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BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

TAYLOR RESOURCES, INC. a Washington
corporation, also known as TAYLOR
SHELLFISH FARMS,

Appellant.

v.

PIERCE COUNTY, a political subdivision of the
State of Washington,

Respondent.

NO. S08-010

PETITION FOR REVIEW

APPELLANT:

Taylor Resources, Inc., also known as
Taylor Shellfish Farms ("Taylor")
Attn: Ms. Diane Cooper
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Shelton, WA 98584
dianec@taylorshellfish.com
Phone: (360) 426-6178 x. 40
Fax: (360) 427-0327

APPELLANT'S REPRESENTATIVE:

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Amanda Carr, WSBA # 38025
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PARTIES:

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County-City Building
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Tacoma, WA 98402

Washington State Department of Ecology
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P. O. Box 47600
Olympia, WA 98504-7600

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2 2425 Bristol Court SW, 2nd Floor
3 P. O. Box 40117
4 Olympia, WA 98504-0117

5 Washington State Attorney General
6 1125 Washington Street SE
7 P. O. Box 40100
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9 INTERVENORS IN THE COUNTY'S PROCEEDINGS BELOW:

10 North Bay Partners
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18 Case Inlet Shoreline Association
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5 *Protect Our Shoreline's Representative:*
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10 Coalition to Preserve Puget Sound¹

11 *Coalition to Preserve Puget Sound's*
12 *Representative:*
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17 Case Inlet Beach Association²

18 *Case Inlet Beach Association's*
19 *Representative:*
20 David A. Bricklin, WSBA #7583
21 Bricklin Newman Dold, LLP
22 1001 Fourth Avenue, Suite 3303
23 Seattle, WA 98154

24 **1. DECISION APPEALED:**

25 1.1 Taylor appeals the Report and Decision of the Pierce County Hearing Examiner ("Examiner") in Administrative Appeal: Case No. AA16-07, Application No.

¹ Coalition to Preserve Puget Sound appeared only through its attorney. An internet search of the records of the Secretary of State does not provide any information regarding Coalition to Preserve Puget Sound. No address was provided at the hearing (or in the Decision) for these Intervenor, nor was there a name or address provided for any representative. Inquiries directed to counsel for Coalition to Preserve Puget Sound have gone unanswered.

² Case Inlet Beach Association appeared only through its attorney. An internet search of the records of the Secretary of State does not provide any information regarding Case Inlet Beach Association. No address was provided at the hearing (or in the Decision) for these Intervenor, nor was there a name or address provided for any representative. Inquiries directed to counsel for Case Inlet Beach Association have gone unanswered.

1 612676 (“Examiner’s Decision”). The County mailed the Examiner’s Decision on March
2 26, 2008. A true and correct copy of the Examiner’s Decision is attached hereto as
3 Exhibit A. A true and correct copy of Taylor’s appeal initiating the Examiner’s review is
4 attached hereto as Exhibit B.

5 1.2 The Examiner’s decision pertains to Taylor’s geoduck farm known as the
6 “Foss Farm.” The Foss Farm is located on 12 acres of private tidelands on the east shore
7 of Case Inlet/North Bay, north of Whitman Cove, and approximately ½ mile northwest of
8 Joemma State Park. Prior to initiating operations at the Foss Farm, Taylor applied for a
9 Shoreline Substantial Development Permit to construct and operate the Foss Farm. A true
10 and correct copy of the permit application is attached hereto as Exhibit C. On December
11 28, 2000, Pierce County issued shoreline substantial development permit SD 22-00
12 authorizing Taylor to construct and operate the Foss Farm. A true and correct copy of SD
13 22-00 is attached hereto as exhibit D.

14 1.3 In his Decision, the Examiner concludes that Taylor’s geoduck operation is
15 development that is subject to the Shoreline Management Act, ch. 90.58 RCW (“SMA”)
16 and that SD 22-00 has expired such that a new permit is required. The Examiner’s
17 Decision effectively revokes SD 22-00.

18 1.4 As a precautionary measure pending Taylor’s appeal of the Examiner’s
19 decision, Taylor filed an application for a new Shoreline Substantial Development Permit
20 and Shoreline Conditional Use Permit to continue operations at the Foss Farm. The
21 County received the application on February 19, 2008. The County has initiated its
22 review of the application, but has not yet scheduled a public hearing or issued a threshold
23 determination under the State Environmental Policy Act.

24 1.5 In his Decision, the Examiner reaches several conclusions regarding the
25 standards the County should apply upon Taylor’s application for a new permit and implies

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1 that the County may be prohibited from issuing a new shoreline permit under existing and
2 draft regulations.

3 **2. GROUND FOR APPEAL:**

4 Taylor Challenges the Examiner's Decision on the following grounds:

5 2.1 The Examiner's conclusion that the SD 22-00 expired is erroneous and
6 inconsistent with applicable laws and regulations including the Shoreline Management
7 Act ("SMA"), state implementing regulations, the Pierce County Shoreline Master
8 Program ("SMP"), case law, and the plain language of the permit, itself.

9 2.2 A preponderance of the evidence presented to the Board will show that SD
10 22-00 did not expire, contrary to the Examiner's Decision.

11 2.3 The County is equitably stopped from finding that SD 22-00 has expired;

12 2.4 The Examiner's decision that the geoduck aquaculture activities at the Foss
13 Farm constitute development under the SMA is erroneous and inconsistent with applicable
14 laws and regulations including the SMA, state implementing regulations, the SMP, case
15 law and an Opinion of the Attorney General, AGO 2007 No. 1.

16 2.5 A preponderance of the evidence presented to the Board will show that the
17 geoduck aquaculture activities at the Foss Farm do not constitute development that is
18 subject to the SMA.

19 2.6 The Examiner's legal conclusions regarding the standards the County
20 should apply upon Taylor's application for a new permit and whether the County may
21 issue a new permit to Taylor under existing and draft regulations exceed the scope of the
22 Examiner's jurisdiction and the limited issues that were presented for his review, and are
23 inconsistent with applicable law and regulations.

1 **3. STATEMENT UPON WHICH APPELLANT RELIES TO SUPPORT**
2 **GROUND FOR APPEAL:**

3 3.1 The Examiner erroneously concludes that all shoreline substantial
4 development permits expire after five years, indicating that “the law clearly sets out that
5 permits are valid for five years and five years only.” The Examiner’s conclusion is
6 inconsistent with the plain language of the SMA (including RCW 90.58.143), the State’s
7 implementing regulations (including WAC 173-27-090), the County’s Shoreline
8 Regulations (including Pierce County Code (“PCC”) 20.76.030(G)(3)), and case law
9 interpreting the SMA, including decisions of the Shoreline Hearings Board. Contrary to
10 the Examiner’s conclusion, the cited provisions of the statute, regulations, and the PCC
11 regarding expiration of authorization apply only to authorization for construction
12 activities. They do not apply to all activities authorized under SDPs issued pursuant to the
13 SMA. Accordingly, the Examiner’s Decision, including Findings 29, 30, and 31 and
14 Conclusions 2 and 3, is inconsistent with the law and fact.

15 3.2 The Examiner’s conclusion that SD 22-00 expired is erroneous because it
16 is inconsistent with the law. The conclusion is inconsistent with the plain language of the
17 permit and with the provisions of the SMA (including RCW 90.58.143), the State’s
18 implementing regulations (including WAC 173-27-090), and the PCC (including PCC
19 20.76.030(G)(3)) upon which the relevant permit conditions are based. The Examiner’s
20 conclusion that the permit expired is based, in part, on comparisons to other permits for
21 ongoing development and construction activities that are not comparable to geoduck
22 farming operations. Nor is there evidence that the County, in adopting the permit
23 conditions, intended to subject the authorized activities to expiration and re-application.
24 Accordingly, a preponderance of the evidence will demonstrate that SD 22-00 did not
25

1 expire. The Examiner's Decision to the contrary, including the description of testimony,
2 Findings 13, 29, 30 and 31 and Conclusions 2 and 3, is inconsistent with the law and fact.

3 3.3 The doctrine of equitable estoppel precludes the County from finding that
4 SD 22-00 expired.

5 3.3.1 Prior to the Administrative Determination and the Examiner's
6 Decision upholding the Administrative Determination, the County repeatedly represented
7 to Taylor and to the public that the farming and harvesting activities at the Foss Farm
8 were not subject to the expiration provisions of SD 22-00, or of the comparable provisions
9 in the SMA (including RCW 90.58.143), state implementing regulations (including WAC
10 173-27-090), and the County's Shoreline regulations (including PCC 20.76.030(G)(3)).
11 The County's more recent Administrative Determination and the Examiner's Decision are
12 inconsistent with these prior representations even though they are based on the same
13 information that was before the County at the time staff made its earlier representations.

14 3.3.2 Taylor has continued its operations at the Foss Farm in reliance on
15 the County's prior interpretations and its reliance on those prior interpretations was
16 reasonable. As a result of its reliance on the County's representations, the Foss Farm is
17 currently planted with geoduck that must be harvested or will be lost. The Examiner's
18 Decision precludes that harvest and the resulting financial loss will be significant.
19 Allowing the Examiner's Decision to stand will therefore result in "manifest injustice" to
20 Taylor. Reversal of the Examiner's Decision will not impair the County's exercise of
21 governmental functions.

22 3.3.3 The Examiner's complete failure to address Taylor's claims of
23 equitable estoppel in the Decision is an erroneous interpretation of law, and a clearly
24 erroneous application of the law to the facts. The Examiner's description of witness
25 testimony and the conclusion in Finding 8 that the County staff made their prior

1 representations and statements “outside of their official capacity” is erroneous and is not
2 supported by evidence. To the contrary, a preponderance of the evidence to be presented
3 to the Board will demonstrate that staff made their representations in their official capacity
4 and that Taylor’s reliance on those statements is reasonable.

5 3.4 The Examiner’s conclusion that Taylor’s geoduck farming operations
6 constitute development that is subject to the SMA is inconsistent with the law. Pursuant
7 to case law and to a recent Opinion of the Attorney General, AGO 2007 No. 1, the
8 question of whether a geoduck farm constitutes “development” is a fact-specific inquiry
9 that requires determining whether a particular farm interferes with the normal public use
10 of surface waters. The AGO specifically concludes that “nothing in the description of
11 geoduck aquaculture necessitates such interference [with surface waters].” AGO 2007
12 No. 1 at 8. Nevertheless, the Examiner concludes, to the contrary, that methods of
13 geoduck aquaculture including the planting, cultivating, and harvesting activities
14 constitute development and require a shoreline substantial development permit. The
15 Examiner’s Decision should have been based solely on the factual inquiry of whether the
16 Foss Farm, specifically, interferes with normal public use of the surface waters, rather
17 than based on generalized conclusions about geoduck aquaculture. The Examiner’s
18 Decision, including Findings 10, 14, 15, 16, 17, 18, 22, 23, 24, 26, 31, and 33, and
19 Conclusions 2 and 3, is in error and inconsistent with the law because he failed to rely on
20 a fact-specific inquiry to reach his decision. In addition, in reaching these conclusions, the
21 Examiner failed to consider or give sufficient deference to AGO 2007 No. 1.

22 3.5 The Examiner erred when he concluded that geoduck operations generally
23 and the Foss Farm, specifically, constitute any of the activities specifically listed in the
24 definition of development in RCW 90.58.030(3)(d), WAC 173-27-030(6), and PCC
25 20.04.130, including construction of structures, dredging, or removal of sand. The

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1 Examiner's conclusion is inconsistent with a plain reading of the SMA and implementing
2 regulations. The Examiner's Decision is also inconsistent with AGO 2007 No. 1, which
3 concludes that geoduck farming activities do not constitute any of the activities
4 specifically listed in the definition of development. The Examiner failed to consider or
5 give sufficient deference to AGO 2007 No. 1. Finally, the Examiner's Decision is also
6 inconsistent with the County's own interpretation as indicated in the Administrative
7 Determination and in witness testimony, in which the County indicates that the geoduck
8 farming activities do not constitute structures or dredging, specifically. Accordingly, the
9 Examiner's Decision, including Findings 22, 23, 24, 26, 28, 31 and 33, and Conclusions 2
10 and 3 are in error and inconsistent with the law.

11 3.6 A preponderance of the evidence to be presented to the Board will
12 demonstrate that geoduck operations, generally, and the Foss Farm, specifically, do not
13 constitute any of the activities specifically listed in the definition of development
14 (including construction of structures, dredging, or removal of sand). The Examiner's
15 Decision to the contrary is not supported by a preponderance of the evidence.
16 Accordingly, the portions of the Examiner's Decision finding that geoduck operations at
17 the Foss Farm constitute any of the activities specifically listed in the definition of
18 development, including Findings 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, and 33, and
19 Conclusions 2 and 3, are in error and are not supported by a preponderance of the
20 evidence.

21 3.7 The Examiner's conclusion that geoduck operations at the Foss Farm,
22 including use of tubes and nets, and harvesting activities, interfere with normal public use
23 of the surface waters is in error and is inconsistent with applicable laws. The Examiner
24 ignored the significance of the private ownership of the tide lands and adjacent uplands
25 and the impact such private ownership has on both the characterization of the "normal

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1 public use” and the assessment of whether an activity constitutes interference with normal
2 public use. A preponderance of the evidence to be presented to the Board will
3 demonstrate that the activities at the Foss Farm do not interfere with normal public use of
4 the surface waters such that the Examiner’s Decision to the contrary is in error. The
5 Examiner failed to give sufficient weight to credible testimony and evidence. The
6 Examiner ignored the testimony and evidence of the various methods and practices Taylor
7 employs to ensure that there is no interference with normal public use. Instead, the
8 Examiner relied on testimony of alleged interference that was purely speculative and
9 insufficient to support the Examiner’s conclusion of interference. The Examiner’s
10 Decision, including the description of testimony, Findings 8, 20, 21, 22, 23, 24, 25, 26, 27,
11 28, 31, and 33, and Conclusions 2 and 3, that the activities at the Foss Farm interfere with
12 normal public use of the surface waters is therefore inconsistent with the law and is not
13 supported by evidence.

14 3.8 The Examiner’s Decision is in error because he relied on irrelevant
15 information, legal analysis, and conclusions in reaching the conclusion that the permit has
16 expired and that the operations at the Foss Farm constitute development. The Examiner
17 considered aesthetic issues and concerns of the neighbors in reaching his conclusions.
18 Similarly, the Examiner considered evidence and argument related to the alleged
19 environmental impact of the geoduck farming activities. These aesthetic and
20 environmental concerns are not relevant to the inquiry of whether the permit has expired
21 or whether the activity constitutes development subject to the SMA. Accordingly, the
22 Examiner’s findings and conclusions are inconsistent with the law.

23 Additionally, and significantly, even if the aesthetic and environmental impacts of
24 the operation were appropriately within the scope of the Examiner’s review, a
25 preponderance of the evidence to be presented to the Board shows that the Examiner’s

1 conclusions regarding aesthetic and environmental impacts are in error. The Examiner
2 ignored credible testimony and evidence. For example,³ the Examiner: (i)
3 mischaracterized the testimony and conclusions of the various experts regarding the extent
4 of scientific information available to assess environmental impacts of the operation; (ii)
5 ignored specific studies conducted at the Foss Farm that measured the alleged impacts of
6 the activities; (iii) relied on lay testimony of speculative harm over testimony from experts
7 regarding environmental impacts; and, (iv) with respect to alleged impacts of harvest,
8 relied on testimony of Intervenors' lay and expert witnesses, despite the fact that it was
9 shown that those witnesses' testimony pertained to a nearby ghost shrimp bed and not an
10 area that had been harvested. Accordingly, the Examiner's Decision, including Findings
11 7, 9, 14, 15, 17, 18, 22, 23, 24, 25, 26, 27, 30, 31, and Conclusions 1, 2, and 3 are in error
12 and are inconsistent with law. A preponderance of the evidence to be presented will
13 demonstrate that the environmental and aesthetic concerns are unfounded.

14 3.9 The Examiner's Decision that a permit is required is in error and inconsistent
15 with applicable laws and regulations because it is based on inapplicable provisions of the
16 PCC. For example, the Examiner based his decision on the County Code provisions
17 regarding use regulations under the SMA. The County's authority to regulate uses under
18 the SMA is irrelevant to the question of whether the activity under review constitutes
19 development such that it requires a shoreline substantial development permit.
20 Additionally, in Finding 32, the Examiner relied on interim shoreline regulations that have
21 not yet been approved by the Department of Ecology and therefore have no legal effect.
22 None of the parties offered argument or analysis with respect to these inapplicable
23 provisions of the PCC or draft regulations such that there is no record supporting the

24 ³ Taylor cites to these specific examples, and other examples included in this Petition, for illustrative
25 purposes. The use of this and other specific examples in this Petition does not limit Taylor's ability to raise
other similar objections during the hearing or in the briefing.

1 Examiner's Decision. Therefore, the Examiner's reliance on unrelated provisions of the
2 PCC and regulations that have not been adopted, including Findings 1, 14, 15, 16, 17, 18,
3 32, and 33 and Conclusions 1, 2 and 3 are in error and inconsistent with applicable laws
4 and regulations. The Examiner was without jurisdiction to rule on these issues.

5 3.10 The Examiner reaches legal conclusions regarding whether the County
6 should issue a new permit to Taylor. These conclusions exceed the scope of the
7 Examiner's jurisdiction and authority and are beyond the limited issues that were
8 presented for his review. None of the parties to the proceeding offered arguments,
9 evidence or analysis related to future requests for authorization under the SMA.
10 Additionally, the Examiner's findings with respect to the County's consideration of
11 subsequent applications are in error. Because no party provided any testimony, evidence
12 or arguments regarding the subject of future authorization of activities, the Examiner's
13 Decision is completely without evidentiary support. The Examiner's Decision, including
14 findings 14, 15, 16, 17, 18, 19, 32, and 33 and Conclusions 1, 2 and 3, is in error, is
15 inconsistent with applicable law, and is outside of his authority and jurisdiction.

16 **4. RELIEF SOUGHT:**

17 Appellant requests the following relief:

18 1. An order and judgment that the Examiner's Decision is contrary to law and
19 not supported by evidence.

20 2. An order and judgment modifying the Examiner's Order to find that the
21 authorization to operate a geoduck farm in SD 22-00 does not expire;

22 3. If the Board determines that SD 22-00 has expired, an order and judgment
23 modifying the Examiner's Order to find that the activities authorized under SD 22-00 do
24 not constitute "development" such that no new permit is necessary; and
25

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Exhibit A

OFFICE OF THE HEARING EXAMINER

PIERCE COUNTY

REPORT AND DECISION

CASE NO.: ADMINISTRATIVE APPEAL: CASE NO. AA16-07
APPLICATION NO. 612676

APPELLANT: Taylor Resources, Inc.
Attn: Diane Cooper
SE 130 Lynch Road
Shelton, WA 98584

**APPELLANT'S
ATTORNEY:** Gordon Derr LLP
Samuel W. Plauche
2025 1st Avenue, Ste. 500
Seattle, WA 98121

INTERVENERS: Coalition to Preserve Puget Sound Habitat
Case Inlet Shoreline Association
Henderson Bay Shoreline Association
Case Inlet Beach Association
Protect Our Shoreline

**INTERVENER'S
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Attn: David Bricklin
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Seattle, WA 98154

**COUNTY'S
ATTORNEY:** Jill Guernsey
Deputy Prosecuting Attorney
955 Tacoma Avenue South #301
Tacoma, WA 98402

INTERVENER: North Bay Partners

**INTERVENERS'
ATTORNEY:** Jerry Kimball
1200 5th Avenue, Ste. 2020
Seattle, WA 98154

SUMMARY OF REQUEST:

The appellant is appealing Pierce County's August 8, 2007, determination that shoreline substantial development permit, Case No. SD22-00 has expired and that a new permit is necessary. SD22-00 was approved on December 28, 2000, by the Pierce County Hearing Examiner to allow for the commercial planting, cultivation and harvesting of geoduck clams on private tidelands. The County has determined that the permit has expired and therefore does not allow continued activities relating to geoduck planting, cultivations and harvesting. Appellant disagrees and asserts that the permit may not have even been necessary in the first place. The site is on the east shore of Case Inlet/North Bay, located approximately one-half mile northwest of Joemma Beach State Park, in Section 8, 9, and 16 in T20N, R1W, W.M., in Council District #7.

SUMMARY OF DECISION: See Decision.

DATE OF DECISION: March 25, 2008

COURT REPORTER: Linda M. Grotefendt, CCR
James, Sanderson & Lowers

PUBLIC HEARING:

After reviewing Planning and Land Services Report and examining available information on file with the application, the Examiner conducted a public hearing on the request as follows:

Parties wishing to testify were sworn in by the Examiner.

