpacts.pdf. L. I. Bendell-Young, Department of Biological Sciences, Simon Fraser
26 University, *Contrasting the community structure and select geochemical characteristics of three*
27 *intertidal regions in relation to shellfish farming* (2006), <http://www.protectourshoreline.org/articles/07BendellShellfishCommunityStructure.pdf>.

1 In the water jet harvesting method, a high powered jet of water is used to drill down
2 through the sediment to loosen the substrate around the geoduck. A large hole, up to three feet
3 deep results. The operation is done in shallow water. Some of the sediment, now suspended
4 in the water, is carried away on the currents. Removing the geoduck in this manner may be
5 economically ideal for the applicant, but causes intense habitat disruption.
6

7 B. Taylor's Foss Farm Site

8 In 2000, Taylor leased private tidelands along approximately one mile of Case Inlet
9 from the North Bay Partnership (Foss Lease) for the purpose of establishing a commercial
10 geoduck farm. Taylor acknowledges that operations at the Foss Lease are "similar to
11 operations at other geoduck farms throughout the area." Notice of Appeal, ¶ 2. The operation
12 covers up to twelve acres.
13

14 The basic facts regarding Taylor's operations are not in dispute. As described in its
15 Notice of Appeal, Taylor inserts PVC pipes into the substrate on one foot centers (i.e., more
16 than 43,000 per acre). Id. Employees plant four baby geoducks by hand into each pipe. Id.
17 The PVC pipes create a barrier which "temporarily protects the vulnerable juvenile geoducks
18 from predators." Id.
19

20 Taylor utilizes nets over the top of the tubes to further obstruct predators from reaching
21 the juvenile geoducks. Taylor's preference is to use "canopy nets," but will use "individual
22 tube nets and rubber bands" if an eagle nest is found in the vicinity.⁶
23

24 The PVC pipes and associated netting remain in place for approximately one to two
25 years. Notice of Appeal, ¶ 2. Four to five years after removing the PVC pipes, the geoducks
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27 ⁶ Letter from Gordon Derr to Examiner McCarthy (Oct. 5, 2007).
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1 are harvested by use of a water jet. The water jet dislodges the sediment to a depth of two to
2 three feet. Some of the sediment suspended in the water column is moved off-site by
3 currents. The sediment then settles out, changing the shape and structure of the beach down
4 current.
5

6 The cycle of planting, growing, and harvesting is repeated on a continuous basis.
7 "After the harvest of each portion, Taylor replants that segment of the farm such that the farm
8 is in a perpetual cycle of planting, cultivation, and harvesting." Notice of Appeal, ¶ 4.

9 In 2000, Taylor filed an application for a Shoreline Substantial Development Permit
10 (SSDP or "Shoreline Permit") from Pierce County "to construct" and operate the Foss Lease.
11 Notice of Appeal at 3, ¶ 6. The Pierce County Hearing Examiner granted the permit in
12 December 2001 (Permit SD 22-00). *Id.* The Permit includes a restriction that provides that
13 the permit expires if the project "has not been completed within five (5) years after the
14 approval of the permit." (Permit, Condition No. 5.) The Permit provides that the five year
15 term can be extended by up to one additional year if good cause is shown, but no longer. *Id.*
16 There is no dispute that Taylor has not "completed" its project, but rather seeks, as stated in
17 its Notice of Appeal, to engage "in a perpetual cycle of planting, cultivation, and harvesting."
18 Notice of Appeal, ¶ 4.
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21 C. The County's Administrative Determination

22 More than six years after issuance of the Permit, the County was asked to determine
23 whether the Permit had expired, thus necessitating cessation of the operations or an
24 application for a new permit. On August 8, 2007, the Pierce County Department of Planning
25 and Land Services issued a formal Administrative Determination concluding that "the permit
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1 has expired and further work at the site will require application for and approval of a new
2 shoreline substantial development permit (SSDP)." Administrative Determination at 1.

3 The Administrative Determination first determined that Taylor's operations constitute
4 "development" as that term is used in the Shoreline Management Act. The Administrative
5 Determination based this conclusion on the decision in Washington Shell Fish, Inc. v. Pierce
6 County, 132 Wn. App. 239 (2006). The Administrative Determination noted that in that case
7 the Court of Appeals had determined that the geoduck aquaculture operations "prevented the
8 general public from using certain areas of the water" and therefore constituted "development"
9 as that term is defined in the Shoreline Management Act. The Administrative Determination
10 expressed ambiguity as to whether geoduck aquaculture might also meet another statutory
11 definition of "development," i.e., whether the installation of geoduck tubes constitutes
12 "structures" and/or "construction." Administrative Determination at 5. The Administrative
13 Determination noted that Taylor itself had characterized its operations as involving
14 "construction" but that an Attorney General opinion had concluded that the installation of
15 PVC tubes and netting does not constitute a "structure" as that term is used in the SMA's
16 definition of "development." Resolution of that issue was not necessary in the Administrative
17 Determination because the Department had already determined that the operations constituted
18 a "development" because they interfere with the ordinary use of surface waters.
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22 The Administrative Determination then went on to consider Taylor's claim that the
23 permit had not expired. Referencing the applicable state statute, state rules, County Code
24 provisions, and permit conditions, the Department concluded that the permit had expired after
25 six years (five years plus the one year extension) and that a new application (or cessation of
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1 activities) was required.

2 D. Taylor's Appeal

3 On August 22, 2007, Taylor filed its Notice of Appeal of Administrative
4 Determination. Taylor's appeal raises two issues. First, Taylor claims that its operations do
5 not constitute "development" for which a shoreline permit is required by the Shoreline
6 Management Act (SMA). Second, Taylor claims that even if a shoreline permit is required,
7 that the permit it obtained in 2000 has not expired because Taylor commenced operations
8 within the initial five year term.
9

10 Taylor and Pierce County subsequently stipulated to allow several neighborhood and
11 environmental organizations to intervene in support of the County's Administrative
12 Determination. The stipulation also allowed intervention by North Bay Partners (the Foss
13 Family Partnership that leases the land to Taylor).
14

15 III. SHORELINE SUBSTANTIAL DEVELOPMENT PERMITS ARE
16 REQUIRED FOR COMMERCIAL GEODUCK OPERATIONS

17 A. The Shoreline Management Act

- 18 1. The Act is to be "broadly construed" to protect shorelines "to the
19 greatest extent feasible"

20 The citizens of Washington State adopted the Shoreline Management Act (SMA), ch.
21 90.58 RCW, through citizen initiative, finding that "the shorelines of the state are among the
22 most valuable and fragile of its natural resources and . . . there is great concern throughout the
23 state relating to their utilization, protection, restoration, and preservation." RCW 90.58.020.
24

25 The State policy enunciated in the Act calls for restricting construction on privately
26 owned and publicly owned shorelines of the State to protect against adverse effects to the
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1 public health, the land and its vegetation and wildlife, and the waters of the state and their
2 aquatic life. Id. That section further states "in the implementation of this policy, the public's
3 opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall
4 be preserved to the greatest extent feasible consistent with the overall best interests of the state
5 and the people generally." Id.

7 The Shoreline Management Act explicitly requires that its provisions be broadly
8 construed "to protect the State's shorelines as fully as possible." See RCW 90.58.900. When
9 doubt exists, the courts repeatedly have required and employed a broad reading of the Act to
10 assure that its environmental protection purposes are served. Bellevue Farm Owners
11 Association v. State of Washington Shorelines Hearings Board, 100 Wn. App. 341, 386, 997
12 P.2d 380 (2000); Buechel v. State Department of Ecology, 125 Wn.2d 196, 203, 884 P.2d 910
13 (1994); Hunt v. Anderson, 30 Wn. App. 437, 439, 635 P.2d 156 (1981).

15 2. The Act regulates all "development" and requires permits for
16 "substantial developments"

17 All "development" within the shorelines of the State of Washington must be consistent
18 with the policies of the Shoreline Management Act and regulations adopted pursuant to the
19 Act. RCW 90.58.140. If such development is a "substantial development," as that term is
20 defined by the Act, then the developer must obtain a shoreline substantial development permit.