The following exhibits were submitted and made a part of the record as follows:

1	Planning and Land Services Staff Report and attachments
2	Resume of Wayne Daley
3	Photographs taken by Wayne Daley
4	"Sustainable Shellfish Recommendations for Responsible Aquaculture"
5	"Effect of Shellfish Aquaculture on Fish Habitat"
6	"A Framework for developing 'ecological carrying capacity' mathematical models for bivalve mollusk aquaculture"
7	"A Review of the Ecological Implications of Mariculture and Intertidal Harvesting in Ireland"
8	"The Potential Impacts of the Commercial Geoduck (<i>Panope generosa</i>) Hydraulic Harvest Method on Organisms in the Sediment and at the Water Sediment Interface in Puget Sound"
9	Environmental Conservation pages 1-7

10	Letter from Tadas Kisielius to Examiner dated October 5, 2007
11	Pacific Coast Shellfish Growers Association "Geoduck Farming Is Good for Washington State"
12	DNR "Geoduck Clam Research and Management, Pacific Shellfish Institute Component Deliverable 3"
13	"Dirty Jobs" segment on Geoducks (not produced due to copyright protection)
14	Protect Our Shoreline Powerpoint
15	Letter from Department of Ecology to Roger Giebelhaus dated September 1, 2006
16	Seminar Document entitled Washington Sea Grant pages 1-111
17	Letter from Bill Dewey to Pierce County Council dated May 21, 2007
18	Analysis of geoduck farm obstruction and visibility during summer daylight hours from Memorial Day to Labor Day (Chart)
19	Shellfish Industry Goals and Research Priorities 2015
20	Spreadsheet of analysis of ACOE NWP 48 Report Forms
21	"Calculation of Fill Comprised of Plastic PVC Tubing in Tidelands for a One-Act Geoduck Operation"
22	Email from Wayne Polsson dated September 27, 2007
23	Geoduck Aquaculture Technical Meeting of August 31, 2006
24	Washington Geoduck Growers Environmental Code of Practice(ECOP)
25	Geoduck Growers ECOP Updated
26	"Material Removal From Beach"
27	Washington Department of Fish and Wildlife forage fish data, maps, and texts
28	NWP 48 with Regional Conditions
29	NWP 48 Terms and Conditions 9/07
30	Mark Luckenbach's Abstract
31	Duplicate of Exhibit "4"
32	Letter to Ty Booth from Gordon Derr dated 8/22/07
33	Second Substitute House Bill 2220
34	Sea Grant Brochure Bivalve Aquaculture and the Environment
35	Duplicate of Exhibit "16"
36	"The Cutability of Rock Using High - Pressure Water Jet" (16 pages)
37	Duplicate of Exhibit "11"
38	Effects of Geoduck Aquaculture on the Environment 2007
39	Duplicate of Exhibit "48"
40	Photographs of Foss Site
41	Comprehensive Literature Review of February 6, 2004
42	Concerns and Questions relevant to infaunal and epibenthic impacts of Geoduck aquaculture by Leitman/Detheier Data Group
43	Partial listing of studies used by Protect Our Shorelines
44	People for Puget Sound Policy on Geoduck Intertidal Farming 9/20/06
45	Letter from Protect Our Shoreline re: Comments on 2007 Geoduck Literature Review dated September 23, 2007
46	Letter to County Council from Robin Downey dated October 5, 2007

47	Resume of Jeffrey D. Parsons, PhD
48	Map of Foss Farm and Washington Shellfish Site
49	List of parcel numbers and property owners SD22-00
50	Metzger Map of Foss Farm
51	Geoduck Environmental Code of Practice (22 pages)
52	Photographs (A-P) of beach
53	Photographs (A-E)
54	Aerial Photo of Foss Farm location
55	Aerial Photo of Washington Shellfish location
56	JARPA Permit Application
57	County's Prior Staff Report
58	Hearing Examiner's Decision (environmental file dated December 28, 2000 from SKC)
59	Shoreline Management Substantial Development Permit SD22-00
60	Declaration of Robert C. Paradise Hearing Date July 3, 2003
61	Declaration of William A. Garrison
62	Verbatim Transcripts of Proceedings Monday, September 15, 2003
63	Verbatim Transcripts of Proceedings November 3, 2003
64	Certification of Administrative Record 32471-7-II
65	Washington Shellfish Case 132 Wn. App 239 131, P.3d 326 (2006)
66	Letter from Vicki Diamond to L.H. Hendricks
67	Email from Pat Prendergrass to Trish Byers
68	DFW Shoreline Management Act pages 1-9 AGO 2007 No. 1
69	Substantial Development Permit Decision dated January 19, 2007 Case No. SD53-05 (SKC)
70	Hearing Examiner's Amended Report and Decision dated January 19, 2007
71	Corrected Shoreline Substantial Development Permits
72	Memorandum of David Risvold to Kathleen Larrabee dated March 21, 2007
73	Email from Ty Booth to Vicki Diamond dated May 21, 2007
74	Notification of Puyallup Tribe
75	Photographs of SD22-00 dated July 6, 2007
76	Photographs of SD22-00 dated July 13, 2007
77	Email from Vicki Diamond to Jan Regan and Sue Larson dated July 13, 2007
78	Email from Dave Rosenkranz to Diane Ranes, Kathleen, Mitchell Brells and Vicki Diamond dated August 9, 2007
79	Department of Natural Resources email by Sarah Dzimbali
80	Letter from J. Pharris to K. Townsend re: AGO 2007 No. 1, Bricklin/Newman letter
81	Letter from the Department of the Army, Seattle District Army Corps of Engineers of Catherine Townsend
82	72 FR 11092-01
83	33 C.F.R. Section 322.2
84	Letter from Bill Dewey to Penny Dalton, Washington Sea Grant dated 9/28/07
85	Letter from Jeff Fisher to Dr. Rachel Waters dated 10/3/07

86	Letter from Representative Lantz to Attorney General dated 9/28/06
87	Letter from David Bricklin to the Thurston County Board of Commissioners dated 7/10/07
88	Commercial Geoduck Fishery Management Plan and EIS Departments of Fisheries and Natural Resources, 1985
89	SEPA Determination of Nonsignificance dated 1998
90	Preliminary Assessment and Corrective Action Plan dated 5/6/04
91	"Draft Programmatic Biological Evaluation of Potential Impacts of Intertidal Geoduck Culture Facilities on Endangered Species and Essential Fish Habitat"
92	Letter from R. Doenges to M. Taylor dated 1/3/07
93	Memorandum from R. Knust re: SEPA Lead Agency and MDNS dated 6/29/07
94	Habitat Conservation Plan for WDNR Geoduck Fishery dated July, 2007
95	Report from Golder to Taylor Shellfish (Summary Observations from Engineering Geological Reconnaissance - August 30, 2007) to Diane Cooper
96	"How Does Shellfish Farming Impact Puget Sound?" dated 9/24/07
97	Entrex Comments on Proposed Nationwide Permit D dated 11/2007
98	"Changes in Species Richness with Stocking Density of Marine Bivalves"
99	"Interactive Effects of Initial Size, Stocking Density, and Type of Predator Deterrent Netting on Survival and Growth of Cultured Juveniles of the Soft-Shell Clam"
100	"The Role of Oyster Reefs as Essential Fish Habitat"
101	"The Importance of Habitat Created by Molluscan Shellfish to Managed Species Along the Atlantic Coast of the United States"
102	"Effects of Shellfish Farming on the Benthic Environment"
103	"Environmental Management of Marine Aquaculture in Tasmania, Australia"
104	"Using Bioenergetics of Intertidal Oyster Populations as a Measurement of Anthropogenic Perturbations to Shellfish Growing Waters"
105	"The Role of Mussel and Mussel Culture in the Dutch Wadden Sea"
106	"A Comparative Evaluation of Habitat Value of Shellfish Aquaculture Gear" Vol. 23, No. 3 Pgs. 867-874 (2004)
107	"Benthic Macrofauna – Habitat Associations in Willapa Bay, Washington, USA"
108	"Suspension-Feeding Bivalves and the Fate of Primary Production: An Estuarine Model Applied to Chesapeake Bay"
109	"Influence of Shellfish Farming Activities on Nitrification, Nitrate Reduction of the Thau lagoon, France"
110	"Shellfish Water Quality Trends and Threats in Puget Sound"
111	"A Multidisciplinary Approach to Evaluating Impacts of Shellfish Aquaculture on Benthic Communities"
112	"Physical Disturbance and Marine Benthic Communities: The Effects of Mechanical Harvesting of Cockles on Non-Target Benthic Infauna"
113	"A Preliminary Study on the Effects of Oyster Culturing Structures on Birds in a Sheltered Irish Estuary"
114	"Hood Canal Salmon Enhancement Group 175 Mooluskan Study, Final Report 10/30/2006"

115	"Habitat Association of Estuarine Species" Volume 29, No. 6B, Pgs. 1150-1160
116	"Potential Indirect Effects on Shellfish Culture on the Reproductive Success of Benthic Predators"
117	"Testing the Potential Effects of Shellfish Farming on Swimming Activity and Spacial Distribution of Sole in a Mesocosm" Pgs. 1014-1028 (2006)
118	"Improving Marine Water Quality by Mussel Farming: A Profitable Solution for Swedish Society"
119	"Oyster Reef Restoration in Virginia, USA: Rehabilitating Habitats and Restoring Ecological Functions"
120	"Oyster Reef Habitat Restoration" Pg. 64-78
121	"Shellfish as the Impetus for Embayment Management"
122	"Influence of Oyster Culture on Water Column Characteristics in a Coastal Lagoon"
123	"Faunal Utilization of created Intertidal Eastern Oyster Reefs in the Southeastern United States"
124	"Comparative Use of Longline Oyster Beds and Adjacent Tidal Flats by Shorebirds and Waders on Humboldt Bay, California"
125	"Effects of Filter-Feeding Oysters on Sedimentation Rates and Phytoplankton Species Composition: Preliminary Results of Mesocosm Experiments"
126	Study by Dr. Newell
127	Study by Dr. Newell
128	"Environmental Interactions of Bivalve Shellfish Aquaculture"
129	"Intertidal Culture of Juvenile Geoduck Clams: An Examination of Predator Protection Technology and Potential Environmental Interactions"
130	"The Impacts of Aquacultured Oysters, on Water Column Nitrogen and Sedimentation: Results of a Mesocosm Study"
131	"Macroalgae Growth of Bivalve Aquaculture Netting Enhances Nursery Habitat for Mobile Invertebrates and Juvenile Fishes" Vol. 336 Pgs. 109-122 (2007)
132	"Eelgrass is Great, but Shellfish Aquaculture is Better Marine Aquaculture and the Environment"
133	"Environmental Impacts of Shellfish Aquaculture: Filter Feeding to Control Eutrophication"
134	"The Transport and Fate of Suspended Sediment Plumes Associated with Commercial Geoduck Harvesting"
135	"The Effect of Manila Clam Cultivation on an Intertidal Benthic Community: The Early Cultivation Phase"
136	"Ecological Effects of Intertidal Manila Clam Cultivation" Observations at the End of the Cultivation Phase"
137	"Intertidal Clam Harvesting: Benthic Community Change and Recovery"
138	"Oysters and Clams Clean up Dirty Water"
139	"Assessing the Relationship Between the Ichthyofauna and Oyster Mariculture in a Shallow Coastal Embayment, Drakes Estero, Point Reyes National Seashore"
140	"Proposed Effluent Guidelines and New Source Performance Standards for the Concentrated Aquatic Animal Production Facility Point Source Category"

141	Final Supplemental EIS dated May 23, 2001
142	"Ecological Implications of Intertidal Mariculture, Observed Differences in Bivalve Community Structure Between Farm and Reference Sites"
143	"Keystone Species of the Estuary"
144	CV of Dr. Fisher
145	CV of Dr. Davis
146	CV of David Troutt
147	CV of Dave Findley
148	Resume of Lynn Goodwin
149	Email by Brad Murphy, Department of Ecology
150	Series of Photographs 1 through 44, Photograph 49
151	Photographs (adjacent to McCormick property)
152	Photograph of moonshell
153	Email from Janney Pinneo dated 7/8/07
154	Large Aerial Photos
155	"Army Corps Establishes New Shellfish Permit" Newsletter National Shellfish Association
156	Photograph showing earthquake damage submitted by Ms. Rydell
157	Photograph showing beach after earthquake submitted by Ms. Rydell
158	Photograph of beach submitted by Ms. Rydell
159	Photograph of bank toward neighbor submitted by Ms. Rydell
160	Photograph of upland area submitted by Ms. Rydell
161	Notice of Appeal of Administrative Decision filed by Gordon Derr dated August 22, 2007, with attachments
162	Letter to Samuel Plauche dated August 29, 2007
163	Letter to Examiner from David Bricklin dated August 30, 2007
164	Stipulation and Proposed Order on Invention dated October 2, 2007
165	Letter to Examiner from Tadas Kisielius dated October 5, 2007
166	Witness List and Exhibit Listed submitted by Taylor Shellfish dated October 5, 2007
167	Letter to Counsel from Examiner dated October 15, 2007
168	Prehearing Order from Examiner dated October 15, 2007
169	Letter to Examiner from Jerry Kimball dated October 16, 2007
170	Intervener's Coalition to Preserve Puget Sound Habitat, ET Al's Opening Brief dated October 19, 2007
171	Intervener's Coalition to Preserve Puget Sound Habitat, ET Al's Witness and Exhibit List dated October 19, 2007
172	Witness and Exhibit List of Intervener North Bay Partners dated October 19, 2007
173	Pierce County's Witness List dated October 19, 2007
174	Taylor Shellfish – Summary of Expert Testimony dated October 19, 2007
175	Taylor Shellfish – Prehearing Brief dated October 19, 2007
176	Pierce County's Amended Witness List
177	Taylor Shellfish – Supplemental Witness and Exhibit List dated October 25, 2007

178	Email correspondence re: hearing dates and prehearing orders
179	Newspaper Article from Peninsula Gateway of October 31, 2007
180	Letter to Planning from Linda M. Grotefendt, Court Report dated January 16, 2008
181	Letter to Examiner from Samuel W. Plauche dated January 16, 2008
182	Letter to Examiner from Jerry Kimball dated January 17, 2008
183	Letter to Examiner from Jill Guernsey dated January 22, 2008, with attached proposed Findings of Fact
184	Intervener's Proposed Findings of Fact and Conclusions of Law and Declaration of Service submitted by David Bricklin dated January 22, 2008
185	Taylor Shellfish Farm's Post-Hearing Brief submitted by Samuel Plauche and Tadas Kisielius dated January 22, 2008 and Declaration of Service
186	Letter to Examiner from Jill Guernsey dated February 7, 2008, with attached SHB 07-021 decision
187	Letter to Examiner from Tadas Kisielius dated February 7, 2008, with attached SHB 07-021 Order on Reconsideration and Modified Findings of Fact, Conclusions of Law, and Order
188	Letter to Counsel from Examiner dated February 22, 2008

This matter came on for hearing before Terrence F. McCarthy on November 1, 2007. It was continued to November 2, 2007, and continued thereafter to December 13, 2007, and December 14, 2007. The record was left open until January 23, 2008, for purposes of parties submitting closing briefs and proposed findings and conclusions.

After opening comments, appearing was TY BOOTH who briefly summarized the staff report which, with its attachments, was marked as Exhibit "1" and admitted into evidence. This appeal is regarding shoreline substantial development permit Case No. SD22-00 which was applied for on July 10, 2000. A hearing was held on the request on December 6, 2000, and a decision approving the substantial development permit was issued on December 28, 2000. This December permit was the first shoreline substantial development permit issued for a geoduck farm in unincorporated Pierce County. This request was a new venture for Taylor Shellfish and it was a new venture for Pierce County Planning and Land Services. He then put on a slide show of photographs of the surrounding property area and the site. The Foss site is pretty much undeveloped. Its high bank waterfront acreage has a small cabin on it. This appeal centers around the five year expiration provisions of the Pierce County Code. The language concerning expiration of the permit in the December 2000, decision is a standard condition that is imposed on shoreline permits that are processed by the County. It is a broiler plate, that is automatically placed on every permit. Frankly, in looking at the language he originally felt that the permit was good indefinitely.

The purpose of this hearing is to discuss whether or not the permit expires after six years and whether or not a permit is even necessary. The applicant contends that they were informed that they had six years to establish their farm and once they established it that it would be good to operate indefinitely. The County contends that the operation

must have a new permit each and every five years; that shoreline substantial development permits have a life history of five years. His personal opinion is that once they establish their farm within six years they should be allowed to operate in perpetuity. There are provisions in the code where someone could seek revocation of the shoreline substantial development permit if they are not in fact following conditions. While that is his personal opinion he never did hold that out as being the position of the County. There have been many meetings within the Planning Department with regard to the overall issue of timing and his opinion was and is in the minority. The vast majority felt that there was a six year time period for establishment of the farm, but also that they could operate for no longer than six years.

He received a complaint about the farm continuing to operate after the expiration date and eventually a decision was made saying that the permit expires after six years. He supports the decision that was issued. If he did not, he could find employment elsewhere. If the applicant wishes to change the code there is a process here that is a legislative process to change the code. The elected officials need to address that issue. In the last couple of years we have had an unprecedented amount of correspondence, calls, emails, and everything regarding the entire geoduck industry. The County has a long history of requiring renewals for permits after six years. For example the Washington State Department of Natural Resources has two sites in Puget Sound where they essentially dump dredged materials. They come in every six years for new permits. DNR disposal sites are similar in that they both involve ongoing development. The geoduck farming continues on as does disposing of dredged material. The applicant has inserted into their appeal the issue of whether or not geoduck farms constitute development. He then went through his photo presentation demonstrating that the site is bordered on the north by a string of waterfront houses and on the south by Joemma State Park. He submitted numerous views of the operations in July, 2007. Thereafter he went through the language concerning a shoreline development permit as used in the report. He indicated that there may be a question about the definition of development and it is clear to him that this is a use. There aren't any buildings being built, however, maybe it isn't technically dredging, but it does involve inserting hydraulic wands 3.5 feet into the beach and liquefying the beach which causes turbidity. The silt dissipates throughout the beach and it is similar to dredging. It is not dredging though. They are doing a function similar to drilling in that they are inserting high pressure water 3.5 feet into the beach as stated before and liquefying it. They insert plastic PVC tubes into the beach at the beginning of the process but it is not drilling. They are not removing sand although they are displacing sand. When they displace the sand they also remove geoducks from the beach. They are placing obstructions on the beach. Photos speak to that. The cost of netting, tubes, labor, barges, fuel, etc. would exceed \$5,700. They are asking that the Hearing Examiner uphold their decision. In giving his presentation he did acknowledge that he himself felt that there was no necessity for obtaining an additional permit, but after initially going through analysis as performed by their staff he determined that he was in error. Exhibit "67" was admitted into evidence. Basically it reads that authorization to conduct activities is limited to five years plus one year extension. Jeff Stewart of D.O.E. indicated that they thought that the development

was the planting, growing, and harvesting of clams. In other words, the permit gets a crop harvested. Exhibit "73" was admitted into evidence. Exhibit "77" and "78" were admitted into evidence. He stated that he made comparisons with regards to dredging and drilling; also removal of sand, gravel, and mineral; he also made a comparison to driving of pilings and placing of obstructions. He discussed that this is a project of permanent or temporary nature which interferes with the normal use of the shoreline. Exhibit "57" was admitted into evidence which is the Examiner's December decision. When the County went through the process of trying to determine its position with reference to the shoreline substantial development permit language it did consult with the Department of Ecology who indicated that they agreed with the decision as issued by the County. He did not analyze whether or not the placement of tubes and net with rebar was a structure. He corrected his prior testimony by indicating that the County's decision was issued on August 8, 2008. There was no official Department position as to an expiration date of a permit before August 8, 2008, although many permits were renewed every five years. There was no appeal from the original decision (December decision). The complete text of Mr. Booth's testimony is set out in pages 1-63 of the transcript of proceedings dated November 1, 2007.

Appearing was BRAD MURPHY from the Washington State Department of Ecology, Southwest Regional Office. He is a wetland and shoreline specialist. He reviews permits for both wetland and shoreline issues and provides technical assistance to local governmental agencies. They do not review shoreline substantial development permits. They review conditional use permits and variance permits. It was the position of DOE that if the timeframe for the permit (i.e. five years) had expired, they should be coming back in for a new/updated permit. Exhibit "149" was admitted into evidence. Mr. Murphy's testimony is set out on pages 64 - 80 of the transcript of proceedings dated November 1, 2007.

Appearing was VICKI DIAMOND who stated that she is the Supervisor of Pierce County Current Planning. She is responsible for subdivisions, administrative decisions, or any case that could go before the Pierce County Hearing Examiner. She is also responsible for providing technical support and advice at the Pierce County Development Center. She has been with the Planning Department since 1993. Mr. Booth is one of the employees she supervises. There has been a substantial amount of discussion about the expiration dates of shoreline development permits in conjunction with geoducks. After reviewing documentation, consultation with legal counsel, and numerous staff discussions, this department issued a formal opinion on August 8, 2007. There was no official administrative determination prior to that date. Her opinion was that there was no expiration once the use was initiated and established. Geoduck harvesting and aquaculture is something we have been learning about. It is new to us. The staff that handles shorelines was unsure as to whether or not the permit did expire. Mrs. Diamond's testimony is set out on pages 81-89 of the transcript of proceedings dated November 1, 2007.

Appearing was SAMUEL W. PLAUCHE, attorney at law, who briefly summarized their

position. There are two legal issues before you. The first of which is whether or not the substantial development permit that was issued to Taylor expired after five years. The question is; Did they put a five year expiration on the permit? That requires an interpretation of the permit language. The staff's previous interpretations are irrelevant. The second issue before the Hearing Examiner is; Does the appellant need to get a permit to continue their operations? Are there on-going operations development as defined under the Shoreline Management Act and under the Pierce County Code. According to the Attorney General, whether or not farms are regulated as development and require a permit is a case-by-case analysis. We need to look at the facts of each case. The County has determined that geoduck farming requires a shoreline substantial development permit and that those permits expire after five years. The County's interpretation, I think, is that they have to expire after five years. That interpretation puts all existing farms at risk. Mr. Plauche's opening testimony is set forth on pages 89-97 of the transcript of proceedings.

Appearing was DIANE COOPER, an employee of Taylor Shellfish in their regulatory compliance area. She is a liaison between the company and regulatory agencies. She ensures that Taylor Shellfish is complying with all regulatory requirements necessary for their operation of 9,000 acres of aquaculture. She also represents the company as well as the industry on a variety of advisory committees. Exhibit "54" was admitted into evidence. Exhibit "50" was admitted into evidence. When she applied for the permit she was applying for an on-going activity. She understood that the County understood that that was her request. It is stated on her JARPA application. She understood from the permit that she could install the farm and that there would be no reason to appeal that decision. The timeframe for planting and harvesting geoducks is four to seven years. The risk of a five year limit is that the rules could change and interpretation such as this could change. Thus, we could end up with a geoduck in the ground that we could not harvest. The AGO's opinion was directed to the Department of Ecology. The Department of Ecology has not adopted the AGO's opinion. She indicated that she has not received any complaints or telephone calls about the process in several years. Exhibit "48" was admitted into evidence. She compared their operation to the Washington Shellfish operation. There is no comparison between their location and the Washington Shellfish location. They are different in terms of area and potential for conflict. The Army Corp regulates geoduck farming. They regulate shellfish farming under either the dredge and fill, discharge and dredge and fill material under the Clean Waters Act, Section 4.04 or work in navigable waters under Section 10 of the Rivers and Harbors Act. Under their Act, the Army Corps of Engineers considers their tubes and nets to be a structure. The Seattle District Army Corps of Engineers has determined that the normal operation of geoduck farms does not necessary result in discharge of dredge and fill. Her JARPA application indicated that she is requesting a permit for the installation and on-going operation of a geoduck farm. Exhibits "68", "69", "70", and "74" were admitted into evidence. During her testimony she indicated they distinguished their operation from Washington Shellfish operations. They do not use floating rope, they use weighted rope that the drivers use to guide them along the bottom. They have one dive barge and then one barge for the harvest equipment and

product and a limited number of workers. They do flag the area to keep the other boaters out of the area pursuant to County ordinance. In terms of installation they insert the tubes into the soil, they plant the seed, then they cover the tubes with an area wide net which is staked down with rebar. They are farming 12 acres as they did at Washington Shellfish. The Army Corps of Engineers has denoted that geoduck aquaculture is an obstacle or other obstruction and therefore requires a permit. Initially there was a debris problem at the Foss site, but they have changed their methods. The net serves the purpose of keeping predators out. They also serve the purpose of securing the tubes in a location and not let them drift away. Based on her personal observations, the litter problem has been reduced significantly. At this particular site the harvest does occur within five years of planting. If they had planted the entire site in 2001 they could have harvested it within a five to six year limit. However, they did not because they did not have enough seeds. They replant areas as well as plant new areas. They replant almost immediately. The cycle is about four years. The Federal aquatic farm registration process does not include scrutiny of the Shoreline Management Program issues and its process. Her testimony is contained in the November 1, 2007, transcript from pages 97-164.

Appearing was BRIAN PHIPPS who indicated that he is the geoduck manager for the applicant and stated that they always following the best management practices. Exhibit "51", geoduck and ethical code of practice was admitted in evidence. He oversees the day to day operation of the Taylor Shellfish geoduck farms and he is the one responsible for applying the best management practice and environmental codes and practice. He is responsible for the 56 leased and Taylor owned farms which are located in South Puget Sound. There is one farm in Hood Canal. He visits the farm twice a month. He has three managers under him, a maintenance crew, a harvest crew, and a planting crew. There are five different age classes of geoducks on the shore of Foss property. The property boundary to the south is Joemma Park. They started planting on the site in 2001 and have planted an area each year from 2002-2006. The timeframe between planting and harvesting varies from four to seven years. Food and growth dictate when the harvest will take place. They try to obtain two pound geoducks as that is what the market requests. There are about 900,000 geoducks planted on the Foss Farm which were planted between the years 2003-2006. They are probably 1.3 million pounds on the Foss Farm and the estimated value of these geoducks is between \$15 and \$20 million dollars. They start the process with installing tubes in the ground and then a crew will come through and put seeds in the tubes and canopy netting over the top. The net is staked into the ground with bent rebar which is shaped like a candy cane. Then six to 18 months later they will remove the tubes, more towards 18 months on the Foss Farm area. After they remove the nets and tubes there is nothing on the farm except for beach and the geoducks. Then they will come through in a few years and harvest the product. They mark the corners of the beds with a ½ inch PVC pipe which sticks out of the ground two to three inches when they are finished planting it. He then reviewed photographs contained within Exhibit "52". The predator nets are half inch squares which are staked into the ground. The nets are 50 foot by 50 foot in size. Exhibit "76" was admitted into evidence. The harvest crew consists of three to five

people who work four hours a day and approximately nine days while the tide is out. 75% of their harvest is beach and 25% is intertidal harvest. That is where the divers approach the geoduck as opposed to people on the beach approaching them. Exhibits "53" A, B, C, D, and E were admitted into evidence. These are photographs of the harvesting process. Exhibits "54" and "60" were admitted into evidence. 900,000 geoducks cover ten acres. In the harvesting process they harvest 3,500 to 4,000 pounds per day. Harvesting on the beach consists of the employee inserting a wand approximately 3 to 3 ½ feet into the beach and liquefying the row of geoducks so that the geoducks float to the surface. A barge is at the site for ten days to two weeks. Exhibit "75" was admitted into evidence. Within one to two tidal cycles after harvest the site will be relatively flat. It is soft to walk on, but you are able to walk on it a few minutes after harvest. The holes in the picture are representative of the end of each row. There was thereupon a discussion comparing their site with the Washington Shellfish site. He has never seen a windsurfer at Joemma State Park. Exhibits "64" and "58" were admitted into evidence. Exhibit "61" was admitted into evidence. People do recreate in the area of Foss Farm. They kayak and boy scouts come down in canoes and climb the bluffs. His testimony is contained on Pages 165-194 of the transcript of proceedings.

No further testimony was taken on November 1, 2007.

NOVEMBER 2, 2007

After opening remarks on November 2, 2007, BRIAN PHIPPS returned to testify. The purpose of the tubes and nets is to obstruct predators from getting into the geoduck seed. Some of the predators get caught in the nets. They usually don't leave the barge at the site for more than ten days at a time. On Exhibit "53" the harvester is standing in a hole which is about thigh deep.

Appearing was DOCTOR JEFF FISHER who stated that he is a managing principal for Pacific Northwest Operations of Environ International Operation. They are an environmental science and research consulting firm. He has assisted Taylor in evaluating various actions. He doesn't see the geoduck structures as blocking migratory pathways or creating types of obstructions for fish. He introduced Exhibits "100", "115", "117" and "120". Geoduck structures are not structures in the context of bulkheads. The tube field and the netting over the tube field provides a structured habitat for the geoducks. The gear used in raising geoducks acts as a structured habitat. The structured environment increases invertebrate density by 44 fold over the unstructured environment. Exhibit "141" was admitted into evidence. The system of harvesting does not remove sand rather it displaces it. It doesn't result in a significant net onshore transport of settlement. We have to remember when looking at the site after harvesting that you have removed many two pound geoducks. Harvest holes will be rapidly filled in the area of this farm because of the tide. The shellfish aquaculture gear provides a three dimensional structure from which the biogenetic community can develop. It is a structured habitat in the same context that the oyster reefs are structured habitats. The

structure is the combination of the tubes and the nets and the tying down of the same. His testimony is contained on pages 23-55 of transcript of proceedings of November 2, 2007.

Appearing was DAVE FINLEY, geologist, who stated that geoduck beds located along the intertidal zone may have some affect on beach processes in the form of locally retaining some beach sand in the area of the plastic tubes. However, there is no discernable difference according to him in beach mortality rates from pre-geoduck operations to the present. His testimony is contained on pages 55-61 of the transcript of proceedings.

Appearing was LESLIE FOSS who stated that she is an early childhood education teacher at Everett Community College. Her grandfather purchased the property which consists of 126 acres with one mile of beach. They have a little cabin and a rope swing. The cabin is 12 by 20. When the applicants were harvesting she didn't hear anything but singing from the harvesters. She indicated that the applicants regularly police the beach. They find debris on the beach from people using the park. People use the park as access to the Foss property. They find beer bottles and different glass debris on site. People in the park trespass all the time. The lease they signed with Taylor requires Taylor to comply with all applicable rules and regulations which includes presumably the Shoreline Management Act. The site is posted "No Trespassing". Ms. Foss' testimony is contained on pages 55-79 of the transcript dated November 2, 2007. Her family uses the cabin for recreational purposes.

Appearing was SHERI M. LUEDTKE who testified that she lives directly north of the Foss lease. Exhibit "150" was admitted into evidence. The tubes that are planted work loose and they find them on the beach. Geoducks are planted up to the north property line which is just adjacent to where the cabins start. If you look at Exhibit "150" #3 they are going to see many loose tubes. The nets get loose, the tubes get loose with tide action and before you know it the tubes are all over the beach. They can't use their float tubes and float with the current like they use to use before the planting of this area. She used to fish from an intertube with her feet hanging out and she can no longer do that. It is not safe. It is not safe to take your boat in the area that is planted because of the possibility of breaking or damaging your propeller. The same too with kayaking. While you can kayak you have to be careful of the depth of the water. She has seen sea life trapped under the nets. There used to be a lot of crabs on the beach, but there aren't anymore. They have disappeared since harvesting has started. The nets attract seaweed and the seaweed then starts baking in the summertime and lets off a horrible odor. This horrible odor is increased by the smell of dead fish and the time period during the summer of the low tide the odor is often hard to bear. She is concerned about the fact that Taylor does not mark their barges and does not mark any of their equipment. The barges when they come stay for weeks at a time and the nets that are placed over the tubes are not always secured and do not always cover all of the tubes.

There is a total absence of crabs and sea life that existed prior to the planting and

harvesting of this area. She took a photograph of the rebar that was there several days after it was photographed.

There is a great deal of recreational boating as well as commercial boating in the area. Joemma Park is one of the primary places to launch a boat on the western side of the Key Peninsula so they have motorboats coming by frequently. They also have a couple of youth camps in the immediate area, one to the north is a catholic camp and they have a couple different sailing vessels. They see a stream of boats coming by on Thursdays or Fridays heading north for the weekend. Jared's Cove, which is their destination, is probably ten miles from the Foss site. The barges came this winter (2007) and they stayed for weeks and weeks at a time. Barges would go away, but then they would come back. They were there so often that we thought they became part of the landscape. After harvesting you could sink six to ten inches in the sand if you are walking the beach. Ms. Luedtke's testimony is contained on pages 61-124.

Appearing was WAYNE DALEY who stated that he is a fisheries scientist. He walked the beach after harvesting and sank up to a point where he couldn't get his feet out of the sand without feeling like he was going to fall on his face. He observed dead animals under nets. He is a fly fisherman and the geoduck operation would definitely interfere with fly fishing. The geoduck structures interfere with the normal behavior of sand lances which are a forage fish that salmon use for survival. He has fished this area for years and he would not even try to fish the area for sea run for cut throat in the same manner that he has fished it previously. The lines and hook would obviously become entangled with the material in the area. These structures would definitely interfere with the normal behavior of salmon who would be normally working their way along the beach and utilizing the sand area. There is no question about the fact that aquaculture activities along our shoreline are causing tremendous stressors. That is why the governor has declared Puget Sound an area of importance. He is concerned about the intensive nature of geoduck farming on the beaches and on habitat. Foss Farm provides a unique area. It is a broad area of significantly altered habitat and there are many issues yet to be resolved with reference to the intensity of this type of commercial farming. Mr. Daly's testimony is contained on pages 61-156 of the transcript of November 2, 2007.

Appearing was JEFF PARSON who stated that he is an environmental consultant with training in civil engineering. He has walked the beach. It is a very sandy beach. It looked like a lot of the sand had been delivered there recently in the geological sense which means over the last decades. In walking the beach there was one area that was extremely soft on both of his visits and that was about 100 to 150 feet off of the beach immediately in front of John McCormick's property. He sunk six to ten inches covering my feet up to my shins. It was a very distinct area. This was an area of slough of the long shore in an area that basically had been harvested plus two feet on either side of the harvested area. The area looked to be liquefied. There was a large quantity of water seeping out of the beach. It is his understanding that the applicants inject water into the beach to fluidize the bed and allow the geoducks to float to the top as a method of

extraction. There are a number of areas where he noted seeps along the beach. He has never observed this degree of fluidation on a shoreline before. He has been involved in many different projects including projects for the Department of Fish and Wildlife. The harvesting operations that they are utilizing would be considered a dredging process. This is based on his experience of working with the Washington State Department of Fish and Wildlife on a habitat conservation plans. It is their theory that if a particular project has the environmental ramifications of another process then the process should be included and we should talk about it in our literature and review. In his experience of what he has seen as well as the photographs provided he sees no difference between harvesting and dredging. There is a particular kind of dredging that is called agitation dredging which is essentially shooting a water jet into the subsurface through any number of means and removal by a machine of the sediment. There is no difference between that particular kind of dredging process and the process that is used to harvest geoducks. This is the type of definition which the State Department of Fish and Wildlife uses and this is the definition that he teaches his students in college.

No further testimony was taken on November 2, 2007.

DECEMBER 13, 2007

Appearing was JOHN McCORMICK who resides to the north of the Foss property. His testimony begins on page 6 of the December 13, 2007, transcript. Before they started farming they were able to let their children run free. The sand is too soft and they are concerned about the children sinking in the sand. After they harvest there are bowl shaped pits along the beach. You actually sink anywhere from six inches to a foot and a half immediately after the harvesting. Since this process has started they have lost almost all of the sand in front of their house. The sand in front of his house has left the beach and appears to be deposited on the nearby spit which has grown dramatically.

Appearing was ROBERT PARADISE who testified concerning the impact of the geoduck operation upon their recreational uses of diving and sailboarding. He has, in the past, got caught in the geoduck nets and nearly drown. He has been diving for approximately 30 years of which 20 years have been on Puget Sound. He has been sail boarding for about 12 years. Nets are a hazard and are one of the main concerns of divers in the Puget Sound area. Divers have drown in Puget Sound when they have become entangled in the nets. He has dived in this area on occasion and he noticed dozens of broken tubes washed out into deep water, maybe 30 to 40 feet deep. Tubes don't float and they are thrown on shore, but when the current brings them out they sink. Thousands of tubes are commonly found in Henderson Bay. They have also found numerous tubes in the Joemma Park area. The visibility of diving ten to 15 feet south of the site is good, the visibility to the north of the site is very poor. The winds in the area are great for windsurfing. It is exposed to the south and the strong winds usually come from that direction. Any obstruction in the water is a hazard to windsurfing. In the Puget Sound primarily the only way of being injured is hitting something in the water. He dives several times a week and testified that this area is

also a hazard for anchoring a boat because of the possibility of getting tied up in the netting. The Foss area and Joemma State Park are great places for beginners to dive. The bay is very enclosed, it is safe, and doesn't deep very quickly. It is a great place to certify divers. He is a math high school teacher by profession.

Appearing was JANIE PINNEO who testified that she has a beach house close to the site. Taylor's testimony concerning no complaints about operations of the site is absolutely untrue. It is far from consistent with her recollection and knowledge. She does know that Sheri Luedtke has had contact with Diane Cooper with concerns. She has made calls and She actually wrote an email they sent out. She spoke to a foreman on the site about her complaints. When she was kayaking recently she was surprised to see them planting because she was under the impression that their permit had expired. She was also looking for marking on the nets and tubes and couldn't find any. She did find a large net, but it did not belong to the appellant. In her daily walking she found a large canvas sack that had four numbers on it. It is a sack that they used in harvesting. It was about a mile north of Camp Gallagher. She found a baby otter on the beach. The otter had a rubber band around his stomach that it was trying to get off. Obviously the band was from the Taylor Shellfish operations prior to their going to using single large nets. Their nets were not secured tightly. She could see that when she was kayaking. Things could get under the nets. The area is far from pretty. They avoid it when the tide is out. The workers do not clean up after themselves. They are always picking up geoduck garbage to include broken tubes, nets, orange crates, and bags. They have picked up piles of garbage. The photographs demonstrate how there are gaps in the netting where animals and fish can get under the nets and get caught. She has seen rebar standing out by itself. The rebar and the netting definitely interfere with kayaking in the area. The main thing it does affect is that you can't push off the sand as you would on a normal beach. She is a new kayaker and her husband doesn't like to be out in the middle by herself so the placement does affect her. She feels like it is her job to clean up after their harvesting. She is constantly picking up tubes and other materials left behind by the appellant and there is no one coming out and checking to make sure that garbage is picked up. It has become our job. Anytime you walk the beach you see garbage that has to be picked up. At the last community meeting there was another pile of garbage that people had collected. They haven't used the small nets in quite a while, but we are still picking them up as well as broken tubes and orange crates, nets, seedling bags. They had their annual and their was a pile of garbage they picked up that weekend. Ms. Pinneo's testimony ended on page 76 of the transcript of December 13, 2007.

Appearing was LAURA HENDRICKS whose testimony began on page 76 of the transcript dated December 13, 2007. Exhibit "26" entitled "Protect our Shoreline" was admitted into evidence. She indicated that the shellfish industry has made statements that the beaches are lowered one to two inches after harvesting. According to her calculations one inch equals a loss of 134 cubic yards and two inches equals the loss of 268 cubic yards of sand. That is 13 dump trucks for one acre of planting. Exhibit "21" was admitted into evidence. There are 18.62 cubic yards of tubes per acre or 868,586

cubic inches per acre. She introduced Exhibit "43" and "4". She is a member of Henderson Bay Shoreline Association. There are actually five or six different groups. Protect our Shoreline is a Thurston group. Case Beach Shoreline Association is another one. There is a Case Inlet Association and they are now working with the Jefferson County Association as well as an Anderson Island Association. They started out as concerned citizens that wanted to find out what aquaculture was and what it was doing. Their concern is how much habitat alteration and modification is each county going to allow in this state and what are the long term consequences of that alteration. There are impacts from the sky to the ground as a result of geoduck harvesting. If you look to the sky you see the impacts to the birds from nettings of the geoducks and oyster nets.

The Examiner asked the attorneys for their view of the issues before the Examiner and it was determined that the issues were whether the project meets the requirements for a substantial development permit and whether the permit that was issued in 2000 has expired. Exhibit No. "4" was admitted into evidence.

BRIAN PHIPPS was recalled to the stand to testimony. His testimony starts at page 95 of the transcript dated December 13, 2007. This farm is never completely covered in tubes. The only tubes currently on the site are the 2006 tubes. The soft area described by Dr. Parsons and Ms. Luedtke is a soft shrimp area. They staple their nests down every six feet with rebar. The overlay is a net that is 50 by 50. The substrate returns to a firm condition after two tide cycles. They are able to walk through it. Exhibit "153" and "154" A –E were admitted into evidence. He has met with Ms. Luedtke concerning debris issues and marking issues. Barges are used there and looking at our harvest records they were there about 40 days. Not 40 days in a row, but about 40 days in a time period from February – June. They also used little outboard boats with skiff with just an outboard on them.

Appearing was BILL DEWEY whose testimony begins on page 128 of the transcript dated December 13, 2007. He manages public affairs for Taylor Shellfish and he does the regulatory and water quality work. He works with the legislature and with various local, state, and federal governments with whom they interact. His recollection is that he invited people to call for tour of the site. People are welcome to visit at their own risk. He does not generally extend invitations on leased property. He disagreed with the testimony of Mr. Daley that the structures are totally unnatural and salmon would avoid them. He believes this type of structure serves as an aggregating device for fish. Exhibit "142" was admitted into evidence. His testimony was based in part upon oyster culture studies and the sand flat type environment. Species do not change their applicability. Algae raises up in the water column and stimulates eelgrass beds. Tubes create a smorgasbord type environment for salmon. It serves as an aggregating device. The mesh diameter is big enough for fish to go through the nets. The size of the net would not preclude sand lance penetrating the net. Exhibit "91" was admitted into evidence. He does not see a significant adverse environmental affect from geoduck cultivation and harvesting at the scale that it is currently being practiced. It is the tubes

and the nets that provide a protective environment for the geoducks.

Appearing was JONATHAN DAVIES whose testimony begins on page 173 of the transcript of December 13, 2007. He has a BA and a Masters in Environmental Studies and PhD in Fisheries Science from the University of Washington and he is a current Associate Professor with the U of W. He is an affiliate faculty member. He works as a researcher for Taylor Shellfish. Because of the higher energy situation of the wave action at this particular site bio deposits are simply flushed away. Geoducks result in increased filtration, reduced turbidity by reducing their cestode or planktonic. There is very little written about geoducks specifically. Geoducks are a clam. There is a great deal that is known about the effects from shellfish aquaculture on the environment. No studies have been done yet on the harvest effects. Exhibit "127" was admitted into evidence. The Segrant analysis indicates that there are many areas of concern that have not been adequately studied with reference to geoduck agriculture.

Appearing was LYNN GOODWIN who co-authored a 1985 environmental impact study about geoduck fishery. The average size of a geoduck in the wild is about 1/3 pound per square foot. The subtidal wild stock geoduck fishery is different in some ways and very similar in others ways to the intertidal fishery. They are not dramatically different.

No further testimony was taken on December 13, 2007.

DECEMBER 14, 2007

Appearing was DAVID TROUT who submitted Exhibit "146", his curriculum vitae. He indicated he was the National Resource Director for the Nisqually Indian Tribe. He is a biologist by trade. Geoduck aquaculture, if properly managed in proper areas and if it avoids critical areas for bate fish or other natural occurring features that are important for natural processes within the beaches or for survival of fish, can have positive aspects. Salmon ultimately feed on things that feed on materials that are reproduced by shellfish.

Reappearing was BRIAN PHIPPS who stated that they installed 100,000 tubes in 2002, roughly 50,000 in 2003, 100,000 were replanted in 2004, 60,000 to 70,000 were planted in 2005, and in 2006 roughly the same number 60,000 to 70,000. They average about 35,000 tubes per acre. Currently there are 50,000 to 60,000 tubes on site. There are about 900,000 geoducks on site. They can plant 20,000 ducks a day for five days with probably a six to eight man crew. A different crew installs the tubes. They can install about 10,000 tubes a day with a six to eight man crew. After they put the tubes in another crew comes in and plants. They can harvest an average of 3,000 pounds a day so a harvest of 60,000 pounds would take approximately 20 to 25 days. The crew for harvesting consists of three; two harvesters and one bander. They have 600,000 pounds per harvest over the year. As soon as a geoduck is pulled out they wash them, band them, and put them in a crate. They put a rubber band on them to keep them closed. Sound travels great distances at night. Conservations can be heard long distances at night.

Appearing was BRYNN RYDELL, a member of the Foss family, who introduced Exhibit "155" and "156" into evidence. Exhibit "153" was also admitted into evidence. She introduced photographs surrounding the Nisqually quake.

Reappearing was MR. McCORMICK to clarify his previous testimony.

No one spoke further in this matter and the Examiner took the matter under advisement. The hearing was concluded.

NOTE: A complete record of this hearing is available in the office of Pierce County Planning and Land Services.

FINDINGS, CONCLUSIONS AND DECISION:

FINDINGS:

1. The Hearing Examiner has admitted documentary evidence into the record, heard testimony, and taken this matter under advisement.
2. Notice of this request was advertised in accordance with Chapter 1.22 of the Pierce County Code. Notice of the date and time of hearing was published two (2) weeks prior to the hearing in the official County newspaper.
3. This hearing was opened on November 1, 2007, and continued to November 2, 2007. It was thereupon continued to December 13, 2007, and the hearing was completed at about 12:00 p.m. on December 14, 2007. The record was left open by the Examiner until January 26, 2008, for purposes of the attorneys preparing proposed findings and conclusions.
4. Taylor Shellfish has a leasehold interest in approximately one mile of shoreline in the Conservancy and Natural Shoreline Environments with the Rural (R10) zone classification. The site is located on the east shore of Case Inlet/North Bay on private tidelands located immediately north of Joemma State Park. The topography of the intertidal zone where Taylor wishes to plant and cultivate geoducks is relatively flat with a gradual slope. The project would not involve work on the adjoining high bank bluff located to the east. The site is owned by the Foss family and is improved with a small single family cabin and a rope swing.
5. On the 28th day of December, 2000, Stephen K. Causseaux, Jr., Hearing Examiner issued a decision granting Taylor's request for a shoreline substantial development permit to allow the commercial production of geoduck clams on this site. The decision of Mr. Causseaux contained several conditions.

Conditions 4 and 5 are the subject of this litigation; they provided as follows:

4. Construction or substantial progress toward construction of a project for which a permit has been granted pursuant to the Act must be undertaken within two (2) years after the approval of the permit. Substantial progress toward construction shall include, but not be limited to the letting of bids, making of contracts, purchase of materials involved in development, but shall not include development or uses which are inconsistent with the criteria set forth in WAC 173-14-100. Provided, that in determining the running of the two (2) year period hereof, there shall not be included the time during which a development was not actually pursued by construction and the tendency of litigation unreasonably related thereto made it reasonable not to so pursue; provided further, that local government may, at its discretion extend the two (2) year time period for a reasonable time based on factors, including the inability to expeditiously obtain other governmental permits which are required prior to the commencement of construction.
5. If a project for which a permit has been granted pursuant to the Act has not been completed within five (5) years after the approval of the permit by local government, the local government that granted the permit shall, at the expiration of the five (5) year period, review the permit, and upon a showing of good cause, do either of the following:
 1. Extend the permit for one (1) year; or
 2. Terminate the permit; provided that nothing herein shall preclude local government from issuing Substantial Development Permits with a fixed termination date of less than five (5) years.

See Exhibit "1F".

6. On August 8, 2007, David Rosencranz, Assistant Director, for the Department of Planning and Land Services forwarded a certified letter to Taylor indicating that the shoreline substantial development permit issued on December 28, 2007, the permit had expired. He stated in pertinent part:

"Planning and Land Services has reviewed this matter and concludes that the permit was issued for five years, and that a

one year extension was granted. Thereby extending the life of the permit to six years. Accordingly, the permit has expired and further work at the site will require application for approval of a new shoreline substantial development permit. See Exhibit "1D". To support his decision Mr. Rosencranz cited RCW 90.58.143(1) and (2) and (3) and (4). He also cited WAC 173-27-090, Pierce County 20.76.030(G), and WAC 173-27-090(3). Mr. Rosencranz also relied upon an opinion of the Attorney General 2007 AGO No. 1 and *Washington Shellfish Inc. v. Pierce County*, 132 Wn. App 239 (2006).