21 Id. Specifically, the Shoreline Management Act states:

23 (1) A development shall not be undertaken on the shorelines
24 of the state unless it is consistent with the policy of this chapter
25 and, after adoption or approval, as appropriate, the applicable
26 guidelines, rules, or master program.

1 (2) A substantial development shall not be undertaken on
2 shorelines of the state without first obtaining a permit from the
3 government entity having administrative jurisdiction under this
chapter.

4 RCW 90.58.140.

5 3. The Act defines "development" (and "substantial development")
6 broadly

7 SMA broadly defines "development" as:

8 . . . a use consisting of the construction or exterior alteration of
9 structures; dredging; drilling; dumping; filling; removal of any
10 sand, gravel, or minerals; bulkheading; driving of piling; placing
11 of obstructions; or any project of a permanent or temporary
12 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.

13 RCW 90.58.030(3)(d). The Pierce County Shoreline Master Program repeats this definition
14 of "development." PCC 20.04.130.

15 "Substantial" development means any "development" of which the total cost of fair
16 market value exceeds \$5,000 or any development, which materially interferes with the normal
17 public use of the water or shorelines of the State. RCW 90.58.030(3)(e).⁷ Under the Shoreline
18 Management Act "no 'substantial development' exists if there is not 'development' within the
19 meaning of RCW 90.58.030(3)(d), because for there to be a 'substantial development,' there
20 must first be a 'development.'" Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 812,
21 828 P.2d 549 (1992).

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24 In this case, there is no dispute that the \$5,000 threshold in the "substantial"
25 development definition is met. Taylor's appeal raises only the issue of whether its activity

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27 ⁷ The \$5,000 threshold is subject to an inflation adjustment starting this year. Id.

1 constitutes a "development" (and whether the five year permit has expired).

2 B. Commercial Geoduck Aquaculture is a Substantial Shoreline Development

3 The Washington Court of Appeals has ruled that geoduck aquaculture and harvesting
4 activities are "developments" under the Shorelines Management Act. Washington Shell Fish,
5 Inc. v. Pierce County, 132 Wn. App. 239, 253, 131 P.3d 326 (2006). The operations at issue
6 in that case were substantially the same as those at issues here. Each year, Washington Shell
7 Fish (WSF) would plant geoduck seeds by pushing 3-inch diameter, polyvinylchloride (PVC)
8 pipes six to twelve inches into the shoreline. Id. at 328. WSF then would place geoduck seeds
9 into the PVC pipes, cover the pipes with netting, and secure the netting with pin and wire ties
10 to protect the geoduck seedlings from predators. After six months, WSF would remove the
11 netting and pipes to allow the geoduck seeds to grow naturally. Five years later, divers would
12 use water jets to harvest them from their burrows three or four feet deep in the sand substrate.
13 From a boat anchored offshore, the harvesters would dive down to the bottom, insert a water
14 jet into the sand substrate next to the geoduck, use water jets to excavate the substrate around
15 the geoduck and loosen its grip, and then pull the geoduck out of the sand. Id. In the process,
16 loosened sand and silt would move around in the nearby saltwater. Id. Removal of each
17 geoduck would leave an excavation pit in the sand substrate one and a half to two feet in
18 diameter. Id.

19 The Court of Appeals held that the geoduck operation was a "development" because
20 it interfered with the normal public use of surface water. Id. at 250. The court noted that
21 several witnesses testified that WSF left rope in the water where WSF had planted geoducks
22 and this rope would become entangled with people or non-geoduck harvest related objects. In
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1 addition, WSF divers harvesting geoducks placed markers on the water's surface that prevented
2 the public use of that area. The court also noted that the top portions of the PVC pipes
3 protruded vertically out of the sand. In addition, according to one witness, WSF used up to
4 four boats at a time to store the geoducks the divers harvested, one of which was a barge large
5 enough to drag a buoy. These WSF boats further restricted the water surface open to public
6 use.

7
8 In those ways, the Court found that WSF's activities prevented the general public from
9 using areas of the water by posing a safety risk to the public and occupying shoreline water and
10 thereby excluding others. As a result, the Court found that WSF engaged in "development"
11 when it planted and harvested geoducks on the leased properties. Id. at 252. Having decided
12 that the interference with public use was sufficient to meet the definition of "development," the
13 Court did not consider whether the operation met the definition in other ways, too. Id.

14
15 C. Taylor's Geoduck Operations Are a "Development" and Must Obtain a
16 Substantial Shoreline Development Permit

17 As is explained more fully below, Taylor's "Foss Lease" geoduck aquaculture
18 operation, like all commercial geoduck operations in South Puget Sound, meets the Act's
19 definition of "development" in multiple ways. As in Washington Shell Fish, Taylor's operation
20 interferes with normal public use of the surface of the waters. Furthermore, it involves the
21 construction of structures; the placement of obstructions; filling; drilling; dredging and the
22 removal of sand, gravel, or minerals; and, therefore, meets the statutory definition of
23 "development" in multiple ways.
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1 1. Geoduck operations involve the "construction of structures"

2 Commercial geoduck operations require the installation of thousands of PVC tubes
3 approximately one foot deep into the shoreline substrate. The question becomes, therefore,
4 whether installation of these tubes constitutes a "use consisting of the construction . . . of
5 structures." See RCW 90.58.030(3)(d). WAC 173-27-030(15) defines "structure" as "a
6 permanent or temporary edifice or building, or any piece of work artificially built or composed
7 of parts joined together in some definite manner."
8

9 A PVC tube is clearly a "piece of work artificially built." Additionally, the PVC tubes
10 are obviously "joined together in a definite manner" in that they are planted in rows and
11 sections to form discrete groupings.
12

13 The large canopy nets are used over the entire grouping of PVC tubes to hold them
14 together so they will not dislodge and become marine debris. (The nets also serve as predator
15 exclusion devices.) These nets "join" the tubes "together in a definite manner." The entire
16 configuration clearly constitutes the construction of a structure.
17

18 The Army Corps of Engineers has regulatory authority over certain activities in waters
19 of the United States and, in that context, characterizes aquaculture apparatus like that utilized
20 by Taylor as "structures." The Army Corps has issued a Nationwide Permit (NWP 48)
21 authorizing continuation of certain pre-existing shellfish aquaculture activities. NWP 48
22 authorized the use of "tubes," "nets," "and other structures" used in commercial aquaculture.⁸
23 The Army Corps has considerable experience in regulating activities and other developments
24

25 ⁸ "This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines,
26 tubes, containers, and other structures necessary for the continued operation of the existing
27 commercial aquaculture activity." NWP 48.

1 in marine waters. Its characterization of these aquaculture elements as "structures" is
2 significant.

3 The Attorney General has issued a formal Attorney General Opinion (AGO)⁹ which
4 concluded, incorrectly, that geoduck operations do not involve the construction of structures.
5
6 First, the AGO incorrectly concluded that the PVC tubes themselves are not structures. The
7 AGO completely disregarded that part of the definition that states that a "structure" is "any
8 piece of work artificially built." It is that phrase in the definition that makes clear that the PVC
9 tubes themselves are "structures." In addition, the opinion erred when it focused solely on the
10 individual tubes and not on the entire configuration that is, in the words of Taylor's Notice of
11 Appeal, "constructed" onsite. Notice of Appeal at 3, ¶ 6. The evenly placed PVC tubes, alone
12 or combined with nets, rubberbands, and poles, and the extent of the area so configured, form
13 an artificially built piece of work that is a "structure."
14

15 2. Taylor's geoduck operations involve the placement of obstructions

16 Taylor's geoduck operations also involves "the placing of obstructions" on the
17 shorelines of Pierce County. The PVC tubes and netting create a physical obstruction to not
18 only the public's use of the area, but also to native plant, animal and fish species. They occupy
19 large swaths of tidelands excluding other uses. For anyone who encounters a geoduck tube
20 planting, it is an obvious obstruction to the use of the area. The public loses beach and water
21 access at mid- and low tide. Barges, rafts, boats, hoses, equipment and workers obstruct
22 boaters and recreational users at all tides.
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25 _____
26 ⁹ The Attorney General's Opinion is just that - an opinion - and not binding on Pierce
27 County or this Examiner.