See Exhibit "5" which is hereby incorporated by reference as though fully set forth.

7. The August 8, 2007, letter issued by Mr. Rosencranz was probably initiated by a petition filed by neighbors to revoke the permit issued herein. The petition was filed on the 2nd day of July, 2007. The petition alleged that there was no provision for extending shoreline substantial development permits beyond six years, that it had been more than six years, that the petitioners were neighbors of the project, and that the project was operating on an expired permit. See Exhibit "1C".
8. On August 22, 2007, Taylor filed an appeal of the Administrative Determination issued on August 8, 2007, by David Rosencranz. Within the petition they alleged that Taylor's geoduck farming activities at the Foss site do not constitute "development" under the Shoreline Management Act and in support of this position they cited AGO 2007-001. They allege that Foss Farm does not substantially interfere with the public use of the waters and is therefore not "development". They allege in the petition that while they initially filed the request for a shoreline substantial development permit they basically just filed the request to cooperate with the County. They really did not believe one was necessary. They also alleged that Taylor completed the development of the Foss Farm within five years stating namely that they established boundaries of the farm, planted the areas appropriate for geoduck culture with geoduck seeds, registered the farm with the Department of Fish and Wildlife, and notified potentially affected tribes that they had established an artificial shellfish bed and that Taylor had initiated a regular rotation of planting geoduck at the established farm. In part, Taylor relied upon statements made by County officials outside of their official capacity. See Exhibit "1A". Taylor alleges that the administrative determination was based on the onerous premises that on-going planting and harvesting operations at the farm constitute development.
9. The revocation request filed by the neighbors was withdrawn prior to hearing.
10. This appeal involves two issues; first Taylor argues that the permit has not expired as they have met conditions 4 and 5 by establishing a geoduck farm

within the required timelines as such Taylor argues that the farm is allowed to continue in perpetuity. Second, Taylor argues that the establishment and operation of a geoduck farm does not constitute development and therefore a shoreline substantial development permit was not necessary in the first place.

11. The appellant, Taylor, has the burden of proving the decision of Mr. Rosencranz dated August 8, 2007, was clearly erroneous. See Pierce County Code 1.22.090(G).
12. Pursuant to Pierce County Code 1.22.090(H) the Examiner may reverse or affirm wholly or in part or modify the administrative official's order, requirement, decision or determination. If the Hearing Examiner reverses the administrative official's decision the entire action shall be remanded to the administrative official for an action consistent with the Hearing Examiner's decision.
13. County staff has argued that Taylor's permit expired five years after it was granted with an additional one year extension thereby extending the expiration date to February 12, 2007, six years after it was approved by the Department of DOE.
14. The beach along Case Inlet north of Joemma Beach is located within the Conservancy and Natural Shoreline Environments of the Shoreline Master Program of Pierce County (SMP). The Conservancy Environment is designed to protect, conserve, and manage existing natural resources and valuable historic and cultural areas in order to ensure a continuous flow of recreational benefits to the public and to achieve sustained resource utilization. The general regulations and policies of this environment encourages development which maintains the existing character of the area and which does not consume the natural physical resource base. The Natural Environment is intended to preserve those dynamic natural systems in a manner relatively free of human influence and to discourage or prohibit those activities which might alter the natural characteristics which make these shorelines unique and valuable. General policies and regulations of this environment provide that all developments which would potentially degrade or significantly alter the natural character should be regulated. The main emphasis of regulation in these areas should be preservation of the natural systems and resources which would not allow man to consider any type of development which will affect the natural condition of the area. Physical alterations should only be considered when they serve to protect a significant, unique or highly valued feature which might otherwise be destroyed. Geoduck aquaculture is relatively new to the area and the citizens are extremely concerned about the impact of geoduck aquaculture on the environment. It is these general policies and regulations of the Natural Environment that bring the citizens forward to argue for regulation and scrutiny of the geoduck operations. Intertidal geoduck operation is in its infancy. Basically the scientists have indicated that they borrow from studies of other types of clams. This is the

information which creates the background for geoduck operations today.

15. The Pierce County Master Program regulates environments as well as uses. On Page 21 of the Master Program it states that the policies and regulations of each use activity have been developed on the premise that all appropriate shoreline uses require some degree of control in order to minimize adverse affects to the shoreline environment and adjoining properties. Each project which falls within the jurisdiction of the Act will be evaluated to determine its conformance with the policies and regulations of the appropriate use activities. Aquaculture practice is listed on page 22 of the master program. It provides that the use of shoreline areas for aquaculture should be encouraged for the production of commodities for human consumption and utilization. Aquaculture operations should be encouraged to locate and operate in a manner which would preclude damage to specific fragile areas and existing aquatic resources. These operations should generally maintain the highest possible levels of environmental quality. It also provides that the processing of aquaculture products should not have significant detrimental effects on the adjacent water areas and wetlands. Use provisions also provide that recognition should be given to the possible detrimental impact aquaculture development might have on the visual access of the upland owner and on the general aesthetic quality of the shoreline area. As aquaculture technology expands with increasing knowledge and experience, preference should be placed on underwater structures which do not interfere with navigation or impair aesthetic quality of the Washington shoreline.

16. Pierce County Code 20.24.030(A) of the Pierce County Shoreline Management Use Regulations states as follows:

Subject to the guidelines for reviewing substantial development permits geoduck harvesting is permitted outright in all shoreline environments.

Pierce County Code 20.24.030(C) provides that "aquaculture operation and the placement of land based structures are permitted subject to the guidelines for reviewing substantial development permits". Aquaculture operations which involve the development of land based structures are allowed as conditional uses and subject to the guidelines for reviewing substantial development permits.

17. Pierce County Code 20.24.030(D) provides with reference to the Natural Environment that aquaculture operations are limited to fishing and harvesting of wild and planted stocks for recreation and commercial purposes. Operations which do not involve the placement of structures or fill in the aquatic or terrestrial environment will be allowed as a conditional use upon the showing that the activity will not substantially change the character of the site or adversely affect natural populations and shall be subject to the guidelines for reviewing

substantial development permits. Operations involving structural developments are prohibited.

18. Pierce County Code 20.24.020 contains the guidelines for reviewing substantial development permits for aquacultural activities. Within the provisions of Pierce County Code 20.24.020(A) are 15 guidelines to be used in the granting of shoreline substantial development permits. Within those 15 guidelines are provisions that aquaculture operation shall be conducted in a manner which precludes damage to specific fragile areas and existing aquatic resources. These operations shall maintain the highest possible level of environmental quality and compatibility with native flora and fauna. There was a substantial amount of concern registered by adjacent neighbors about the environmental quality of these operations. Ms. Luedtke testified about the odor that arises from the nets during the hot summer days. The seaweed, dead fish, and other things get caught in the net and on real hot days the odor from them is tremendous. There was also concern that the absence of crabs after the liquefaction of the beach. She also described the fact that the tubes which are implanted in this process escape and litter the beach. Pierce County Code 20.20 contains introduction to use activities for the shoreline. Basically it indicates that the regulations for each use activity had been developed on the premises that all appropriate shoreline uses require some degree of control in order to minimize adverse affects to the shoreline and property. Provisions cited thus far clearly indicate that a shoreline substantial development is required for aquaculture activities. Pierce County 20.04.090 provides a definition of "permit" as a substantial development permit that is issued in compliance with the Shoreline Management Act of 1971. Wherever the term "permit" is used throughout the Shoreline Management Use Regulations the term refers to a shoreline substantial development permit.
19. Pierce County Code 20.02.030 provides that hereafter no construction or exterior alteration of structures, dredging, drilling, dumping, filling, removal of any sand, gravel or minerals, bulkheading, driving of piling, placing of obstructions, or any project of a permanent or temporary nature which interferes with the normal public use of the waters overlying land subject to the Shoreline Management Act of 1971 shall be undertaken in compliance with the provisions of this title and then only after the securing all required permits. Permit as used in this provision is a shoreline substantial development permit by definition. Pierce County Code 20.04.640 provides that a substantial development is any development of which the total cost or fair market value exceeds \$2,500 or any development which materially interferes with the normal public use of the water or shorelines of the state...
20. During the hearing process there was substantial testimony trying to distinguish the Foss operation from Washington Shellfish or trying to bring it within the confines of the decision of the 2007 AGO No. 1 Attorney General. During the hearing process Brian Phipps, geoduck manager, testified that Taylor uses the

Best Management Practices and follows the Geoduck Environmental Code of Practice, Exhibit No. "51". He indicated that Taylor has 56 leased and Taylor owned farms which it operates. They surveyed this site in 2000 and planted in 2001. They visit the farm twice a month. He has three managers he works with, one manager manages the maintenance crew, the second a harvest crew, and the third a planting crew. Their property boundary on the site is Joemma State Park. They have five different age group classes currently on site. After planting the tube is exposed two to three inches. They use a 50 by 50 net that is staked every six feet with a candy cane shaped bent rebar. Their harvest crew consists of three to five people who work four hours a day nine days in a row while the tide is out. They use different approaches for harvesting both the beach and the subtidal approach. Seventy-five percent of the harvest is done by beach and 25% by intertidal harvest. After harvest the beach will drop one to two inches in height. Inserting tubes is the beginning of the farming process. During harvesting process each individual will remove approximately 300 pounds of geoduck per day. The harvest will last approximately ten days. A barge will be there with equipment for ten days to two weeks. They harvest from late April to May. Harvesting is performed 800 yards from the State park. The property is posted "Private Property" although Ms. Foss did indicate that people do trespass and use the property. If they have enough seed they will plant 70,000 geoduck each year on the site. One acre of planting contains 35,000 tubes. They plant a total of 10,000 tubes per day for five days in a row. The process is started by the crew which puts in 10,000 per day. After that a crew comes in and plants geoducks. They plant 20,000 per day. It takes an eight man crew five or six days to plant the geoducks. Thereafter they spread netting over the tubes and secure them by rebar. In 2002 they planted 100,000 geoducks, 2003 - 50,000, 2004 - 100,000, 2005 - 60,000 to 70,000, 2006 - 60,000 - 70,000 geoducks. A lot of the planting depends on the number of seeds available. However, the normal calculation is one acre equals 35,000 geoduck. If fully planted this site would contain 420,000 geoducks on 12 acres. Geoducks sell for approximately \$10.00 per pound. This is a multi-million dollar operation.

21. People using the park for intertubing, kayaking, wakeboarding, waterskiing, boating could be carried by the current down to this area and it would be dangerous to those who ended in the area of this 12 acre site and needed assistance. The planted area would definitely would interfere with fishing and other recreational uses of the surfacewater. Particularly when the water was only one to two feet above the planted tubes.
22. There appears to be several different types of harvesting available for geoducks. The harvesting performed by Foss at this site is a harvest process where they liquefy the beach. Basically the geoducks are buried about 36 inches plus under the surface. The harvesters insert a wand into the sand about three feet plus in depth. They shot water into the sand where the geoducks are planted and they liquefy the beach. They continue to insert water in the area until the geoducks

float to the top. They move along one row after another. At the end of the row they will generally leave a deep impression which takes, according to testimony, most favorable to the applicants two to three tides to clear up. The photographs of the harvest process taken place at this site clearly indicate that during the planting process there is an interference with the use of the surface waters. There is also an interference with the use of the surface waters when harvesting takes place. The testimony indicates that when the tubes are inserted a net is stretched over them then the steel rebar is inserted to hold it in place. However, after the tubes and net have been in place for a while and there are storms on the water and whatever else occurs it appears from the photographs that the tubes are loosened, that they are no longer two to four inches in height and they appear to be substantially higher and many appear to be floating or loose. After a while the net appears to be covered with a green algae and the entire area is far from attractive. It is this scene which causes so much concern from the neighbors. The neighbors have complained about the absence of sea life after the beach has been liquefied. They have also complained about the odors and the appearance and the loose tubes floating in the area. There is little doubt that when this process starts everything is neat and clean, but as time goes on the tubes loosens and the acres of tubes become a floating mess. Photographs taken on September 4, 2006, clearly demonstrate floating tubes, green algae, fish life being caught under the nets, and a rubber band around an otter. The photographs also show pictures of the barges and other equipment used in the process. There is little to no doubt that kayaking in shallow waters in this area would be a problem for kayakers particularly when loose nets and tubes are floating. It also appears that this would be very dangerous to windsurfers and unsuspecting people viewing the beach area with boats to happen on to this 12 acre site. There is no issue presented to this Examiner about the cost being in excess of \$5,000 nor does it appear to this Examiner that there is any issue about the fact that this operation clearly interferes with the normal uses of the Shorelines of the State at least temporarily. See *Clamshack v. Skagit County*, 109 Wn. 2d 91 and *Washington Shellfish...*

23. There was quite a bit of discussion about schematics and various terminology. Dr. Jeff Fisher, an expert brought in by Taylor, indicated that much of the information they were other using with reference to geoducks was gained through oyster studies and types of clams and shellfish. He indicated that these tubes create a smorgasbord type environment for sand lance and that the mesh size they use on the nets is large enough for small fish to get through. He believes that the geoduck aquaculture does not have a significant adverse environmental impact. In looking at the pictures from Mr. and Mrs. Luedtke he disagreed with her analysis that these were dead sea creatures, he believed that they were alive. She clearly testified based upon her observations when the photograph was taken that they were dead. His testimony was based upon looking at the photograph. He also disagreed with Mr. Paradise's testimony about visibility in the water although he was not physically present when Mr.

Paradise made his observations. He disagreed that the lack of visibility was caused by the harvesting process. He further testified that tubes and the netting are structures for geoducks. There are a variety of different types of structures that they use, but basically the tubes and the netting are a protective device and the structure that is used to provide a structured habitat to protect the geoduck from adverse elements in the environment. He further indicated that there is very little information about geoducks, but that there is a great deal known about the affects of the shellfish culture.

24. Alora Hendricks testified to the volume of material used in this process by the shellfish industry. She further indicated that if the beach was lowered by inch it would be a 134 cubic yards of sand. If it was lowered by two inches it would be 268 cubic yards of sand equivalent to 13 dump trucks of sand per acre. She indicated that the volume of tubes would be about 868,586 cubic inches per acre. She is a member of Henderson Bay Shoreline Association. They are concerned about the impacts of geoducks upon the environment and have started doing research in the area. They are concerned about the lack of studies concerning geoducks.
25. According to Megan N. Dethier, PhD, University of Washington, the harvest of geoducks from high density agriculture beds will involve near total liquefaction of the sediment of at least 50 cm. While organisms in the intertidal zone are adapted to small scale physical disturbances (from waves, ghost shrimp, crab pits, etc.). This large scale is not part of their evolutionary history. Other forms of intense habitat disruption, such as mechanical dredging for clams, have been outlawed. Intertidal holes are known to fill with sediment within weeks or months after small scale digging, but there has been no research on recovery of normal intertidal sediment characteristics after liquefaction. A very limited amount of research has been done on the subtidal geoduck harvesting on non-target species, but none in the intertidal zone where the native flora and fauna are completely different. Many questions arise.
26. Dr. Jonathan Davies appeared on behalf of Taylor who indicated that he works as a researcher for Taylor and he has a very impressive curriculum vitae. There is very little written about geoducks specifically. Geoducks are a clam. There is a great deal known about shellfish culture on the environment. There was testimony that this process is a form of dredging. Dredging has been defined by the Pierce County Code as removal of material from the bottom of a stream, river, lake, bay, or other water body. The issue would be whether or not liquefying approximately one acre of a beach from about three foot plus level in depth constitutes dredging. It definitely does result in the removal of geoducks from the bottom of the stream and it also results in a floating of sand from the area. It definitely does constitute removal of sand from the area although the amount is unknown it definitely does result in sand being displaced or removed.

27. When the tide is in the tubes and net obstruct the use of shallow waters of Puget Sound by watercraft like kayaks, canoe, shallow draft, motorboats, and intertubers and fisherman. The tubes and nets also obstruct use by windsurfers, divers, and fishers. The obstructive nature of operations increases during planting and harvesting when barges, workers, hoses, and other equipment are present.
28. A "structure" is a permanent or temporary edifice or building of any piece of work artificially built or proposed apart joined together in some definite manner. See WAC 173-27-030(15). PVC tubes which Taylor installs in the beach join in a definite manner when they are planted in rows in sections and covered by a net to hold them in place.
29. Pierce County Code 20.76.030(G)(3) states that "authorization to conduct development activities shall terminate five years after the effective date of a permit. The Examiner may authorize a single one year extension as set forth in Subsection 2. above." WAC 173-27-090(2)(B) contains the identical language.
30. As the above indicates the decision of David Rosencranz issued on August 7, 2007, is supported by substantial evidence and the law and therefore the appeal of Taylor is denied particularly in view of the legislative findings set out in RCW 90.58.020 that the shorelines of our State are the most valuable and fragile of its natural resources and that is great concern throughout the state relating to the utilization, protection, restoration, and preservation. The law clearly sets out that permits are valid for five years and five years only. I do agree that the decision previously entered in this case does not specifically point out as it could that the permit is good for five years, but the law very clearly sets out that it is good for five years only.
31. The installation of thousands and thousands of geoducks upon this 12 acre site and the installation of thousands and thousands of tubes and the entire harvesting process clearly interferes with the use of the surface waters at least on a temporary basis. At least one scientist during the hearing indicated that this process is considered dredging by the scientific community. Another scientist has indicated that a net installed over a tube with rebar being used as a method of hold a net in place constitutes a structure. It is a structure which is designed to protect the lives of geoducks being raised. The Taylor Farm could accommodate a minimum of 420,000 tubes all covered with nets. It could accommodate three times that number of geoducks. Typically they place three to four geoducks in each tube. It is a multi-million dollar business that does interfere with the use of the surface waters. Certainly anyone who wishes to use the water and accidentally stumbles into this area could be in jeopardy. Pierce County has clearly identified aquaculture as being an area that needs a shoreline substantial development permit regardless of any other fact. Requiring a renewal of a permit every five years is not uncommon. There were numerous examples

submitted to the Examiner during the hearing process. The shoreline substantial development permit issued to Taylor Shellfish on January 18, 2002, identified the law which indicates that development activity must terminate after five years. Unfortunately the decision itself did not refer to that portion of the law. The appeal of Taylor Shellfish is hereby denied and a shoreline substantial development permit is required for their operation of the Foss site.

32. It should be noted that on October 26, 2007, the Pierce County Council amended the provisions of the Pierce County Code Chapter 20.24 governing aquaculture operations. This chapter in the future will contain guidelines for the operation of geoduck aquaculture. Aquaculture operations are limited to fishing, raising, holding, and harvesting allowed in planted stocks for recreation and commercial purposes that do not involve the use of tubes, netting, or other materials placed in the intertidal areas. Aquaculture operations that do not involve the use of tubes, netting, or other materials placed in intertidal areas will be allowed upon the showing the activity will not change the character of the site or adversely affect the natural populations and shall be subject to the standards and guidelines for reviewing substantial development permits in the Urban and Rural Residential Environments. With reference to the Natural Environment aquaculture operations are limited to fishing and harvesting of wild and planted stocks for recreation and commercial purposes. Operations which do not involve planting in the intertidal areas the placement of structures are fill in the aquatic or terrestrial environment or the use of tubes, netting, or other materials placed in intertidal areas will be allowed as a conditional use upon the showing the activity will not substantially change the character of the site or adversely affect natural populations and shall be subject to the standards reviewing substantial development permits. Operations involving structural developments are prohibited.
33. Pierce County Code 20.24.030(B)(C) provides with reference to the Conservancy Environment that "aquaculture operations which involve the development of land based structures are allowed as conditional uses and subject to the guidelines for reviewing substantial development permits". It also provides that aquaculture operations which do not involve the placement of land structures are permitted subject to the guidelines reviewing a substantial development permit. As previously stated, these provisions clearly require a substantial development permit, in the opinion of this Examiner that this operation is located in part in the Conservancy Environment and a conditional use permit may also be required. Although this issue was not raised it appears to me that the language of the ordinance is perfectly clear.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.
2. The appeal of the letter written by David Rosencranz on August 8th (Exhibit "1D")

which is hereby incorporated by reference as if set forth in full and the appeal from the same is denied.

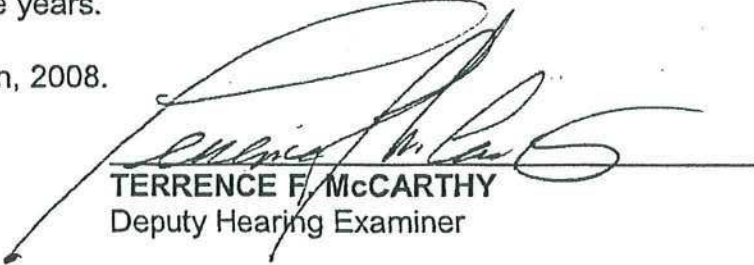
3. The appellant's assertion that a shoreline substantial development permit is not required for their operation even though they applied for them in the past is incorrect. A shoreline substantial development permit is required for their operation at the Foss site and they are required to renew the permit at least once every five years.

DECISION:

The appeal of the Taylor Shellfish is denied.

The appellants are required to obtain a shoreline substantial development permit for their operation at least once every five years.

ORDERED this 26th day of March, 2008.



TERRENCE F. McCARTHY
Deputy Hearing Examiner

TRANSMITTED this 26th day of March, 2008, to the following:

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Attn: Diane Cooper
SE 130 Lynch Road
Shelton, WA 98584

**APPELLANT'S
ATTORNEY:** Gordon Derr LLP
Samuel W. Plauche
2025 1st Avenue, Ste. 500
Seattle, WA 98121

INTERVENERS: Coalition to Preserve Puget Sound Habitat
Case Inlet Shoreline Association
Henderson Bay Shoreline Association
Case Inlet Beach Association
Protect Our Shoreline

**INTERVENER'S
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**COUNTY'S
ATTORNEY:**

Jill Guemsey
Deputy Prosecuting Attorney
955 Tacoma Avenue South #301
Tacoma, WA 98402

INTERVENER:

North Bay Partners

**INTERVENERS'
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PIERCE COUNTY PLANNING AND LAND SERVICES
PIERCE COUNTY BUILDING DIVISION
PIERCE COUNTY DEVELOPMENT ENGINEERING DEPARTMENT
PIERCE COUNTY PUBLIC WORKS AND UTILITIES DEPARTMENT
TACOMA-PIERCE COUNTY HEALTH DEPARTMENT
FIRE PREVENTION BUREAU
PIERCE COUNTY PARKS AND RECREATION
PIERCE COUNTY COUNCIL
PIERCE COUNTY RESOURCE MANAGEMENT

**CASE NO: ADMINISTRATIVE APPEAL: CASE NO. AA16-07
APPLICATION NO. 612676**

NOTICE

1. **RECONSIDERATION:** Any aggrieved party or person affected by the decision of the Examiner may file with the Department of Planning and Land Services a written request for reconsideration including appropriate filing fees within seven (7) working days in accordance with the requirements set forth in Section 1.22.130 of the Pierce County Code.