1 The predator exclusion tubes and nets obstruct aquatic animals. Indeed, it is the *very*
2 *purpose* of the predator exclusion devices to obstruct predators, e.g., wildlife, from occupying
3 their normal habitat. Native species also are inadvertently trapped under predator exclusion
4 netting and in the netting or by rubberbands. The entire facility is one large obstruction to
5 native species in the tidelands.
6

7 The Attorney General Opinion considers only one type of obstruction: "the tubes could
8 obstruct a walker." In its discussion of the "obstruction" issue, the AGO gives no consideration
9 to the possibility that the tubes and netting constitute an obstruction for fish and wildlife.
10 However, earlier in the opinion, in the discussion of "drilling," the AGO characterizes the tubes
11 as "a temporary barrier." Precisely. We are not aware of a meaningful difference between the
12 characterization of the tubes as a "barrier" or an "obstruction." Inadvertently or not, the AGO
13 supports characterizing the tubes as obstructions which qualify the facility as a "development."
14

15 The AGO also fails to consider whether the facilities act as an "obstruction" to boaters
16 and swimmers. But there can be no doubt that these facilities would obstruct boaters,
17 swimmers, and waders. Similarly, the array of pipes, nets, barges, and other support equipment
18 obstructs view of the shoreline environment.
19

20 Even as to beach walkers, the AGO does not rule out that the facility constitutes an
21 obstruction. Rather, the AGO asserts that this determination must be made on a case-by-case
22 basis: "[l]ocal government, as the primary administrator of the substantial development permit
23 system, would determine whether a particular project involves placing obstructions" on a case-
24 by-case basis. AGO 2007 No. 1 at 10, *citing* RCW 90.58.140(3); *Samuel's Furniture*, 147
25 Wn.2d at 455. We do not think a case-by-case determination is necessary; all geoduck
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1 operations include "obstructions" to people and wildlife. But even if a case-by-case analysis
2 were required, that analysis here can only result in a conclusion that Taylor's operation places
3 obstructions to both public use and fish and animal use of the tidelands. There should be no
4 question that the netting and tubes installed by Taylor create an obstruction when that is their
5 very purpose.
6

7 3. Taylor's geoduck harvest operations involve the use of drilling

8 The Shoreline Master Act lists "drilling" as one of the definitions of "development."
9 The Attorney General states that "[t]he term 'drilling' is commonly defined in terms of creating
10 a hole. See Merriam-Webster online Dictionary, Drill, '2 a(1): to bore or drill a hole in (2): to
11 make by piercing action <drill a hole>.'" The Attorney General disqualifies the placement of
12 tubes as "drilling" saying "while tubes could be creatively described as being 'drilled into' the
13 substrate, no hole is created. The tube is a temporary barrier protecting the juvenile clam." But
14 the Attorney General did not consider the water jet used during harvesting as a drill.
15

16 The water jet device, as it is used in geoduck harvest, is a "drill" and its operation
17 constitutes "drilling." The description of water jet harvesting in the Washington State
18 Geoduck Growers Environmental Codes of Practice (ECOP) clearly indicates that it involves
19 piercing the substrate to create a hole: "the nozzle is inserted next to the geoduck siphon" and
20 "the average size hole produced is about 1/3 cubic feet" in deep water harvest. The intertidal
21 harvest drilling according to the ECOP, is even more severe, as "the harvester will not harvest
22 geoduck one at a time producing single holes but will systematically emulsify the substrate
23 with the water jet."
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1 The Pacific Coast Shellfish Growers Association states that commercial geoduck
2 harvesters pump large volumes of seawater at low pressure to loosen the sand and release the
3 geoducks."¹⁰ The ECOP allows water jet pressure up to 100 psi. Whether the industry uses
4 the term "emulsify," as in the ECOP, or uses terms such as "loosen" or "soften," the technique
5 and the effect of the technique are the same: extraction of the geoduck by drilling a hole, a hole
6 which the geoduck harvester actually sinks into, several feet deep, while harvesting.
7

8 The Attorney General concludes that "disruption of the substrate around a geoduck,
9 considered in isolation, cannot be legally distinguished from general clam digging or raking."
10 But the Attorney General errs in not taking into account the method used in geoduck
11 aquaculture, which is "drilling." It is clear from the ECOP that the very definition of water jet
12 harvesting of geoducks in intertidal areas involves thousands of geoducks, not just one. The
13 purpose of water jet harvest is to extract approximately 90,000 geoduck per acre or some 19-
14 23 geoducks per square yard. According to the ECOP, water jet harvest is a highly efficient
15 method of extraction and "100 geoducks per hour can be harvested with this method." On the
16 other hand, the ECOP states that the hand digging method "can be a very difficult and time
17 consuming effort since geoducks are buried so deeply (36") in the substrate."¹¹ Thus, using
18 the industry's own definitions, the Attorney General Opinion is inaccurate when it analogizes
19 water jet harvest with general clam digging or raking.
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24 ¹⁰ Pacific Coast Shellfish Growers Association, *Geoduck Farming Is Good for Washington*
25 *State*.

26 ¹¹ The Washington State Department of Fish and Wildlife website as of July 8, 2007
27 describes hand-digging a single geoduck as nearly as difficult as "climbing Mt. Rainer."

1 4. Taylor's geoduck operations involve dredging and the removal of
2 materials

3 The Washington State Geoduck Growers Environment Codes of Practice (ECOP)
4 essentially acknowledges that harvesting involves "dredging" and results in the "removal of
5 sand, gravel or minerals." According to ECOP, "the beach level will be lowered about 1-2
6 inches by the harvest." An inch or two may not seem like much, but taken over an acre (or the
7 twelve acres at issue here), the loss of material is significant. One to two inches equates to
8 approximately 134 to 268 cubic yards of material per acre, the equivalent of 13 to 26 dump
9 trucks of material. Taylor's lease covers 12 acres, equating to the dredging and removal of
10 nearly 1,500 to 3,000 cubic yards of material for each cycle of planting and harvesting.
11 Moreover, growers drill into the beach area not just once during the harvest, but make as many
12 as 12 to 15 passes to get every last geoduck,¹² further increasing the amount of material
13 "removed."
14

15
16 In his opinion, the Attorney General does not dispute removal occurs, but attempts to
17 trivialize it: "...if sediment is disrupted during harvest, only a minimal amount of sediment is
18 actually removed with the clam. This minimal amount of materials removed does not comport
19 with a reasonable interpretation of the statutory language concerning "removal of materials."
20 See Black's Law Dictionary 464 (8th ed. 2004), 'de minimis non curat lex' (the law does not
21 concern itself with trifles.)" The Attorney General does not state the source of his information
22 about the amount of sediment removed nor does he back up his claim that it is a minimal
23

24
25
26 ¹² Department of Natural Resources, *Geoduck Clam Research and Management, Pacific*
27 *Shellfish Institute Component Deliverable 3 (2004).*

1 amount. Obviously, removing material in the range of 1,500 to 3,000 cubic yards per acre is
2 more than a "trifle" or "minimal amount."

3
4 5. Taylor's operations involve "filling"

5 Taylor places "fill" in the beds of Puget Sound when it inserts the PVC tubes into the
6 substrate at the rate of more than 43,000 per acre. The amount of fill associated with the
7 insertion of any single tube can be calculated and, when multiplied 43,000 times over, results
8 in a considerable amount of fill. Depending on the length of the tube inserted into the
9 substrate, the fill associated with the tubes in a single acre ranges from 12 to 18 cubic yards.
10 Multiplied by the 12 acres in Taylor's Foss Lease, the amount of fill increases to between 144
11 and 216 cubic yards.
12