2. **APPEAL OF EXAMINER'S DECISION:** The final decision by the Examiner may be appealed in accordance with Ch. 36.70C RCW.

NOTE: In an effort to avoid confusion at the time of filing a request for reconsideration, please attach this page to the request for reconsideration.

Exhibit B



File Name or Number: SD22-00
Parcel Number(s): 0020093005, 93008

**APPEAL OF A DETERMINATION
OF AN ADMINISTRATIVE OFFICIAL OR THE
RESPONSIBLE COUNTY OFFICIAL (ENVIRONMENTAL OFFICIAL)**

TO: THE PIERCE COUNTY HEARING EXAMINER:

COMES NOW Taylor Shellfish farms on this 22nd day of August,
(your name)
as an APPELLANT in the matter of the decision by an Administrative Official, namely
the Director of Pierce County Department of Planning and Land Services
(appropriate department)
or decision of the Responsible Official (Environmental Official) to
interpret county code, state statute and regulations in
"Administrative Determination, SD 22-00, Taylor Shellfish (foss property)"

WHEREAS, David Rosenkrantz, the Administrative Official or the Responsible Official, after duly
considering this matter, did on August 8, 2007, take said action;

THEREFORE BE IT KNOWN that the APPELLANT, after review and consideration of the reasons given
by the Administrative Official or the Responsible Official for the action, does now, under the provision of
the appropriate official regulations, give written notice of APPEAL to the Hearing Examiner of said
decision and alleges the following errors of the Administrative Official or Responsible Official:

see attached notice of appeal, dated and filed Aug. 22, 2007

(If more space is needed, please attach additional sheets)

FURTHERMORE, the APPELLANT requests that the Hearing Examiner, upon review of the decision of
the Administrative Official or Responsible Official, find in favor of the APPELLANT and revise
the action of the Administrative Official or Responsible Official by

[Signature] 130 SE Lynch Road (360) 426-6178
Signature of Appellant Address of Appellant Phone
Shelton, WA 98584

Filed with the Planning and Land Services Department this _____ day of _____,
By _____; Received by _____;
Forwarded to the Hearing Examiner on _____.

AUG 22 2007

PIERCE COUNTY

BEFORE THE HEARING EXAMINER
OF PIERCE COUNTY

TAYLOR SHELLFISH FARMS

Appellant.

NO.

NOTICE OF APPEAL
OF ADMINISTRATIVE
DETERMINATION

APPELLANT:

Taylor Shellfish Farms ("Taylor")
Attn: Ms. Diane Cooper
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Shelton, WA 98584
dianec@taylorshellfish.com
Phone: (360) 426-6178 x. 40
Fax: (360) 427-0327

APPELLANT'S REPRESENTATIVE:

Samuel W. Plauché, WSBA #25476
Tadas Kisielius, WSBA #28734
GordonDerr, LLP
2025 First Avenue, Suite 500
Seattle, Washington 98121
Phone: (206) 382-9540
Fax: (206) 626-0675

DECISION APPEALED

On August 8, 2007, the Assistant Director of Pierce County's Department of Planning and Land Services issued "Administrative Determination, SD22-00, Taylor Shellfish (Foss Property)" ("Administrative Determination"). A copy of the Administrative Determination is attached hereto as Exhibit 1. In this Administrative

NOTICE OF APPEAL - 1

GordonDerr.

2025 First Avenue, Suite 500
Seattle, WA 98121-3140
(206) 382-9540

1 Determination, the County concludes that: (a) Taylor was required to obtain a Shoreline
2 Substantial Development Permit ("SSDP") for its activities at the Foss Geoduck Farm; (b)
3 the SSDP that Taylor obtained in 2000 expired pursuant to RCW 90.58.143, WAC 173-
4 27-090, Pierce County Code 20.76.030, and the terms of the SSDP itself; and (c) Taylor
5 must obtain a new SSDP from the Pierce County Hearing Examiner to continue operation
6 of its geoduck farm. That August 8, 2007, Administrative Determination is the subject of
7 this appeal.

8 FACTUAL BASIS FOR THE APPEAL

9
10 1. In 2000, Taylor leased private tidelands along approximately one mile of
11 shoreline of Case Inlet from the North Bay Partnership ("Foss Farm") for the purposes of
12 establishing a commercial geoduck farm. Specifically, Taylor intended to plant, cultivate,
13 and harvest geoduck at the Foss Farm on an ongoing basis.

14 2. The planting and harvesting cycle at the Foss Farm is similar to operations
15 at other geoduck farms throughout the area and uses methods developed by the
16 Washington State Department of Fish and Wildlife. Taylor employees insert nine-inch-
17 long PVC pipe into the substrate approximately one foot apart. The employees plant four
18 juvenile geoduck by hand into the PVC pipe. The PVC pipe temporarily protects the
19 vulnerable juvenile geoduck from predators. Taylor employees remove the pipes from the
20 sand after approximately 1-2 years when the geoduck have burrowed sufficiently into the
21 sand to avoid predation and drying out at low tide.

22 3. The geoduck continue to grow for 4-5 years after the PVC pipes are
23 removed. Taylor employees then harvest the geoduck by using a low pressure, high
24 volume water pump to loosen the sand around the geoducks and remove them from their
25

1 burrows. This is the same methods employed by divers to harvest wild geoducks from
2 subtidal beds. This harvest takes place 5-6 years after the initial planting.

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

7 5. Taylor's geoduck farming activities at the Foss Farm do not constitute
8 "development" under the Shoreline Management Act ("SMA"). The Washington
9 Attorney General has opined that geoduck farming does not constitute "development"
10 under the SMA unless the farm in question substantially interferes with the public's use of
11 the surface waters. AGO 2007-001, attached hereto as Exhibit 2. Taylor's Foss Farm
12 does not substantially interfere with the public's use of the waters and is therefore not
13 "development" under the SMA

14 6. Although Taylor's Foss Farm does not constitute "development," Pierce
15 County Code purports to require that all geoduck farms obtain an SSDP. In 2000, in
16 deference to these regulations and prior to initiating its farming activities, Taylor
17 requested a SSDP from Pierce County to construct and operate the Foss Farm. The Pierce
18 County Hearing Examiner granted the permit in December 2000. *See* Shoreline
19 Substantial Development Permit SD 22-00 ("Permit"), attached hereto as Exhibit 3. The
20 Permit authorizes Taylor to "cultivate the intertidal zone of private tidelands for the
21 commercial production of geoduck clams along the east shore of Case Inlet/North Bay."
22 *Id.*

23 7. The SMA and implementing regulations require construction of projects
24 permitted by SSDPs be completed within five years of permit issuance. *See* RCW
25

1 90.58.143(1); WAC 173-27-090. The Permit includes a similar restriction that is
2 patterned from the statute and regulations. See Exhibit 3 at pp.2-3, conditions 4 and 5.

3 8. Taylor completed development of the Foss Farm within five years of
4 issuance of the permit. Namely, Taylor established the boundaries of the farm, planted the
5 areas appropriate for geoduck culture with geoduck seed, registered the farm with the
6 Department of Fish and Wildlife, and notified potentially affected Tribes that it had
7 established an artificial shellfish bed. Taylor has now initiated a regular rotation of
8 planting geoduck on the established farm.

9 9. Taylor has been in continuous communication with the County regarding
10 its farming operations at the Foss Farm ever since it applied for and was granted its
11 Permit. Over the past six years, the County repeatedly confirmed that the Permit remains
12 valid as long as Taylor continues farming at the Foss Farm. The County confirmed that
13 the Permit did not expire, and Taylor was permitted to farm the property on an ongoing
14 basis once the farm was established. Taylor has continued to plant geoduck at the Foss
15 Farm on an annual basis in reliance on those assurances.

16 10. On May 9, 2007, Taylor received a letter from Pierce County indicating,
17 for the first time, that the County interpreted the Permit as establishing timelines for the
18 operation of the farm. A copy of that letter is attached hereto as Exhibit 4.

19 11. On June 26, 2007, Taylor prepared a letter addressing the duration of the
20 Permit. A copy of that letter is attached hereto as Exhibit 5. In that letter, Taylor pointed
21 out that the permit did not contain an expiration provision and remained in effect. Taylor
22 also noted that, because its operations do not substantially interfere with the public's use
23 of surface waters, its farm is not "development" under the SMA and does not require an
24 SSDP.
25

1 12. On August 8, 2007, David Rosenkranz, Assistant Director of Planning and
2 Land Services, issued the Administrative Determination that is the subject of this appeal.
3 Contrary to the County's prior interpretations with respect to the Permit's impact on
4 ongoing farming activities, the Administrative Determination concludes that the Permit
5 has expired and that ongoing farming operations, including planting and harvesting,
6 constitute "development" under the SMA and therefore require a new permit.

7 13. The Administrative Determination appears to require that all geoduck
8 farms in Pierce County obtain SSDPs. The County's conclusion in this regard is contrary
9 to AGO 2007-001. The County's interpretation in this regard is also inconsistent with its
10 historic practices: the County is fully aware of other geoduck farms operating in Pierce
11 County without SSDPs.

LEGAL BASIS FOR THE APPEAL

12
13 1. The Administrative Determination is clearly erroneous because it is
14 contrary to the law, including, without limitation, the Shoreline Management Act (e.g.,
15 RCW 90.58.020, RCW 90.58.030, RCW 90.58.140, RCW 90.58.143, RCW 90.58.200),
16 implementing regulations in the Washington Administrative Code (e.g., WAC 173-27-
17 020, WAC 173-27-030, WAC 173-27-090, WAC 173-27-140, WAC 173-26-241), the
18 County's Shoreline Master Program, case law, guidance documents interpreting these
19 laws and the County's own historic interpretation of these laws on other, similarly-situated
20 farms. The Administrative Determination is based on the erroneous premise that the
21 ongoing planting and harvesting operations at the Farm constitute development. Based on
22 this premise, the County concludes that a shoreline substantial development permit is
23 required to plant and harvest geoduck, that Taylor's substantial development permit
24 expired with respect to planting and harvesting operations, and that a new permit is
25 required to continue planting and harvesting activities. The fundamental premise on

1 which the Administrative Determination is based is inconsistent with the law. Instead, the
2 farming and harvesting operations at the Foss Farm do not constitute development
3 because those operations do not substantially interfere with normal public use of the
4 surface waters. Neither do the operations at the Foss Farm constitute dredging, drilling,
5 filling, removal of materials, or placing of obstructions. Accordingly, no SSDP is
6 required to continue the planting and harvesting at the Foss Farm.

7 2. The Administrative Determination is clearly erroneous because it is not
8 supported by evidence or facts and is internally inconsistent. The Administrative
9 Determination concludes that the ongoing farming and harvesting activities interfere with
10 normal public use of surface waters such that they constitute “development” and are
11 governed by the Shoreline Management Act. However, the Administrative Determination
12 does not investigate or consider *any* facts related to the impact of the farming and
13 harvesting operations on the public’s use of surface waters. This is despite the conclusion
14 in the Administrative Determination that the inquiry into whether an activity interferes
15 with normal public use of waters “will depend on the facts, which should be determined
16 by the local government.”

17 3. The Administrative Determination is clearly erroneous because it is
18 contrary to the SMA, its implementing guidelines, Pierce County Code and the permit
19 itself. Even if the Foss Farm is “development” and requires an SSDP, these provisions of
20 the law, and the language of the Permit, required only that Taylor fully establish the Foss
21 Farm within five years of permit issuance. Taylor fulfilled that requirement. The
22 County’s interpretation that authorization to continue farming activities at the Foss Farm
23 expired is contrary to the law (including, but not limited to, RCW 90.58.143, WAC 173-
24 27-090, and PCC 20.76.030) and the language of the Permit itself.

1 4. The Administrative Determination is arbitrary and capricious and
2 inconsistent with the County's prior interpretations of the Permit and the law. According
3 to the County's previous and repeated interpretations of the Shoreline Management Act,
4 implementing regulations in the WAC, the County's Shoreline Master Program, and the
5 Permit, itself, the farming and harvesting activities at the Foss Farm were not subject to
6 the expiration provisions of the permit, or of the comparable provisions in the Shoreline
7 Management Act (including RCW 90.58.143) and implementing regulations (including
8 WAC 173-27-090). Accordingly, the County previously determined that ongoing farming
9 activities could continue at the Foss Farm without need of a new permit. The more recent
10 Administrative Determination, which is seemingly based on the same information that
11 was before the County at the time it issued its earlier interpretations, is therefore arbitrary
12 and capricious and inconsistent with earlier interpretations.

13 5. The County is time-barred from issuing an Administrative Determination
14 that is inconsistent with the Permit and prior interpretations of the Permit and the law.
15 The Permit and the County's prior interpretations constitute land use decisions that should
16 have been appealed administratively and/or to the Courts pursuant to RCW 36.70C. As is
17 any party, the County is time-barred from challenging those earlier determinations beyond
18 the timeframe for filing appeals.

19 6. Taylor has continued to plant the Farm through its rotation, in reliance on
20 the County's prior interpretations. The Foss Farm is currently planted with geoduck that
21 must be harvested or it will be lost. The doctrine of equitable estoppel precludes the
22 County from issuing an Administrative Determination that is inconsistent with its prior
23 interpretations and would preclude the Taylor from harvesting the geoduck it has planted.

24 **RELIEF SOUGHT**

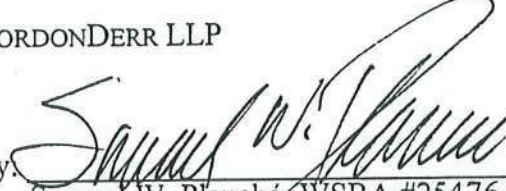
25 Appellant requests the following relief:

- 1 1. An order and judgment reversing the challenged Administrative
2 Determination because it is clearly erroneous, contrary to law, arbitrary and capricious
3 and not supported by evidence.
- 4 2. An order and judgment remanding the matter back to Pierce County's
5 Department of Planning and Land Services for action consistent with the Order;
- 6 3. Any other relief as the Hearing Examiner may find just and equitable.

7 Respectfully submitted this 22nd day of August, 2007.

8 GORDONDERR LLP

9

10 By: 

11 Samuel W. Plauché, WSBA #25476

12 Tadas Kisielius, WSBA #28734

13 Attorneys for Appellant, Taylor

14 Shellfish Farms

15

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23

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25

Y:\WP\Taylor\Foss\p.Notice of Appeal.FINAL.082207.swp.doc

EXHIBIT 1



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Tacoma, Washington 98409-7460
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RECEIVED

AUG 10 2007

GordonDerr LLP

August 8, 2007

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Shelton, WA 98584

RE: Administrative Determination, SD22-00
Taylor Shellfish (Foss Property)

Dear Ms. Cooper:

As you know an issue has arisen regarding your Shoreline Substantial Development Permit (SSDP) to cultivate the intertidal zone of private tidelands for the commercial production of geoduck clams along the east side of Case Inlet/North Bay, commonly known as the Foss Property, SD22-00. This permit was approved by the Hearing Examiner on December 28, 2000. No appeals were filed.

The present issue involves whether the permit has expired. Planning and Land Services has reviewed this matter and concludes that the permit was issued for five years, and that a one-year extension was granted, thereby extending the life of the permit to six years. Accordingly, the permit has expired and further work at the site will require application for and approval of a new shoreline substantial development permit (SSDP).

Our position is based upon Revised Code of Washington (RCW) 90.58.143, Washington Administrative Code (WAC) 173-27-090, Pierce County Code (PCC) 20.76.030, the Hearing Examiner's December 28, 2000, decision, 2007 Attorney General's Opinion (AGO) No. 1, and the Court of Appeals decision in *Washington Shell Fish, Inc. v. Pierce County*, 132 Wn. App. 239 (2006), as set forth below. In addition, we have reviewed the letter from Samuel W. Plauche at Gordon Derr, LLP, dated June 26, 2007.

I. RCW 90.58.143.

RCW 90.58.143(1) sets forth time requirements for SSDPs and other shoreline permits. Subsection 1 provides that these time requirements apply to all shoreline permits and that upon a finding of good cause; local governments may adopt different time limits from those set forth in this statute:



(1) The time requirements of this section shall apply to all substantial development permits and to any development authorized pursuant to a variance or conditional use permit authorized under this chapter. Upon a finding of good cause, based on the requirements and circumstances of the project proposed and consistent with the policy and provisions of the master program and this chapter, local government may adopt different time limits from those set forth in subsections (2) and (3) of this section as a part of action on a substantial development permit.

Subsection 2 of RCW 90.58.143 requires that construction activity or, where no construction activities are involved, the use or activity shall be commenced within two years of the effective date of a SSDP. A one-year extension of the commencement date may be approved.

Subsection 3 provides that authorization for construction activities shall terminate five years after the effective date of the SSDP, with a possible one year extension:

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

Subsection 4 addresses the effective date of SSDPs in light of appeals, etc. Of note is that part of this section which provides that the time periods for commencing the construction or activity, and the five year period in subsection (3) do not run where other governmental permits/approvals are required:

(4) The effective date of a substantial development permit shall be the date of filing as provided in RCW 90.58.140(6). The permit time periods in Subsections (2) and (3) of this section do not include the time during which a use or activity was not actually pursued, due to the pendency of administrative appeals or legal actions, or due to the need to obtain any other government permits and approvals for the development that authorize the development to proceed, including all reasonably related administrative or legal actions on any such permits or approvals.

II. WAC 173-27-090.

WAC 173-27-090 parallels RCW 90.58.143. WAC 173-27-090 Subsections 1-4 appear to be identical to Subsections 1-4 in RCW 90.58.143, except that WAC 173-27-090(3) refers to conducting "development" activities, as opposed to "construction" activities.

III. PCC 20.76.030.

PCC 20.76.030.G sets forth time limitations for SSDPs as well as other shoreline permits (shoreline conditional use permits, shoreline variances, etc.). Subsection G.2 requires that "construction or substantial progress toward construction of a project shall be commenced or, where no construction is involved, the use or activity shall be commenced within two years of the effective date of a permit." This subsection goes on to allow the Hearing Examiner to authorize a single one-year extension.

Like WAC 173-27-090(3) subsection G.3 states that "[a]uthorization to conduct development activities shall terminate five years after the effective date of a permit. The Examiner may authorize a single, one-year extension as set forth in Subsection 2, above." Other subsections in G address the date of filing, the effect of appeals and litigation, revisions, etc.

IV. 2007 AGO No. 1.

In January of this year the Attorney General issued an opinion (2007 AGO No. 1) regarding the need for SSDPs for geoduck planting, growing and harvesting activities. Although the opinion did not address the time limitation for SSDPs, the opinion is helpful in that it discusses the activity itself.

In this opinion the Attorney General questioned whether geoduck farming is, in and of itself, a "development" under the SMA.¹ The Attorney General concludes that geoduck tube aquaculture does not necessarily fall within the definition of "development."

Therefore, although hypothetically a project may interfere with use of surface waters, we conclude that the SMA addresses permitting of actual "projects" and involves a concrete examination of whether the project interferes with normal public use of surface waters. The Washington Shell Fish case illustrates this approach by examining the facts of a particular project. Accordingly, we conclude that whether a particular geoduck farm interferes with normal public use of Taylor Shellfish, Inc. surface waters will depend on the facts, which should be determined by local government when deciding if a permit is required. See RCW 90.58.140(1).²

¹ RCW 90.58.030(3)(d) defines "development" to mean: a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any 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[.]

² The Attorney General also states that geoduck tubes do not fall within the ordinary meaning of the word "structures" referred to in the definition of "development." If tubes are not "structures," then placing them does not appear to amount to "construction."

V. **Washington Shell Fish, Inc. v. Pierce County, Court of Appeals Decision.**³

As noted in the AGO, the Court of Appeals recently interpreted Pierce County's shoreline regulations with respect to geoduck activities in *Washington Shell Fish, Inc. (WSF) v. Pierce County*, 132 Wn. App. 239 (2006). A brief recap of that decision may be helpful. In this case, Washington Shell Fish (WSF) leased County Park property (tidelands) at the Purdy Spit as well as other nearby privately owned tidelands. After receiving numerous complaints about WSF's harvesting and aquaculture activities, PALS issued Cease and Desist (C&D) orders applicable to all 11 leased properties, requiring WSF to stop its geoduck operations because they did not have SSDPs. WSF appealed the C&D orders and the Hearing Examiner upheld the C&D orders. WSF filed a judicial appeal (LUPA) and the Pierce County Superior Court upheld the Examiner's decision. WSF appealed to the Court of Appeals.

WSF argued before the Court of Appeals that it was not required to obtain a SSDP before engaging in geoduck planting and harvesting on leased shorelines because such activities are not "development." The Court of Appeals disagreed:

In these ways, WSF's activities prevented the general public from using certain areas of the water: (1) WSF's geoduck planting and harvesting equipment posed a safety risk to the public; and (2) WSF's activities and fixed objects occupied shoreline water, thereby excluding others. The testimony and exhibits provided substantial evidence to support the hearing examiner's finding that WSF's geoduck activities interfered with the normal public use of the surface water. Therefore, under PCC 20.76.030, WSF engaged in "development" when it harvested and planted geoducks on the leased properties.

WSF also argues that it merely disrupted, but did not remove, sand when it used water jets to harvest geoducks. But the hearing examiner did not expressly address WSF's sand removal; rather, he based his decision on WSF's interference with the public's use of the surface water. Interfering with public use of the surface water is a sufficient ground, standing alone, to support the hearing examiner's findings and the cease and desist orders as they relate to geoduck planting and harvesting. Thus, we do not address whether disrupting sand provides a separate basis for requiring a substantial development permit under Pierce County's shoreline regulations.

The Court of Appeals further found that the activities involving the harvesting and planting of geoducks constituted "substantial" development:

³ A petition for review of this case is pending before the Washington Supreme Court.

WSF admitted engaging in both planting cultivated geoducks and harvesting wild geoducks on the leased lands (except for the Tellefson and Ohlson properties). Neither activity is exempt from substantial development permit requirements under PCC 20.24.030: Harvesting activities are subject to PCC 20.24.030(A), and planting activities are subject to PCC 20.24.030(B) through (D). Because WSF's geoduck activities constituted substantial developments, WSF had to apply for and to obtain the required permits before planting or harvesting geoducks.

Washington Shell Fish, Inc. v. Pierce County, 132 Wn. App. at 250 - 253.

VI. Taylor Shellfish's Position.

In the case at hand, a SSDP was issued on December 28, 2000. More than six years have passed since the permit was issued. In his June 26, 2007, letter, Samuel W. Plauche, Taylor Shellfish's attorney, argues that Condition 5 of the Examiner's decision requires that the approved project be completed within five years, with an option for a one-year extension; and that they have met condition 5 by building/creating/installing the Foss geoduck farm within five years. Mr. Plauche further argues that they do not need a SSDP for continued geoduck farming under the criteria set forth in the AGO discussed above.

Taylor Shellfish describes the process by which it constructed the geoduck farm as establishing the boundaries of the Foss farm, registering it with the WDFW, and planting the entire farmable area with geoduck seed. Although not specifically mentioned, the actual construction appears to refer to the installation of PVC tubes and netting. While Taylor Shellfish considers such activities to be "construction" of structures as required by RCW 90.58.143(3), the Attorney General Opinion referenced above appears to be to the contrary. ("Geoduck tubes do not fall within the meaning of the word 'structures' referred to in the definition of development.")

Regardless of whether the installation of geoduck tubes constitutes "structures" and/or "construction", WAC 173-27-090(3) and PCC 20.76.030.G(3) limit "development" activities to a five year period. Since the Washington Shell Fish case determined geoduck aquaculture falls within the definition of "development," the SSDP approved for this geoduck farm is limited to a five-year period.

Taylor Shellfish also argues that even if a SSDP was required to establish the operation, they do not need a SSDP for continued operation based upon the criteria set forth in the Attorney General Opinion.

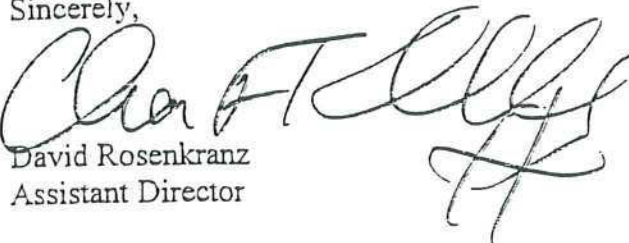
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The Planning and Land Services Department disagrees with Taylor Shellfish's interpretation of the *Washington Shell Fish* Court of Appeals decision. The decision was not limited to public lands. The Court of Appeals specifically upheld the requirement for SSDPs on public and private tidelands based upon the wording in Pierce County's shoreline regulations. In the present case, the activities of Taylor Shellfish are similar to the activities of Washington Shell Fish. It is this activity that necessitates the SSDP, both in 2000 and now.

In conclusion, under applicable provisions of the PCC shoreline regulations, Taylor Shellfish was properly required to obtain a SSDP in 2000 for its activities at the Foss property. The permit that Taylor obtained in 2000 expired pursuant to the applicable RCW, WAC, PCC provisions and Hearing Examiner decision. To continue operation of its geoduck farm at this location, Taylor must obtain a new SSDP from the Hearing Examiner.

In accordance with PCC 1.22, Appeals of Administrative Decisions to the Examiner, any person aggrieved or affected by any decision of an administrative official may file a notice of appeal. A notice of appeal, together with the appropriate appeal fee, shall be filed within 14 days of the date of an Administrative Official's decision, at the Public Services Building, 2401 So. 35th Street, Tacoma, Washington.

Sincerely,


David Rosenkranz
Assistant Director

JG/TB/cia

ADMIN/PLANNERS/BYERS/Taylor Shellfish AD 2.doc

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EXHIBIT 2

Wash. AGO 2007 NO. 1, 2007 WL 81009
(Wash.A.G.)

Office of the Attorney General
State of Washington
*1 AGO 2007 No. 1

January 4, 2007

**DEPARTMENT OF FISH AND WILDLIFE -
SHORELINE MANAGEMENT ACT -
DEPARTMENT OF ECOLOGY - Extent to
which hydraulic project approval permits or
shoreline substantial development permits are
required for the planting, growing, and
harvesting of farm-raised geoduck clams.**

1. The Department of Fish and Wildlife may not require hydraulic project approval permits under RCW 77.55.021 to regulate planting, growing, or harvesting of farm-raised geoduck clams by private parties.
2. The planting, growing, and harvesting of farm-raised geoduck clams would require a substantial development permit under the Shoreline Management Act if a specific project or practice causes substantial interference with normal public use of the surface waters, but not otherwise.
3. Where a geoduck clam culture project would require a substantial development permit, the local government and the Department of Ecology would have a variety of enforcement options available; in some cases, conditional use permits might also be used to regulate this practice.

Honorable Patricia Lantz
State Representative
26th District
P. O. Box 40600

Olympia, WA 98504-0600

Dear Representative Lantz:

By letter previously acknowledged, you have requested an opinion on the following questions, which we have paraphrased slightly for clarity:

1. May the Department of Fish and Wildlife require hydraulic project approval permits under RCW 77.55.021 to regulate planting, growing, and harvesting of farm-raised geoduck clams by private parties?
2. Should local governments require shoreline substantial development permits under RCW 90.58.140 for planting, growing, and harvesting farm-raised geoduck clams by private parties?
3. If substantial development permits can be required for geoduck farming operations, how can local government and the Department of Ecology address existing operations?

*[original page 2]***BRIEF ANSWERS**

We answer the first question in the negative. RCW 77.115.010(2) limits application of Washington Department of Fish and Wildlife (WDFW) regulatory powers with respect to private sector cultured aquatic products. The limitation prevents WDFW from requiring a hydraulic project approval permit to regulate the planting, growing, and harvesting of geoducks grown by private aquaculturalists.

Regarding the second question, we conclude that farm-raised geoducks may require a substantial development permit under circumstances where the particular geoduck planting project causes substantial interference with normal public use of the surface waters. Projects that do not meet this description would not require a substantial development permit.

In answer to the third question, local government and the Department of Ecology may take informal or formal civil enforcement actions against a

substantial development that is undertaken without a permit. Alternatively, conditional use permits may be used to manage this type of aquaculture if the approved shoreline master program includes such a requirement.

BACKGROUND

*2 Your questions concern a new type of shellfish farming that takes place on lower elevations of intertidal lands. [FN1] The process involves four-inch diameter PVC pipe cut into approximately one-foot lengths. The short PVC tube is inserted in the beach, leaving a few inches above the surface. A shellfish grower places tiny juvenile geoduck clams into the sandy substrate protected by the tube. The tube itself, or the general area, is covered with netting. Together, the tube and netting protect the juvenile geoduck from predators until it grows large enough to bury itself to a safer depth. After the geoduck has grown a sufficient amount to avoid predation (which requires several months), the shellfish grower removes the netting and tubes. The geoduck farming site may occupy many acres of tideland.

Approximately five years after planting, geoducks reach their marketable (and impressive) size as one of the world's largest burrowing clams. At that point, the shellfish grower harvests the clams which have "burrowed" two or three feet below the surface. A water jet loosens the substrate around the clam's shell and siphon (also called the "neck"), allowing the harvester to remove the geoduck from the muck.

The harvest incidentally releases silt and sediment which may temporarily be found in the surrounding water. Kent S. Short & Raymond Walton, Ebasco Environmental, *Transport and Fate of Suspended Sediment Plumes Associated with Commercial Geoduck Harvesting* (April 1992) (copy on file). Removing a geoduck from the beach therefore results in a temporary depression where the substrate was loosened and the geoduck removed. See generally [original page 3] *Washington Shell Fish, Inc., v. Pierce Cy.*, 132 Wn. App. 239, 131 P.3d 326 (2006) (petition for review denied Jan. 3, 2007) (discussing geoduck aquaculture). [FN2]

1. May the Department of Fish and Wildlife require hydraulic project approval permits under RCW 77.55.021 to regulate planting,

growing, and harvesting of farm-raised geoduck clams by private parties?

Your first question concerns the requirement for a hydraulic project approval (HPA) issued by the WDFW under the authority of RCW 77.55.021. That statute provides, in part:

(1) Except as provided in RCW 77.55.031, 77.55.051, and 77.55.041, in the event that any person or government agency desires to undertake a hydraulic project, the person or government agency shall, before commencing work thereon, secure the approval of the department in the form of a permit as to the adequacy of the means proposed for the protection of fish life.

RCW 77.55.021(1) (emphasis added). A "hydraulic project" is "the construction or performance of work that will use, divert, obstruct, or change the natural flow or bed of any of the salt or freshwaters of the state." RCW 77.55.011(7). The work of inserting tubes and netting on the tidelands for geoduck aquaculture would be a hydraulic project because it is "work" that "uses" and "changes" the "bed of any of the salt or freshwaters of the state." *Id.* An HPA permit would thus be required for geoduck aquaculture unless there is some exception. The exception is in the statutes that address WDFW disease inspection powers for private sector cultured aquatic products.

*3 RCW 77.115.010(2) provides, in part:

The authorities granted the department by [the rules implementing a program of disease inspection and control for aquatic farmers] and by RCW 77.12.047(1)(g), 77.60.060, 77.60.080, 77.65.210, 77.115.020, 77.115.030, and 77.115.040 constitute the only authorities of the department to regulate private sector cultured aquatic products and aquatic farmers as defined in RCW 15.85.020.

(Emphasis added.)

[original page 4] Farm-raised geoducks are within the definition of private sector cultured aquatic products because they are "native, nonnative, or hybrids of marine or freshwater plants and animals that are propagated, farmed, or cultivated on aquatic farms". RCW 15.85.020(3). An "aquatic farmer" is a private sector person who "commercially farms and manages the cultivating of private sector cultured aquatic products on the person's own land

or on land in which the person has a present right of possession.” RCW 15.85.020(2). The case of *State v. Hodgson*, 60 Wn. App. 12, 802 P.2d 129 (1990), illustrates that privately planted geoducks can be private sector cultured aquatic products. [FN3]

RCW 77.115.010(2) allows WDFW to regulate private sector cultured aquatic products only by using the enumerated statutes, which do not include the HPA permit. We reach this conclusion after considering the two canons of statutory construction identified in your letter and by examining the language of the statute and the statutory scheme.

First, we examine whether the HPA statute is a later enacted statute that might apply to geoduck farming regardless of RCW 77.115.010(2). This concept does not apply, however, because the general HPA requirement dates back to the 1940s. See Laws of 1943, ch. 40, § 1. The HPA law, indeed, existed when the original version of RCW 77.115.010(2) was adopted in Laws of 1985, ch. 457, § 8. See former RCW 75.20.100 (1985 HPA statute). Thus, although a 2005 bill recodified the HPA law, we do not conclude that it is a new legal requirement. We therefore cannot conclude that HPA authority reflects a latter enactment outside the scope of RCW 77.115.010(2).

Second, we examine whether the HPA law is more specific than RCW 77.115.010(2), because a more specific statute is given effect if there is a conflict with a general statute. See *Pannell v. Thompson*, 91 Wn.2d 591, 597, 589 P.2d 1235 (1979). However, the HPA law is substantially broader than RCW 77.115.010(2), applying to all work and construction in salt and fresh waters. In contrast, RCW 77.115.010(2) has a narrow scope. We therefore conclude that RCW 77.115.010(2) is a later enactment and more specific with regard to WDFW authority to regulate private sector cultured aquatic products.

Next, we consider that RCW 77.115.010(2) does not mention the HPA permit or terms that address HPA requirements. The HPA statute refers to “construction” or “work” that “uses” or “changes” the bed or flow of state waters. RCW 77.55.021(1). In contrast, RCW 77.115.010(2) does not use any of these terms. Moreover, other statutes in RCW 77.55 provide explicit exemptions to the HPA permit. See RCW 77.55.031-.071 (describing

activities that might use or change the beds of state waters such as crossing an established ford, removing derelict fishing gear, abatement of certain noxious plants, hazardous waste cleanups, and construction of housing for sexually violent predators). It is arguable that these express [original page 5] exemptions in RCW 77.55 should be interpreted as providing the only exceptions to the HPA permit. See *In re S.B.R.*, 43 Wn. App. 622, 625, 719 P.2d 154 (1986) (express exceptions in a statute exclude all other exceptions).

*4 However, we do “not construe statutes so as to render language meaningless.” *State v. Haddock*, 141 Wn.2d 103, 112, 3 P.3d 733 (2000). RCW 77.115.010(2) has no meaning if it does not reflect a legislative intent to limit WDFW authority to regulate private sector cultured aquatic products. We therefore construe RCW 77.115.010(2) as a limit on WDFW regulation of private sector cultured geoducks using the following guidance.

First, RCW 77.115.010(2) acts as an exception and must be read narrowly. See *State v. Turpin*, 94 Wn.2d 820, 825, 620 P.2d 990 (1980) (statutory provisos should be strictly construed with doubts resolved in favor of the general provisions to which the proviso does not strictly apply). We also avoid absurd or unintended consequences. *Frat. Order of Eagles, Tenino Aerie v. Grand Aerie*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002) (The courts “will avoid literal reading of a statute which would result in unlikely, absurd, or strained consequences.”). Thus, we do not read RCW 77.115.010(2) disjunctively as a limit on WDFW regulation of any registered aquatic farmer, because that leads to absurd results where, for example, WDFW could not regulate an aquatic farmer who is hunting because the laws regulating hunting are not on the statutory list. We read RCW 77.115.010(2) conjunctively. Thus, it limits regulations when applied to both the private sector cultured aquatic products and the aquatic farmer. [FN4]

We also rely on RCW 77.12.047(3) to reach our conclusion. This statute provides that rules adopted by the Fish and Wildlife Commission shall not apply to private sector cultured aquatic products, except for rules adopted under RCW 77.12.047(1)(g) (allowing WDFW to adopt rules “specifying the statistical and biological reports required from fishers, dealers, boathouses, or

processors of wildlife, fish or shellfish.”) Under this statute, WDFW rules governing the time, place, and manner for taking wild fish, shellfish, and wildlife are not applicable to private sector cultured aquatic products. We conclude that if an HPA permit were used to regulate geoduck planting and harvesting, it would sidestep this express limit on the use of WDFW rules, confounding express legislative intent.

Finally, we consider that the HPA permit is enforced primarily using criminal sanctions under RCW 77.15.300. Interpretation of whether an HPA permit is required must therefore consider the rule of lenity. Under the rule of lenity, if two possible constructions of a statute imposing a criminal penalty are permissible, the criminal statute will be construed against the state and in favor of the accused. *See, e.g., State v. Radan*, 143 Wn.2d 323, 330, 21 P.3d 255 (2001). A person planting geoducks without an HPA permit would properly invoke the rule of lenity to argue for the above interpretation of RCW 77.115.010(2) limiting the HPA permit requirement. [FN5]

[original page 6]2. Should local governments require shoreline substantial development permits under RCW 90.58.140 for planting, growing, and harvesting farm-raised geoduck clams by private parties?

Background - The Shoreline Management Act

*5 The Legislature enacted the Shoreline Management Act (SMA) to protect and to manage the private and public shorelines of Washington State; to further public health, public rights of navigation, land, vegetation, and wildlife; and to plan for and foster reasonable and appropriate shoreline uses. RCW 90.58.020; *Samuel's Furniture, Inc. v. Ecology*, 147 Wn.2d 440, 448, 54 P.3d 1194 (2002). The SMA regulates both “uses” of shorelines as well as “developments” on them. *Clam Shacks of Am., Inc. v. Skagit Cy.*, 109 Wn.2d 91, 95-96, 743 P.2d 265 (1987).

RCW 90.58.140(1) provides that development on the shorelines shall not be undertaken unless consistent with the SMA, with SMA guidelines, and with local government master programs. Subsection (2) prohibits substantial development on the

shorelines “without first obtaining a permit from the government entity having administrative jurisdiction under this chapter.”

RCW 90.58.030(3)(d) defines “development” to mean:

a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any 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[.]

RCW 90.58.030(3)(e) defines “substantial development” as “any development of which the total cost or fair market value exceeds five thousand dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state.” We accept your suggestion that we engage in the reasonable assumption that the cost and value of such activity will exceed the five thousand dollar threshold for “substantial” development in RCW 90.58.030(3)(e).

“Under the [SMA]no ‘substantial development’ exists if there is no ‘development’ within the meaning of RCW 90.58.030(3)(d), because for there to be a ‘substantial *[original page 7]* development’, there must first be a ‘development’ “ . *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 812, 828 P.2d 549 (1992). Our analysis therefore focuses on whether geoduck farming is a development. [FN6]

Substantial development permits are administered by local government according to shoreline master programs. RCW 90.58.140(3). The process for development of the shoreline master program governing these permits is described in *Weyerhaeuser Co. v. King Cy.*, 91 Wn.2d 721, 729, 592 P.2d 1108 (1979):

The SMA requires each local government to develop a master program for the use and development of shorelines within its boundaries. RCW 90.58.080. The programs, once approved by the Department of Ecology, operate as controlling use regulations for the various shorelines of the state. RCW 90.58.100.

Analysis

We start by examining a recent case where the Court of Appeals held that a geoduck tube aquaculture operation required a substantial development permit. *Wash. Shell Fish*, 132 Wn. App. 239. [FN7] The Court analyzed the Pierce County shoreline master program definitions for substantial development, which are identical to SMA definitions. It held that geoduck aquaculture in that case involved "development" because it interfered with normal public use of the waters. *Id.* at 251-52, citing RCW 90.58.030(3)(d) ("any 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 We have found the Court of Appeals opinion answers your question only in the context of the facts of that case, and it fails to offer an analysis applicable to all geoduck tube aquaculture. To answer your questions, we conclude that geoduck tube aquaculture does not necessarily fall within the definition of development except where it interferes with normal public use of surface waters, as in *Washington Shell Fish*:

Several witnesses testified that WSF left rope in the water where WSF had planted geoducks, and this rope would become entangled with people or non-geoduck-harvest-related objects. WSF divers harvesting geoducks placed markers on the water's surface that prevented public use of that area. The PVC planting pipes that WSF inserted into the shorelines were up to 12 inches long, [original page 8]with their top portions protruding vertically out of the sand. In addition, according to one witness, WSF used up to four boats at a time to store the geoducks that divers harvested, one of which was a barge large enough to drag a buoy; these WSF boats further constricted the water surface open to public use.

Wash. Shell Fish, 132 Wash. App. at 251. The opinion goes on to describe the particular site where wind surfers were affected by the project. The relevant factors appear to be the public use of the surface waters of the site and the manner in which the geoduck project interfered with public use-floating ropes on the surface, markers on the water's surface creating barriers to public use, and barges and boats that occupy the site to the

exclusion of the public.

Although *Washington Shell Fish* shows how geoduck tube aquaculture can interfere with use of surface waters, nothing in the description of geoduck aquaculture necessitates such interference. 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. The markers, floats, barges, and entanglements affecting the surface in *Washington Shell Fish* may not exist at every geoduck farm. The neighboring public park appears to trigger the interference with public use of the surface waters.

Therefore, although hypothetically a project may interfere with use of surface waters, we conclude that the SMA addresses permitting of actual "projects" and involves a concrete examination of whether the project interferes with normal public use of surface waters. The *Washington Shell Fish* case illustrates this approach by examining the facts of a particular project. Accordingly, we conclude that whether a particular geoduck farm interferes with normal public use of surface waters will depend on the facts, which should be determined by local government when deciding if a permit is required. See RCW 90.58.140(1).

We next examine the other statutory definitions of development. The *Washington Shell Fish* opinion does not address the argument that geoduck tube aquaculture is development because the harvest disrupts the substrate around the geoduck. *Wash. Shell Fish*, 132 Wash. App. at 252 n.12. We conclude that disruption of the substrate around a geoduck, considered in isolation, cannot be legally distinguished from general clam digging or raking. Any clam harvest disrupts the substrate around the buried clam. We find no indication that the SMA has ever treated clam harvesting, alone, as development. Moreover, it would lead to a burdensome and apparently unintended consequence where substantial development permits would be required for all significant clam beds, both commercial and recreational.

*7 Next, we consider whether geoduck tube aquaculture involves dredging. In 1977, the Washington Supreme Court affirmed the Shoreline Hearings Board and held that clam harvesting using a dredge was a type of substantial development.

English Bay Enters., Ltd. v. Island Cy., 89 Wn.2d 16, 568 P.2d 783 (1977). The court rejected the harvester's argument that the statutory definition of "development" did not explicitly include clam harvesting.

[T]he Board found, and we find here, that it is not the goal of the appellant's activity which governs but rather it is the method employed. The appellant's operation involves the removal of earth from the bottom of the bay. In the plain and ordinary sense of the term, this procedure is "dredging." The Board found *[original page 9]* that this activity constitutes dredging; the interpretation of the Board is to be given great weight. *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wash.2d 441, 536 P.2d 157 (1975).

Id. at 20 (emphasis added).

The dredging in *English Bay* is significantly different. A hydraulic dredge machine removed the top twelve inches of beach, leaving a trench while dislodging clams. *Id.* at 18. The *English Bay* case thus involved a dredging machine, which is necessary to dictionary definitions of dredging, but absent in geoduck farming. See Merriam-Webster OnLine Dictionary, Dredging, "1 a: to dig, gather, or pull out with or as if with a dredge -- often used with *upb*: to deepen (as a waterway) with a dredging machine". The water jet used to loosen the substrate around an individual geoduck is not a dredging machine, even if water jets might be used for dredging channels in other places. Here, the water jet simply loosens a geoduck.

Constructing Structures

Geoduck tubes do not fall within the ordinary meaning of the word "structures" referred to in the definition of development. WAC 173-27-030(15) defines structure as "a permanent or temporary edifice or building, or any piece of work artificially built or composed of parts joined together in some definite manner." This does not suggest that a structure could comprise of PVC tubes on a beach. The tubes are not "edifices or buildings" taken separately, they do not form an "edifice or building" taken together, nor are the tubes "parts joined together in a definite manner." Our conclusion is reinforced by *Cowiche Canyon Conservancy*, above, where the Court rejected an argument that

removal of railroad trestles was a development, because it modified a structure. The Court there held that removal resulted in no structures, applying the common meaning of the term.

Drilling, Filling, And Removal Of Materials

The term "drilling" is commonly defined in terms of creating a hole. See Merriam-Webster OnLine Dictionary, Drill, "2 a(1) : to bore or drive a hole in (2) : to make by piercing action <;drill a hole>" . While tubes could be creatively described as being "drilled into" the substrate, no hole is created. The tube is a temporary barrier protecting the juvenile clam.

*8 Similarly, while sand, silt, and gravel is disturbed, geoduck aquaculture does not involve filling of tidelands. In contrast, *Dep't of Fisheries v. Mason Cy.*, SHB No. 88-26, 1989 WL 106061 (Wash. Shore. Hrgs. Bd. Aug. 15, 1989), the Shoreline Hearings Board considered a proposal to apply several inches of gravel over large areas of tidelands to create an artificial bed for clam production. That filling required a substantial development permit.

Finally, if sediment is disrupted during harvest, only a minimal amount of sediment is actually removed with the clam. This minimal amount of materials removed does not comport with a reasonable interpretation of the statutory language concerning "removal of materials." See *Black's Law Dictionary* 464 (8th ed. 2004), "*de minimis non curat lex*" (the law does not concern itself with trifles).

[original page 10] Placing Obstructions

The statutory definition refers to "placing obstructions" as "development." Assuming that this refers to blocking or clogging passage on the water, we conclude that it is conceivable that a project might involve tubes, nets, or other materials that obstruct passage. Arguably, the tubes could obstruct a walker, but that would be relevant only if placed on tidelands used by the public. This term should be applied based on the particular project, as in *Washington Shell Fish*. Local government, as the primary administrator of the substantial development permit system, would determine

whether a particular project involves placing obstructions. See RCW 90.58.140(3); *Samuel's Furniture*, 147 Wn.2d at 455. [FN8]

The Farming Practices Exception

Several comment letters have raised the farming practices exception from the substantial development permit in RCW 90.58.030(3)(e)(iv). This subsection exempts:

Construction and practices normal or necessary for farming, irrigation, and ranching activities, including agricultural service roads and utilities on shorelands, and the construction and maintenance of irrigation structures including but not limited to head gates, pumping facilities, and irrigation channels.