13 These operations also result in fill when tubes and other materials come loose and
14 deposit themselves on the bed of Puget Sound. Considerable volumes of this material has been
15 found there. Inadvertent or not, Taylor's operations will result in "filling," i.e., depositing
16 debris on the bed of the Puget Sound.
17

18 The Attorney General did not consider the "fill" issue in the AGO. If the issue had been
19 considered, undoubtedly the Attorney General would have recognized that inserting the tubes
20 into the substrate and the deposition of debris on the floor of the Puget Sound constitutes "fill"
21 and, thereby, qualifies the activity as "development" under the SMA.
22

23 6. Taylor's geoduck operations interfere with normal public use of surface
24 waters

24 Taylor's geoduck operations, like all geoduck operations, interfere with normal public
25 use of surface waters. The very existence of the structure, barge, hoses, and other devices
26
27
28

1 precludes the use of the shoreline by fishers, boaters, and other recreational (and potentially
2 commercial) users.

3 As discussed above, the PVC tubes, netting, stake and rebar structures create a physical
4 obstruction to the public's use of the surface waters. Their presence simply excludes other uses.

5
6 When the tide line is in the midst of the geoduck operation, all access to the surface water at
7 that location is precluded. At higher tides, boaters need to avoid the area lest they hit bottom
8 on the protruding pipes and nets. Large barges, multiple boats, men with water jet hoses and
9 crews of workers obstruct boaters and recreational users during planting and harvesting
10 operations. When large swaths of tideland are converted to this type of agricultural use, as has
11 already happened at the Foss Lease, the practical consequence is that these surface water areas
12 are effectively made off limits to the public.
13

14 Additionally, if Taylor marks the area as off-limits to the public with bouys or stakes,
15 as was the case in Washington Shell Fish, then Taylor has interfered overtly with the public use
16 of surface waters. If Taylor does not mark the area for hazards, it has created an irresponsible
17 hazard to the public, because at higher tides the structure and netting may not be visible
18 underneath the water.
19

20 In sum, Taylor's operations meet the definitions of "development" in many ways, any
21 one of which is sufficient to trigger the SMA's permitting requirements. Taylor's appeal of
22 that portion of the Administrative Determination should be denied.
23

24 IV. SD 22-00 HAS EXPIRED

25 There is a five year term limit (with a possible one-year extension) for construction
26 activities requiring a Shoreline Substantial Development Permit. The five year term limit is
27

1 set forth in the Revised Code of Washington, the Washington Administrative Code, the Pierce
2 County Code, and in SD 22-00. As stated in the statute:

3 Authorization to conduct construction activities shall terminate
4 five years after the effective date of a substantial development
5 permit. However, local government may authorize a single
6 extension for a period not to exceed one year based on
7 reasonable factors, if a request for extension has been filed
8 before the expiration date and notice of the proposed extension
9 is given to parties of record and to the Department [of Ecology].

8 RCW 90.58.143(3).

9 The corresponding State regulation appears to be identical to the statute except that the
10 regulation refers to conducting "development" activities as opposed to "construction" activities.
11 WAC 173-27-090(3). Likewise, PCC 20.76.030.G(3) states that "[a]uthorization to conduct
12 development activities shall terminate five years after the effective date of a permit. The
13 Examiner may authorize a single, one-year extension as set forth in Subsection 2 above."

14 In SD 22-00, Condition 5 states:

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

- 21 (1) Extend the permit for one (1) year; or
22 (2) Terminate that permit; provided that nothing herein shall
23 preclude local government from issuing Substantial
24 Development Permits with a fixed termination date of less than
25 five (5) years.

1 In the Administrative Determination at issue here, Pierce County determined that the
2 five year termination clause in the statute, regulations, County Code, and permit applied to
3 Taylor's Foss Lease operations:
4

5 Planning and Land Services has reviewed this matter and
6 concludes that the permit was issued for five years, and that a
7 one-year extension was granted, thereby extending the life of
8 the permit to six years. Accordingly, the permit [issued
9 December 28, 2000] has expired and further work at the site will
10 require application for and approval of a new Shoreline
11 Substantial Development Permit (SSDP).