Every term in the exception describes upland farming; no term reflects aquaculture. See also WAC 173-27-040(2)(e) (adopting statute into regulation without any clarification or interpretation of aquaculture practices). Moreover, the Department of Ecology guidelines on shoreline uses distinguish between aquaculture and agriculture. See WAC 173-26-241(3)(a), (b). We found no history to suggest that RCW 90.58.030(3)(e)(iv) was adopted to address aquaculture activities or that it has been applied to aquaculture. [FN9] Accordingly, we conclude that this exception does not apply to geoduck tube aquaculture.

To summarize, we conclude that geoduck aquaculture requires a substantial development permit if conducted as described by *Washington Shell Fish*. We do not conclude that geoduck [original page 11] aquaculture inherently involves interference with normal public use of the surface waters in all locations. We also conclude that it does not involve dredging, construction, or other types of development described by RCW 90.58.030(3)(d). Therefore, the substantial development permit requirement is not necessarily required for intertidal geoduck farming.

*9 As described in the next section, our conclusion does not imply that the SMA lacks authority for local government to manage geoduck aquaculture use of the shoreline. The SMA authorizes conditional use permits to manage shoreline uses.

3. If substantial development permits can be required for geoduck farming operations, how can local government and the Department of Ecology address existing operations?

If there is a geoduck farm that meets the definition of substantial development, then both state and local government have a variety of options. First, government may simply pursue informal measures, like asking the geoduck farmer to obtain a permit. Second, RCW 90.58.210 authorizes Ecology and local government to issue penalties, orders requiring permits, and orders requiring corrective action. [FN10]

We also note that government may consider using "conditional use permits" to regulate geoduck aquaculture. The *Clam Shacks* case, cited above, illustrates this SMA regulatory power. In that case, a shellfish harvester using a "hydraulic rake" claimed that if his harvests did not involve substantial development, then no SMA permit could be required to regulate it as a use of the shoreline. The Washington Supreme Court unanimously rejected the argument. The SMA includes express directions and powers to regulate and manage "uses" of the shoreline. Local government may, therefore, require a conditional use permit to manage that hydraulic rake clam harvest. The opinion contains the following discussion:

Clam Shacks argues that the language of the statute and its application of the permit process only to substantial developments limits the SMA to developments as defined. Thus, Clam Shacks concludes there can be no use control, regardless of the master program, unless the activity involved constitutes a development. We disagree. Such construction would frustrate the declared policy of the SMA.

Clam Shacks v. Skagit Cy., 109 Wn.2d at 95.

It is likely that shoreline master programs have not considered using conditional use permits to regulate geoduck aquaculture and, therefore, that option is not immediately applicable in all jurisdictions. However, all local master programs are being reviewed and updated during the upcoming decade. See RCW 90.58.080. Ecology's guidelines for updating master programs [original page 12] provide that aquaculture of this type is a favored use of the shoreline environment that should be accommodated by shoreline master programs. WAC

173-26-241(3)(b). [FN11] Therefore, this option is prospectively available as a means for managing existing and future operations.

We trust that the foregoing analysis will be helpful to you.

Sincerely,
Rob Mckenna
Attorney General

Jay Douglas Geck
Deputy Solicitor General

[FN1]. Intertidal here simply refers to tidelands that are periodically covered and uncovered by the daily high and low tides. It is not necessary to distinguish types of tidelands and bedlands to address the questions.

[FN2]. Embedded and immobile shellfish are part of the real property, under Washington law, belonging to the landowner. *State v. Longshore*, 141 Wn.2d 414, 5 P.3d 1256 (2000). The proprietary aspect of shellfish is illustrated by statutes such as RCW 79.135.130, which requires payment of fair market value for existing shellfish on state aquatic lands before leasing to a shellfish farmer. Other state laws allow shellfish to be taken without regard to the state's proprietary interest. For example, shellfish on certain parks and public lands are available for recreational harvest under licenses and rules of the WDFW and other state agencies.

Shellfish may also be subject to a "right of taking fish at all usual and accustomed grounds and stations" created by federal treaties with various Indian Tribes in Washington. Because federal law creates the treaties and preempts contrary state laws, the right of taking shellfish under the treaty can be applied notwithstanding state property law. See *United States v. State of Washington*, 157 F.3d 630, 646-47 (9th Cir. 1998).

[FN3]. In *Hodgson*, a criminal defendant contended that geoduck clams he harvested from DNR-managed bedlands were private sector cultured aquatic products. The court took judicial notice that geoduck clams take five years to mature and rejected the defendant's argument because the

harvester's connection with the public geoduck beds was transitory, and wild geoduck clams were not under the active supervision and management of a private aquatic farmer at the time of planting. *State v. Hodgson*, 60 Wn. App. at 17-18. In contrast to *Hodgson*, your question deals with an aquatic farmer who actively supervises and manages the geoduck clam bed at the time of planting.

[FN4]. Thus, a person who constructs a boat ramp, dock, or other construction work at an aquatic farm would require an HPA permit, because the permit regulates construction; it does not regulate aquaculture products.

[FN5]. Whether lenity applies here depends on whether application of HPA laws to a geoduck planter would be criminal. An ordinance is penal or criminal in nature when "a violation of its provisions can be punished by imprisonment and/or a fine." *State v. Von Thiele*, 47 Wn. App. 558, 562, 736 P.2d 297 (1987). An ordinance is remedial, rather than criminal, "when it provides for the remission of penalties and affords a remedy for the enforcement of rights and redress of injuries." *Von Thiele*, 47 Wn. App. at 562. Civil and criminal penalties may coexist without "converting the civil penalty scheme into a criminal or penal proceeding." *Von Thiele*, 47 Wn. App. at 561.

We interpret the HPA laws using lenity because of the primacy of the criminal sanctions; the HPA code includes minimal civil remedial powers. For example, the HPA laws include no provisions for civil orders to stop work or to take corrective actions. See RCW 90.58.210(3) (Shoreline Management Act authorizes civil penalty, stop work orders, and corrective action orders). While the HPA laws include a narrow civil penalty provision, RCW 77.55.291, the requirement of an HPA is enforced with a criminal sanction under case law. *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 602 P.2d 1172 (1979).

[FN6]. In addition to substantial development permits, the SMA contemplates conditional use permits and variance permits. These latter types of permits are issued by local government but require the approval of the Department of Ecology to be valid. RCW 90.58.140(10); *Samuel's Furniture*, 147 Wn.2d at 455, n.13. We discuss the option of using conditional use permitting in response to the

third question.

[FN7]. The *Washington Shell Fish* case arose after the county leased 47 acres of county park tidelands for a nominal fee and the lessee proceeded to remove approximately 2.7 million dollars worth of geoducks. *Wash. Shell Fish*, 132 Wash. App. at 253. The county then raised the issue of a substantial development permit and also challenged the validity of its lease. See *Pierce Cy. v. Wash. Shell Fish, Inc.*, No. 31380-4-II, 2005 WL 536097 (Wash. Ct. App. Mar. 8, 2005) (unpublished).

[FN8]. Washington common law also shows that the private property interest in a shellfish farm allows the farmer to restrain the general public from interfering with the farm. See *Sequim Bay Canning Co. v. Bugge*, 49 Wash. 127, 94 P. 922 (1908) (lessee of state aquatic lands devoted to shellfish operation can bring trespass action against others who enter the lands and take clams). Thus, even if the PVC tubes might hypothetically affect a person crossing a shellfish farm, it is not a cognizable obstruction of the public, because the person is there at the farmer's express or implied permission.

[FN9]. We note that the findings section of the Aquaculture Marketing Act, RCW 15.85.010, describes a general goal that aquaculture "should be considered" a branch of the agricultural industry for purposes of laws that advance and promote the agricultural industry. "When the legislature employs the words 'the legislature finds,' as it did in RCW 80.36.510, it sets forth policy statements that do not give rise to enforceable rights and duties. See *Aripa v. Dep't of Soc. & Health Servs.*, 91 Wash.2d 135, 139, 588 P.2d 185 (1978)." *Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 203, 95 P.3d 337 (2004). The Aquaculture Marketing Act, therefore, does not amend RCW 90.58.030(3)(e)(iv) to change the intent to address farming as described by the words in that subsection. We conclude that for marketing purposes, the Legislature intended to include aquaculture with agriculture but did not intend to erase all distinctions for purposes of environmental regulation or other laws not related to marketing.

[FN10]. We interpret your third question as addressing unpermitted projects where no local decision expressly determined that no substantial development permit is required. If local government previously decided that a project is not a substantial

development and did so with a final written local decision, then that decision may be final and unappealable because of appeal deadlines in the Land Use Petition Act. See *Samuel's Furniture*, 147 Wn.2d at 463 (local government decision that project was not in the shoreline became a final decision that no SMA permit is required because it was not appealed under the Land Use Petition Act, RCW 36.70C).

[FN11]. Local government regulation of aquaculture in the shoreline must be consistent with the policies of the SMA, which promote appropriate aquaculture uses. See AGO 1988 No. 24 (opining that local government regulation of aquaculture in the shoreline must be done consistent with the SMA). As explained in this 1988 Attorney General's Opinion, the Planning Enabling Act, RCW 36.70, and local police powers cannot be used to impose greater restrictions on aquaculture than allowed under the shoreline master program.

Wash. AGO 2007 NO. 1, 2007 WL 81009
(Wash.A.G.)
END OF DOCUMENT

EXHIBIT 3

**SHORELINE MANAGEMENT ACT OF 1971
PERMIT FOR SHORELINE MANAGEMENT SUBSTANTIAL DEVELOPMENT
CONDITIONAL USE, OR VARIANCE**

NOTE: THIS PAGE FOR LOCAL
GOVERNMENT USE ONLY

Application No. SD22-00
Administering Agency Pierce County
Date Received 06/29/00
Approved X Denied _____
Date 01/09/01

Type of Action: (Check if appropriate)

Substantial Development Permit _____ Shoreline Conditional Use Permit
 Shoreline Variance Permit

Pursuant to RCW 90.58, a permit is hereby granted to:

Taylor Resources, Inc.
SE 130 Lynch Road
Shelton, WA 98584

to undertake the following development (be specific):

A Shoreline Substantial Development Permit to cultivate the intertidal zone of private
tidelands for the commercial production of geoduck clams along the east shore of
Case Inlet/North Bay.

upon the following property: (Legal description to the nearest quarter section, township,
range): on the east shore of Case Inlet/North Bay, on private tidelands, located
immediately north of Joemma Beach State Park

within Case Inlet/North Bay and /or its associated wetlands.
(Name of water area)

The project will be within shorelines of statewide significance (RCW 90.58.030).
(Be/Not Be)

The project will be located within a conservancy and natural shoreline designation.
(Environment)

The following master program provisions are applicable to the development (State the master
program sections or page numbers and specifically reference applicable conditional use or
variance provisions): Attached

Development pursuant to this permit shall be undertaken pursuant to the following terms and
conditions: Attached

SD22-00 DOE

The following master program provisions are applicable to this development:

THE CONSERVANCY ENVIRONMENT

Definition and Purpose
General Regulations and Policies
Preferred Uses

20.76.020 Permits Required
20.20.010 Use Activity Regulations

Chapter 20.24 Aquacultural Practices

20.24.010 Definitions
20.24.020 Guidelines for Reviewing Substantial Development Permits
20.24.030 Environment Regulations

Development pursuant to this permit shall be undertaken pursuant to the following terms and conditions:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.
2. The applicant has established that the request for a shoreline substantial development permit to allow the commercial production of geoduck clams along the east shore of Case Inlet is consistent with both the Conservancy and Natural Shoreline Environments of the SMP and also satisfies the Aquaculture Practices Element of the SMP.
3. The applicant has also shown that the request satisfies all criteria in the SUR and WAC for the issuance of a substantial development permit. Therefore, said permit should issue subject to the following conditions:
 1. The applicant shall obtain permits required, if necessary, by other agencies with jurisdiction, including, but not limited to, the U.S. Army Corps of Engineers and the Washington State Departments of Ecology, Fish and Wildlife, and Natural Resources.
 2. A Memorandum of Agreement shall be completed and recorded by the applicant with the Pierce County Auditor. No work shall begin on-site until the recording of the agreement.
 3. The applicant shall comply with the Washington State Geoduck Growers Environmental Code of Practice that was submitted with the application.
 4. Construction or substantial progress toward construction of a project for which a permit has been granted pursuant to the Act must be undertaken within two (2) years after the approval of the permit. Substantial progress toward construction shall include, but not be limited to the letting of bids, making of contracts, purchase of materials involved in development, but shall not include development or uses which are inconsistent with the criteria set forth in WAC 173-14-100. Provided, that in determining the running of the two (2) year period hereof, there shall not be included the time during which a development was not actually pursued by

construction and the tendency of litigation reasonably related thereto made it reasonable not to so pursue; provided further, that local government may, at its discretion extend the two (2) year time period for a reasonable time based on factors, including the inability to expeditiously obtain other governmental permits which are required prior to the commencement of construction.

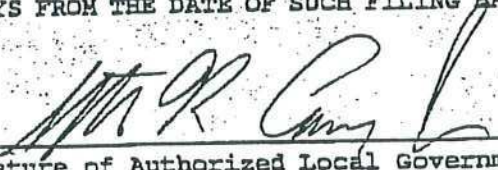
5. If a project for which a permit has been granted pursuant to the Act has not been completed within five (5) years after the approval of the permit by local government, the local government that granted the permit shall, at the expiration of the five (5) year period, review the permit, and upon a showing of good cause, do either of the following:
 1. Extend the permit for one (1) year; or
 2. Terminate the permit; provided that nothing herein shall preclude local government from issuing Substantial Development Permits with a fixed termination date of less than five (5) years.

This permit is granted to the Shoreline Management Act of 1971 and nothing in this permit shall excuse the applicant from compliance with any other federal, state, or local statutes, ordinances, or regulations applicable to this project, but not inconsistent with the Shoreline Management Act (Chapter 90.58 RCW):

This permit may be rescinded pursuant to RCW 90.58.140(7) in the event the permittee fails to comply with the terms of conditions hereof.

CONSTRUCTION PURSUANT TO THIS PERMIT WILL NOT BEGIN OR IS NOT AUTHORIZED UNTIL THIRTY (30) DAYS FROM THE DATE OF FILING ORDER OF THE LOCAL GOVERNMENT WITH THE REGIONAL OFFICE OF THE DEPARTMENT OF ECOLOGY AND THE ATTORNEY GENERAL, OR UNTIL ALL REVIEW PROCEEDINGS INITIATED WITHIN THIRTY DAYS FROM THE DATE OF SUCH FILING HAVE TERMINATED.

01/09/01



Date

Signature of Authorized Local Government Official

THIS SECTION FOR DEPARTMENT OF ECOLOGY USE ONLY IN REGARD TO A SUBSTANTIAL DEVELOPMENT PERMIT WITH A CONDITIONAL USE OR VARIANCE.

Date received by Department of Ecology _____

Approved _____ Denied _____

This substantial development permit with conditional use/variance is approved by the Department of Ecology pursuant to Chapter 90.58 RCW. Development shall be undertaken pursuant to the following additional terms and conditions:

Date

Signature of Authorized Department of Ecology Official

EXHIBIT 4



2401 South 35th Street
Tacoma, Washington 98409-7460
(253) 798-7210 • FAX (253) 798-7425

May 9, 2007

Taylor Resources, Inc.
Attn: Diane Cooper
SE 130 Lynch Road
Shelton, WA 98584

RE: SD22-00 (Foss)

Dear Ms. Cooper

In a decision dated December 28, 2000, and effective January 9, 2001, the Pierce County Hearing Examiner approved the above-referenced case for a geoduck aquaculture farm. Please reference Conditions 4 and 5 of that decision. Timelines were established as to how many years the farm may operate.

Based on such, when did the farm start operations and is it still in operation? Please provide evidence. Based on the answers, the farm may be operating within the allowable timelines. If so it is appropriate for this department to conduct a site inspection. It is also possible that the farm may be operating outside the allowable timelines and may need to cease operations and/or obtain necessary shoreline permits with associated environmental review.

Kindly provide a response to me by May 24, 2007. Should you have any questions please contact me at (253) 798-7425, fax (253) 798-7425, or email ty.booth@co.pierce.wa.us.

Sincerely,

Ty Booth

Ty Booth
Senior Planner

by Anderson

c: Vicki Diamond, Current Planning Supervisor
Kathleen Larrabee, Resource Management Supervisor
Adonais Clark, Senior Planner
Patricia Byers, Associate Planner



EXHIBIT 5

June 26, 2007

Mr. Ty Booth
Senior Planner
Pierce County Planning & Land Services
2401 So. 35th Street
Tacoma, WA 98409

RE: Shoreline Substantial Development Permit SD 2-00, Taylor Shellfish Farms

Dear Mr. Booth:

We represent Taylor Shellfish Farms ("Taylor") with regard to the above-referenced permit. We have prepared this letter in response to your inquiry to Diane Cooper regarding the current status of Taylor's geoduck farm on its Foss lease property ("the Foss farm."). This letter also addresses several of the allegations in David Bricklin's June 15, 2007 letter to Vicki Diamond concerning SD 22-00.

I. Conditions 4 and 5 of SD 22-00.

You have inquired as to when Taylor commenced operations on its Foss farm. Taylor began constructing its geoduck farm on the Foss lease property in the summer of 2001, shortly after SD 22-00 was granted. That commencement of construction occurred within the time period established by Condition 4 of SD 22-00, which requires that "[c]onstruction or substantial progress toward construction of a project for which a permit has been granted pursuant to the Act must be undertaken within two (2) years after the approval of the permit."

You have also inquired as to whether Taylor continues to operate its Foss farm. Taylor is indeed continuing to operate its Foss farm, although Taylor has now completed construction of its farm. Specifically, the boundaries of the Foss farm have been established, the farm has been registered with the Washington Department of Fish and Wildlife, and, over the past six years, Taylor has planted the entire farmable area with geoduck seed. The completion of the construction of the farm occurred within the time period established in Condition 5 of SD 22-00, which requires that project construction be completed within five years of permit issuance.

Based on the foregoing, the Foss farm is operating within the timeframes established in SD 22-00. You indicated in your correspondence with Ms. Cooper that it is an appropriate time for the Department to conduct a site visit. We invite you and other representatives of the Department to the Foss farm for a site visit at your convenience. Please contact Ms. Cooper directly to arrange logistics.

II. Response to Mr. Bricklin's claim that the Foss permit expired.¹

In his June 15, 2007, letter, Mr. Bricklin argues that the Shoreline Substantial Development Permit for the Foss farm has expired. Mr. Bricklin appears to interpret the language of Condition 5 of SD 22-00 not as requiring that the Foss farm be fully established within five years of permit issuance but as an absolute limitation on the length of the permit, *i.e.* that SD 22-00 expires in five years regardless of the status of the Farm. That interpretation is incorrect for several reasons.

A. Under the permit language and applicable Shoreline Management Act provisions, SD 22-00 has not expired.

Condition 5 in SD 22-00, the condition at issue here, provides as follows:

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

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

This condition requires that the project for which SD 22-00 was granted -- installation of a geoduck farm on the Foss lease -- be completed within five years. As noted above, Taylor has fulfilled that condition.

Condition 5 of SD 22-00 was not created whole cloth by the Hearing Examiner; that condition is grounded in the provisions Shoreline Management Act itself. Reference to relevant portions of the Act is therefore helpful in interpreting Condition 5. The statutory antecedent for Condition 5 of SD 22-00 is found in RCW 90.58.143(3), which provides:

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

In reviewing whether Taylor has completed "construction activities" at its Foss farm, it is useful to review the definition of "construct." Construct means "build" or "to create." *Webster's II New Riverside University Dictionary*. Taylor built, or created, its Foss farm when it established

¹ While not relevant to the issue at hand, Taylor must respond to Mr. Bricklin's claim that the Foss farm is increasing erosion in the area. Mr. Bricklin offers no support for this allegation, and we do not believe any exists. In fact, any erosion that is occurring on Mr. Bricklin's clients' property is likely attributable to the significant clearing operations that Mr. Bricklin's clients recently engaged in, presumably to enlarge their view.

the corners of the farm area, planted the farm area with geoduck and registered the farm with the Washington Department of Fish and Wildlife ("WDFW"). Indeed, at the outset of its operations, Taylor notified relevant Native American Tribes that it intended to "create" a shellfish farm on the Foss property. See Attachment 1, January 24, 2001 letter from William Taylor to David Winfrey ("Please consider this letter our notification to you on the creation of artificial shellfish beds.") Under WDFW's regulations, the Foss farm is now an aquatic farm. WAC 220-76-015 ("An aquatic farm is any facility or tract of land used for private, commercial culture of aquatic products.") Thus, Taylor's current cultivation activities on the Foss farm constitute operating an existing, established farm, and those activities are not prohibited by Condition 5 of SD 22-00.

B. The Foss farm is not the type of ongoing mining or dredging activity that requires a five year permit limitation.

We fully recognize that some ongoing activities that are regulated as "development" under the Shoreline Management Act are generally subject to time limitations in substantial development permits. For example, substantial development permits for mines typically include a five-year limitation. Substantial development permits for dredging activities are also often subject to time limits. This is because mining and dredging are themselves included in the statute's definition of "development." See RCW 90.58.030(3)(d). Thus, if mining or dredging activities continue after five years, the mine or dredging area continues to expand and construction is not "complete." The Foss farm, by contrast, is now an established farm and, while farming operations continue, the size of the farm area will not expand.

Indeed, the Washington Attorney General recently opined that geoduck farming is dissimilar from mining, dredging and other ongoing activities that are typically subject to a five-year limitation in shoreline permits. See *Washington Attorney General Opinion 1007 No. 1 at 8-10*. It would be contrary to the Attorney General's Opinion for the County to now determine that the Foss farm is subject to a five-year permit limitation because it involves "dredging" or "mining" activities that may be subject to such a time limit.

The Attorney General found that geoduck farming is only regulated "development" under the Shoreline Management Act when the project itself (*i.e.* the farm), based on the equipment used and the public use of the area, interferes with the normal public use of surface waters. *Id.* at 8. The Act does not place a five-year time limit on projects that are "development" because they interfere with the public use of surface waters; indeed, the Act expressly recognizes that such projects may be permanent. RCW 90.58.030(3)(d) (defining as development "any project *of a permanent or temporary nature which interferes with the normal public use of surface waters. . .*" (Emphasis added.))

An analogy is useful. When local governments grant shoreline substantial development permits for docks (which often interfere with the normal public use of surface waters), the permit itself typically does not expire. That is true even though ongoing activities may be occurring at the dock (boat moorage, swimming, or, in the case of commercial docks, barge loading activities, etc.) Thus, the dock itself, along with the associated activities, is permitted to continue in place so long as construction was completed within the timeframe provided in the Act. Similarly, with respect to the Foss farm, having completed the construction of the Farm within the time period provided in the Act (and the permit), the farm is permitted to

remain in place, and Taylor is permitted to continue the farming activities associated with the farm.

We also recognize that, in some instances, even where a five-year expiration is not required by the Shoreline Management Act, local governments have placed time limitations on certain projects as a means of addressing potential environmental impacts. However, when local governments set such an expiration period, they do so clearly and explicitly. See, e.g., *Washington State Ferries v. City of Edmonds and Dept. of Ecology*, SHB No. 03-013, 2003 WL 22476216 (Order Granting Summary Judgment and Dismissal, 2003) (shoreline permit for ferry terminal improvements provides "the use of the subject site for the development approved under this permit shall expire five years from the date the application is finally approved by the City. . . ."); *Puget Sound Mussels, Inc. v. Kitsap County*, SHB 90-59, 1991 WL 55611 (Order Granting Partial Summary Judgment, 1991) (conditioning a salmon net pen permit on a requirement "[t]hat the shoreline substantial development permit shall expire five years from issuance. A new permit shall be required to continue operations.") Condition 5 of SD 22-00 contains no such explicit expiration provision. Rather, as discussed in detail above, the more reasonable interpretation of that condition is that it requires, pursuant to the Shoreline Management Act's statutory language, construction of the farm be completed within five years of permit issuance. Taylor has satisfied that condition.

C. A five-year permit limitation would render geoduck farming impossible.

Geoduck cultivation operations occur on a four-to-six-year crop cycle. That means geoduck clams are harvested from four to six years after they are planted, with the last of the crop being harvested in year six. Because it typically takes six years to fully harvest a geoduck crop, geoduck farmers generally cannot harvest even a single crop cycle within five years of commencing operations.

In addition, geoduck farms typically contain more than a single crop cycle. That is because geoduck farms, particularly farms the size of the Foss farm, cannot be completely planted in a single year. On the Foss farm, approximately 1/6 of the farm area was planted in 2001, another 1/6 planted in 2002, another 1/6 in 2003, and so forth. Then, when the mature geoduck are harvested from a portion of a farm, the harvested area is typically replanted with a new crop. The County was fully aware, and made the Hearing Examiner aware, that Taylor's proposed Foss farm involved the repeated planting and harvesting of geoduck from the farm property. See December 28, 2000, Hearing Examiner Decision at 2 (Comments of Ty Booth, County Planning Division staff: "They will plant four baby clams in PVC pipes and five years hence will harvest the clams with water jets and sell them in Asia. They will then repeat the process.")

These geoduck farming practices would be completely impossible if permits for geoduck farms expired in five years. Thus, interpreting Condition 5 of SD 22-00 as a five-year term limit for the Foss permit would render impossible the project that the permit ostensibly allows. Such a result is not only illogical, it would be contrary to state and local shoreline guidelines. The Department of Ecology's shoreline guidelines make clear that aquaculture is an activity of statewide interest and is a preferred use of shoreline areas. WAC 173-26-241(3)(b). Pierce County's shoreline regulations are in accord. Pierce County Code Section 20.24.020(A)(1) ("The use of shoreline areas for aquaculture shall be encouraged for the production of

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

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

III. Conclusion.

Since applying for its permit for the Foss farm, Taylor's employees have engaged County staff in numerous discussions relating to the farm. From these discussions, as well as various materials provided by Taylor with its application, it has been clear to all involved that Taylor is continuing to harvest and replant its Foss farm. Staff has confirmed on several occasions over the years that it interprets the permit for the Foss farm to be in place so long as Taylor continues farming that area. Taylor has now invested, quite literally, millions of dollars in geoduck seed based on its understanding that SD 22-00 remains in effect. A change in the County's interpretation of the permit conditions at this late date would cause significant damage to Taylor.

It also bears emphasizing that Taylor does not believe that its Foss farm constitutes "development" under the Shoreline Management Act. Because of the farm's location and the manner in which the activities on the farm are conducted, the farm does not interfere with the public use of surface waters. Taylor nevertheless pursued (and obtained) a substantial development permit from Pierce County for the Foss farm, in deference to Pierce County's Master Program. If Pierce County re-interprets the conditions in SD 22-00 to render ongoing geoduck farming activities impossible, Taylor will be left with no alternative but to contest the applicability of the County's substantial development permit to the Foss farm.

Based on the foregoing, we request that the County reject any suggestion that Taylor's permit has expired.

Very truly yours,



Samuel W. Plaucbe

SWP:TAD

Attachment

cc: Jill Guernsey
Vicki Diamond
Client



January 24, 2001

Mr. David Winfrey
Puyallup Tribe
6824 Pioneer Way East
Puyallup, Washington 98371

Subject: Creation of Artificial Shellfish Beds

Dear Mr. Winfrey:

Please consider this letter our notification to you on the creation of artificial shellfish beds. This notification procedure follows the direction outlined in the Implementation of Shellfish Proviso, CV 9213, Sub-proceeding No. 89-3, Section 6.3.

The location of the beds and species cultivated is as follows:

Description	Species
North Bay Partnership Second Class tidelands Portions of Section 8,9,16 Township 20 North, Range 1 West, W.M., Pierce County	Geoduck

According to our survey and in our opinion, there is not a natural shellfish bed at this site. A copy of the survey information is attached. A copy of the survey information is attached. Please contact Dave Robertson at this office if you would like an on-site visit. According to the Implementation Order, you will notify us within fifteen days of receipt of this letter if you object to our determination.

Sincerely,

William J. Taylor
Taylor Shellfish Farms

Exhibit C

Agency Reference #: _____

Date Received: _____

JARPA FORM

(for use in Washington State)



PLEASE TYPE OR PRINT IN BLUE OR BLACK INK

Based on the preceding checklist, I am sending copies of this application to the following: (check all that apply)

Local Government for shoreline: Substantial Development Conditional Use Variance Exemption; or, if applicable
 Floodplain Management Critical Areas Ordinance

Washington Department of Fish and Wildlife for HPA

Washington Department of Ecology for: Approval to Allow Temporary Exceedance of Water Quality Standards;
 401 Water Quality Certification Nationwide Permits

Washington Department of Natural Resources for: Aquatic Resources Use Authorization Notification

Corps of Engineers for: Section 404 Section 10 permit

Coast Guard for: Section 9 Bridge Permit

SECTION A - Use for all permits covered by this application. Be sure to also complete Section C (Signature Block) for all permit applications.

APPLICANT Taylor Resources, Inc.

MAILING ADDRESS SE 130 Lynch Road

WORK PHONE (360) 426-6178

HOME PHONE _____

FAX # (360) 427-0327

If an agent is acting for the applicant during the permit process, complete #2.

AUTHORIZED AGENT Diane Cooper

MAILING ADDRESS Same

WORK PHONE Same

HOME PHONE _____

FAX # Same

RELATIONSHIP OF APPLICANT TO PROPERTY: OWNER PURCHASER LESSEE OTHER: _____

NAME, ADDRESS, AND PHONE NUMBER OF PROPERTY OWNER(S), IF OTHER THAN APPLICANT:

Representative of landowners -

Foss
219 East View Ridge Drive
Everett, WA 98203 (425) 258-0643

See authorization letter

LOCATION (STREET ADDRESS, INCLUDING CITY, COUNTY AND ZIP CODE, WHERE PROPOSED ACTIVITY EXISTS OR WILL OCCUR)

Tidelands in prts Sections 8, 9, & 16, Township 20 N., Range 1 West, W.M.

WATERBODY North Bay

TRIBUTARY OF Puget Sound

1/4 SECTION	TOWNSHIP	RANGE	GOVERNMENT LOT
<u>SE 8 SW 9 NW 16</u>	<u>20N</u>	<u>1W</u>	<u>—</u>

SHORELINE DESIGNATION Natural

ZONING DESIGNATION —

TAX PARCEL NO: 0020093003, 93008

DNR STREAM TYPE, IF KNOWN 1+

6. DESCRIBE THE CURRENT USE OF THE PROPERTY, AND STRUCTURES EXISTING ON THE PROPERTY. IF ANY PORTION OF THE PROPOSED ACTIVITY IS ALREADY COMPLETED ON THIS PROPERTY, INDICATE MONTH AND YEAR OF COMPLETION.

The site is intertidal zone of second-class tidelands and is not currently used.

IS THE PROPERTY AGRICULTURAL LAND? YES NO

ARE YOU A USDA PROGRAM PARTICIPANT? YES NO

DESCRIBE THE PROPOSED WORK: COMPLETE PLANS AND SPECIFICATIONS SHOULD BE PROVIDED FOR ALL WORK WATERWARD OF THE ORDINARY HIGH WATER MARK OR LINE, INCLUDING TYPES OF EQUIPMENT TO BE USED. IF APPLYING FOR A SHORELINE PERMIT, DESCRIBE ALL WORK WITHIN AND BEYOND 200 FEET OF THE ORDINARY HIGH WATER MARK. ATTACH A SEPARATE SHEET IF ADDITIONAL SPACE IS NEEDED.

This is a proposal for the cultivation of geoduck clams. Juvenile clams will be planted in the substrate by hand. PVC tube is inserted around the clams, temporarily, until the clams dig deep enough in the substrate to evade predators. Clams are harvested approximately five years from planting. See attached Environmental Code of Practice, Draft, March 2000 for detail.

DESCRIBE THE PURPOSE OF THE PROPOSED WORK:

Commercial cultivation of geoduck clams.

DESCRIBE THE POTENTIAL IMPACTS TO CHARACTERISTIC USES OF THE WATER BODY. THESE USES MAY INCLUDE FISH AND AQUATIC LIFE, WATER QUALITY, WATER SUPPLY, RECREATION, AND AESTHETICS. IDENTIFY PROPOSED ACTIONS TO AVOID, MINIMIZE, AND MITIGATE DETRIMENTAL IMPACTS, AND PROVIDE PROPER PROTECTION OF FISH AND AQUATIC LIFE.

Shellfish aquaculture is a preferred use under the Shoreline Management Act. The nature of the operation requires clean water and a healthy marine ecosystem to be successful.

See attached Environmental Code of Practice, Draft, March 2000 for operation detail.

SEPARATION OF DRAWINGS: SEE APPENDIX A - SAMPLE DRAWINGS AND CHECKLIST FOR COMPLETING THE DRAWINGS. ONE SET OF ORIGINAL OR GOOD QUALITY REPRODUCIBLE DRAWINGS MUST BE ATTACHED. NOTE: APPLICANTS ARE ENCOURAGED TO SUBMIT PHOTOGRAPHS OF THE PROJECT SITE, BUT THESE DO NOT SUBSTITUTE FOR DRAWINGS. THE IRPS OF ENGINEERS AND COAST GUARD REQUIRE DRAWINGS ON 1-1/2 X 11 INCH SHEETS. LARGER DRAWINGS MAY BE REQUIRED BY OTHER AGENCIES.

WILL THE PROJECT BE CONSTRUCTED IN STAGES? YES NO

PROPOSED STARTING DATE: Summer 2000

ESTIMATED DURATION OF ACTIVITY: On-going

CHECK IF ANY STRUCTURES WILL BE PLACED: N/A

WATERWARD OF THE ORDINARY HIGH WATER MARK OR LINE FOR FRESH OR TIDAL WATERS; AND/OR

WATERWARD OF MEAN HIGH WATER LINE IN TIDAL WATERS

1. WILL FILL MATERIAL (ROCK, FILL, BULKHEAD, PILINGS OR OTHER MATERIAL) BE PLACED: N/A

WATERWARD OF THE ORDINARY HIGH WATER MARK OR LINE FOR FRESH WATERS?

IF YES, VOLUME (CUBIC YARDS) _____ / AREA _____ (ACRES)

WATERWARD OF THE MEAN HIGHER HIGH WATER FOR TIDAL WATERS?

IF YES, VOLUME (CUBIC YARDS) _____ / AREA _____ (ACRES)

IMPACTED AREA IN ACRES: _____

HAS A DELINEATION BEEN COMPLETED? IF YES, PLEASE SUBMIT WITH APPLICATION.

YES NO

HAS A WETLAND REPORT BEEN PREPARED? IF YES, PLEASE SUBMIT WITH APPLICATION.

N/A

YES NO

AND COMPOSITION OF FILL MATERIAL (E.G., SAND, ETC.): _____

MATERIAL SOURCE: _____

LIST ALL SOIL SERIES (TYPE OF SOIL) LOCATED AT THE PROJECT SITE, & INDICATE IF THEY ARE ON THE COUNTY'S LIST OF HYDRIC SOILS. SOILS INFORMATION CAN BE OBTAINED FROM THE NATURAL RESOURCES CONSERVATION SERVICE (NRCS):

WILL PROPOSED ACTIVITY CAUSE FLOODING OR DRAINING OF WETLANDS? YES NO

YES, IMPACTED AREA IS _____ ACRES.

WILL EXCAVATION OR DREDGING BE REQUIRED IN WATER OR WETLANDS? YES NO

VOLUME: _____ (CUBIC YARDS) / AREA _____ (ACRES)

COMPOSITION OF MATERIAL TO BE REMOVED: _____

DISPOSAL SITE FOR EXCAVATED MATERIAL: _____

METHOD OF DREDGING: _____

LIST OTHER APPLICATIONS, APPROVALS, OR CERTIFICATIONS FROM OTHER FEDERAL, STATE OR LOCAL AGENCIES FOR ANY STRUCTURES, CONSTRUCTION, DISCHARGES, OR OTHER ACTIVITIES DESCRIBED IN THE APPLICATION (I.E., PRELIMINARY PLAT APPROVAL, HEALTH DISTRICT APPROVAL, BUILDING PERMIT, SEPA REVIEW, FERC LICENSE, FOREST PRACTICES APPLICATION, ETC.) ALSO INDICATE WHETHER WORK HAS BEEN COMPLETED AND INDICATE ALL EXISTING WORK ON DRAWINGS.

TYPE OF APPROVAL	ISSUING AGENCY	IDENTIFICATION NO.	DATE OF APPLICATION	DATE APPROVED	COMPLETED?
PA	DFW				

LEAD AGENCY: Pierce County SEPA DECISION: _____ SEPA DECISION DATE: _____

HAS ANY AGENCY DENIED APPROVAL FOR THE ACTIVITY DESCRIBED HEREIN OR FOR ANY ACTIVITY DIRECTLY RELATED TO THE ACTIVITY DESCRIBED HEREIN? YES NO IF YES, EXPLAIN:

TOTAL COST OF PROJECT. THIS MEANS THE FAIR MARKET VALUE OF THE PROJECT, INCLUDING MATERIALS, LABOR, MACHINE RENTALS, ETC.

\$2500.00

LOCAL GOVERNMENT WITH JURISDICTION:

Pierce County

RPS, COAST GUARD, AND DNR PERMITS, PROVIDE NAMES, ADDRESSES, AND TELEPHONE NUMBERS OF ADJOINING PROPERTY OWNERS, LESSEES, ETC..

NOTE: SHORELINE MANAGEMENT COMPLIANCE MAY REQUIRE ADDITIONAL NOTICE - CONSULT YOUR LOCAL GOVERNMENT.

NAME	ADDRESS	PHONE NUMBER

SECTION C - This section MUST be completed for any permit covered by this application.

APPLICATION IS HEREBY MADE FOR A PERMIT OR PERMITS TO AUTHORIZE THE ACTIVITIES DESCRIBED HEREIN. I CERTIFY THAT I AM FAMILIAR WITH THE INFORMATION CONTAINED IN THIS APPLICATION, AND THAT TO THE BEST OF MY KNOWLEDGE AND BELIEF, SUCH INFORMATION IS TRUE, COMPLETE, AND ACCURATE. I FURTHER CERTIFY THAT I POSSESS THE AUTHORITY TO UNDERTAKE THE PROPOSED ACTIVITIES. I HEREBY GRANT TO THE AGENCIES TO WHICH THIS APPLICATION IS MADE, THE RIGHT TO ENTER THE ABOVE-DESCRIBED LOCATION TO INSPECT THE PROPOSED, IN-PROGRESS OR COMPLETED WORK. I AGREE TO START WORK ONLY AFTER ALL NECESSARY PERMITS HAVE BEEN RECEIVED.

SIGNATURE OF APPLICANT OR AUTHORIZED AGENT

Diane Cooper

DATE 4/11/00

HEREBY DESIGNATE _____ TO ACT AS MY AGENT IN MATTERS RELATED TO THIS APPLICATION FOR PERMIT(S). I UNDERSTAND THAT IF A FEDERAL PERMIT IS ISSUED, I MUST SIGN THE PERMIT.

[Signature]

DATE 4/11/00

SIGNATURE OF APPLICANT

SIGNATURE OF LANDOWNER (EXCEPT PUBLIC ENTITY LANDOWNERS, E.G. DNR)

DATE

THIS APPLICATION MUST BE SIGNED BY THE APPLICANT AND THE AGENT. IF AN AUTHORIZED AGENT IS DESIGNATED.

U.S.C §1001 provides that: Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly falsifies, conceals, or covers up by any trick, scheme, or device a material fact or makes any false, fictitious, or fraudulent statements or representations or makes or uses any false writing or document knowing same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than 5 years or both.

COMPLETED BY LOCAL OFFICIAL

A. Nature of the existing shoreline: (Describe type of shoreline, such as marine, stream, lake, lagoon, marsh, bog, swamp, flood plain, floodway, delta; type of beach, such as accretion, erosion, high bank, low bank, or dike; material such as sand, gravel, mud, clay, rock, riprap; and extent and type of bulkheading, if any:)

B. In the event that any of the proposed buildings or structures will exceed a height of thirty-five feet above the average grade level, indicate the approximate location of and number of residential units, existing and potential, that will have an obstructed view.

C. If the application involves a conditional use or variance, set forth in full that portion of the master program which provides that the proposed use may be a conditional use, or, in the case of a variance, from which the variance is being sought:

These Agencies are Equal Opportunity and Affirmative Action employers. For special accommodation needs, please contact the appropriate agency from Appendix B.

Exhibit D

**SHORELINE MANAGEMENT ACT OF 1971
PERMIT FOR SHORELINE MANAGEMENT SUBSTANTIAL DEVELOPMENT
CONDITIONAL USE, OR VARIANCE**

NOTE: THIS PAGE FOR LOCAL
GOVERNMENT USE ONLY

Application No. SD22-00
Administering Agency Pierce County
Date Received 06/29/00
Approved X Denied _____
Date 01/09/01

Type of Action: (Check if appropriate)
X Substantial Development Permit _____ Shoreline Conditional Use Permit
_____ Shoreline Variance Permit

Pursuant to RCW 90.58, a permit is hereby granted to:

Taylor Resources, Inc.
SE 130 Lynch Road
Shelton, WA 98584

to undertake the following development (be specific):

A Shoreline Substantial Development Permit to cultivate the intertidal zone of private
tidelands for the commercial production of geoduck clams along the east shore of
Case Inlet/North Bay.

upon the following property: (Legal description to the nearest quarter section, township,
range): on the east shore of Case Inlet/North Bay, on private tidelands, located
immediately north of Joemma Beach State Park

within Case Inlet/North Bay and /or its associated wetlands.
(Name of water area)

The project will be within shorelines of statewide significance (RCW 90.58.030).
(Be/Not Be)

The project will be located within a conservancy and natural shoreline designation.
(Environment)

The following master program provisions are applicable to the development (State the master
program sections or page numbers and specifically reference applicable conditional use or
variance provisions): Attached

Development pursuant to this permit shall be undertaken pursuant to the following terms and
conditions: Attached

The following master program provisions are applicable to this development:

THE CONSERVANCY ENVIRONMENT

Definition and Purpose
General Regulations and Policies
Preferred Uses

20.76.020 Permits Required
20.20.010 Use Activity Regulations

Chapter 20.24 Aquacultural Practices
20.24.010 Definitions
20.24.020 Guidelines for Reviewing Substantial Development Permits
20.24.030 Environment Regulations

Development pursuant to this permit shall be undertaken pursuant to the following terms and conditions:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.
2. The applicant has established that the request for a shoreline substantial development permit to allow the commercial production of geoduck clams along the east shore of Case Inlet is consistent with both the Conservancy and Natural Shoreline Environments of the SMP and also satisfies the Aquaculture Practices Element of the SMP.
3. The applicant has also shown that the request satisfies all criteria in the SUR and WAC for the issuance of a substantial development permit. Therefore, said permit should issue subject to the following conditions:
 1. The applicant shall obtain permits required, if necessary, by other agencies with jurisdiction, including, but not limited to, the U.S. Army Corps of Engineers and the Washington State Departments of Ecology, Fish and Wildlife, and Natural Resources.
 2. A Memorandum of Agreement shall be completed and recorded by the applicant with the Pierce County Auditor. No work shall begin on-site until the recording of the agreement.
 3. The applicant shall comply with the Washington State Geoduck Growers Environmental Code of Practice that was submitted with the application.
 4. Construction or substantial progress toward construction of a project for which a permit has been granted pursuant to the Act must be undertaken within two (2) years after the approval of the permit. Substantial progress toward construction shall include, but not be limited to the letting of bids, making of contracts, purchase of materials involved in development, but shall not include development or uses which are inconsistent with the criteria set forth in WAC 173-14-100. Provided, that in determining the running of the two (2) year period hereof, there shall not be included the time during which a development was not actually pursued by

construction and the tendency of litigation reasonably related thereto made it reasonable not to so pursue; provided further, that local government may, at its discretion extend the two (2) year time period for a reasonable time based on factors, including the inability to expeditiously obtain other governmental permits which are required prior to the commencement of construction.

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

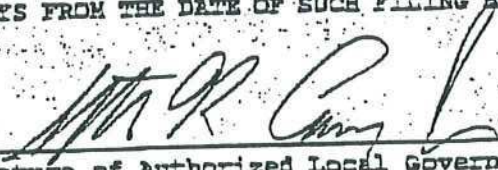
1. Extend the permit for one (1) year; or
2. Terminate the permit; provided that nothing herein shall preclude local government from issuing Substantial Development Permits with a fixed termination date of less than five (5) years.

This permit is granted to the Shoreline Management Act of 1971 and nothing in this permit shall excuse the applicant from compliance with any other federal, state, or local statutes, ordinances, or regulations applicable to this project, but not inconsistent with the Shoreline Management Act (Chapter 90.58 RCW):

This permit may be rescinded pursuant to RCW 90.58.140(7) in the event the permittee fails to comply with the terms of conditions hereof.

CONSTRUCTION PURSUANT TO THIS PERMIT WILL NOT BEGIN OR IS NOT AUTHORIZED UNTIL THIRTY (30) DAYS FROM THE DATE OF FILING ORDER OF THE LOCAL GOVERNMENT WITH THE REGIONAL OFFICE OF THE DEPARTMENT OF ECOLOGY AND THE ATTORNEY GENERAL, OR UNTIL ALL REVIEW PROCEEDINGS INITIATED WITHIN THIRTY DAYS FROM THE DATE OF SUCH FILING HAVE TERMINATED.

01/09/01



Date

Signature of Authorized Local Government Official

THIS SECTION FOR DEPARTMENT OF ECOLOGY USE ONLY IN REGARD TO A SUBSTANTIAL DEVELOPMENT PERMIT WITH A CONDITIONAL USE OR VARIANCE.

Date received by Department of Ecology _____

Approved _____ Denied _____

This substantial development permit with conditional use/variance is approved by the Department of Ecology pursuant to Chapter 90.58 RCW. Development shall be undertaken pursuant to the following additional terms and conditions:

Date

Signature of Authorized Department of Ecology Official