12 Administrative Determination at 1.

13 Sound policy supports the five year limitation in Substantial Development Permits for
14 geoduck aquaculture. Testimony will reveal that the geoduck aquaculture industry is in its
15 infancy. There is much that is not yet known about the adverse impacts associated with these
16 activities. The SMA is to be construed broadly to assure its salutary purposes are
17 accomplished. Those purposes are advanced by applying the five year term limit to an activity
18 like geoduck aquaculture where so little is currently known about its impacts. Only by
19 requiring re-application on a periodic basis are the State's interests and the County's interests
20 in protecting the shoreline environment adequately served. Only through that mechanism can
21 Pierce County be assured that it will be able to take account of new information regarding the
22 project's environmental impacts that may develop in the ensuing years (assuming a permit is
23 issued in the first place).

24 The issue of requiring permit renewals for aquaculture is not new. In DNR v. Kitsap
25 County, SHB 78-37 (1980), aff'd 107 Wn.2d 801 (1987) (1980 WL 131174), the Shorelines
26 Hearings Board reversed a Kitsap County decision to deny a permit for sub-tidal clamming at
27

28
INTERVENORS COALITION TO PRESERVE PUGET
SOUND HABITAT, ET AL.'S OPENING BRIEF - 22

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1 Agate Pass, but added a condition that the substantial development permit expire after five
2 years. That decision was affirmed by the Supreme Court. See also San Juan County v. DOE,
3 SHB No. 88-52 (1989) (affirming San Juan County Shoreline Program's inclusion of expiration
4 limits for aquaculture).
5

6 Taylor argues that it should be treated like a dairy farm operating in the shoreline
7 environment. According to Taylor, if a permit were issued for a dairy farm, a new permit
8 would not be required every five (or six) years to authorize continued grazing in the shoreline
9 zone. But analogies like that miss the mark. Grazing cattle probably do not meet any of the
10 definitions of "development." Whether cattle graze in the shoreline environment on a single
11 occasion or repeatedly, a Substantial Development Permit likely is not necessary.
12

13 More apt is the analogy to ongoing "development" activities like dredging the Nisqually
14 River. Shoreline permits for repetitive activities like those are routinely subject to the five year
15 term.
16

17 Like repetitive dredging, Taylor's proposed aquaculture activities involve new
18 "development" on a repeat basis. As Taylor explains, the operations move progressively along
19 the beach. Different parts of the beach each year are subject to new installation of the tubes,
20 cultivation of the geoducks, and harvesting. As we have demonstrated above, both the planting
21 and harvesting phases constitute "development." Different sections of the beach are subject
22 to this renewed "development" each year.
23

24 It is as if a dairy farmer each year built a new shed on a different portion of the
25 shoreline. A Substantial Development Permit for that activity would expire after five years.
26 If the farmer wanted to continue building new sheds along the same shoreline stretch in
27
28

1 succeeding years, the farmer would need to obtain a new permit. Given the liberal construction
2 of the Act required by the statute itself and the construction of the Act given by the agency
3 (Ecology) charged with enforcing the Act, the Examiner should not hesitate to affirm the
4 County's interpretation of the five year condition.
5

6 Taylor may claim that at times past the County took a different position regarding the
7 five year condition. That evidence should not be considered by the Examiner. The agency's
8 erroneous interpretation of a condition in the past is not a bar to the agency enforcing the
9 statute, rules, and permit correctly now.
10

11 V. CONCLUSION

12 For the foregoing reasons, the Examiner should affirm the Administrative
13 Determination in all respects. The Examiner should find that Taylor's project meets the
14 definition of "development" in multiple ways as outlined above. Further, the Examiner should
15 determine that SD 22-00 has expired pursuant to the requirements of State and local law and
16 the terms of the permit itself.
17

18 Dated this 19 day of October, 2007.

19 Respectfully submitted,

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21
22 By: 

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CPPSH\Opening Brief

INTERVENORS COALITION TO PRESERVE PUGET
SOUND HABITAT, ET AL.'S OPENING BRIEF - 24

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