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BEFORE THE SHORELINES HEARINGS BOARD  
OF THE STATE OF WASHINGTON

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

SHB NO. 08-010  
SHB NO. 08-017

Petitioners,

MEMORANDUM OF COALITION  
TO PROTECT PUGET SOUND  
HABITAT IN OPPOSITION TO  
TAYLOR RESOURCES, INC.'S  
MOTION FOR SUMMARY  
JUDGMENT

v.

PIERCE COUNTY,

Respondent.

I. INTRODUCTION

Taylor's pending motion is a continuation of its efforts to avoid oversight of its geoduck operations pursuant to the Shoreline Management Act. Taylor contends that the issuance of a permit eight years ago insulates Taylor's ongoing operations from any further review. According to Taylor, it can continue to install geoduck operations on Puget Sound beaches with impunity, despite increasing knowledge of the havoc wrought by intertidal geoduck aquaculture on natural resources, including threatened and endangered salmon.

This case is not about aquaculture generally. Most other forms of aquaculture (including subtidal geoduck aquaculture) have impacts different in kind and severity from those associated with

1 intertidal geoduck aquaculture. The issues here relate to intertidal geoduck aquaculture only. Any  
2 ruling the Board makes should make clear its limited applicability.

3 Taylor seeks to take advantage of a permit issued before most people were paying any  
4 attention to intertidal geoduck aquaculture to allow it to continue its damaging activities indefinitely  
5 into the future. Yet the Shoreline Management Act explicitly requires that its provisions be  
6 broadly construed "to protect the State's shorelines as fully as possible." See RCW 90.58.900.  
7 When doubt exists, the courts repeatedly have required and employed a broad reading of the Act  
8 to assure that its environmental protection purposes are served. Bellevue Farm Owners  
9 Association v. State of Washington Shorelines Hearings Board, 100 Wn. App. 341, 386, 997 P.2d  
10 380 (2000); Buechel v. State Department of Ecology, 125 Wn.2d 196, 203, 884 P.2d 910 (1994);  
11 Hunt v. Anderson, 30 Wn. App. 437, 439, 635 P.2d 156 (1981).  
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13  
14 The Supreme Court has directed that "analysis of the SMA must be made with [this]  
15 legislative mandate in mind: 'This chapter is exempted from the rule of strict construction, and it  
16 shall be liberally construed to give full effect to the objectives and purposes for which it was  
17 enacted.'" Clam Shacks of America, Inc. v. Skagit County, 109 Wn.2d 91, 93 (1987) (quoting  
18 RCW 90.58.900).

19 This Board should be wary of Taylor's invitation to construe the Act in a way that allows  
20 Taylor's dated operation to escape scrutiny under the Shoreline Management Act and Pierce  
21 County's Shoreline Master Program. As the following memorandum demonstrates, there are  
22 ample reasons for this Board to deny Taylor's pending motion.  
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24 Further, we adopt by this reference the County's Opposition to North Bay's motion.  
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II. TAYLOR'S MOTION IS A GIANT *NON SEQUITUR*

Taylor's motion makes no sense. Taylor starts by noting that in this Board's November 7, 2008 Order, this Board "reserved a single issue for hearing: 'whether a permit rescission was warranted in this case.'" Taylor Motion at 4 (*quoting* Order at 12) (emphasis supplied). One might expect, then, that Taylor would then set forth the legal grounds that might support a legitimate rescission of an existing permit and demonstrate that there were no disputed facts regarding any of the possible grounds for rescission. As the County notes in its memorandum in opposition to Taylor's motion, the County Code provides five grounds for rescinding a permit:

1. That the approval or permit was obtained by fraud;
2. That the use for which such approval or permit was granted is not being exercised;
3. That the use for which such approval or permit was granted has ceased to exist or has been suspended for one year or more;
4. That the approval or permit granted is being, or recently has been exercised contrary to the terms or conditions of such approval or permit, or in violation of any statute, resolution, code, law, or regulation;
5. That the use for which the approval or permit was granted was so exercised as to be detrimental to the public health or safety, or so as to constitute a nuisance.

PCC 18.140.060. (The County Code refers to these five items as grounds for "revocation" which we take to be synonymous with "rescission" of a permit.)

1 Taylor should have cited these five grounds for rescission and then demonstrated that  
2 there were no disputed facts regarding the non-existence of any of these grounds. But,  
3 surprisingly, Taylor's motion goes off into another direction.<sup>1</sup>

4 Instead of discussing the sole issue reserved for hearing in the Board's November 7, 2008  
5 Order -- whether a permit rescission was warranted in this case -- Taylor instead spends the  
6 entirety of its memorandum arguing whether the permit "expired" under the terms of the five-  
7 year expiration clause. See Taylor Memorandum at 6-14. This Board has clearly distinguished  
8 the separate issues of whether a permit "expires" versus whether it has been "rescinded." The  
9 Board has determined that the issue in this case is whether the permit should have been rescinded,  
10 but Taylor has briefed the argument whether it had expired.

11 Taylor recognizes that it has the initial burden of showing the absence of an issue of  
12 material fact. *Id.* at 6. Taylor has not met its burden. Given the sole issue reserved by the  
13 Board's November 9, 2008 Order, Taylor's initial burden in this motion was to demonstrate an  
14 absence of disputed facts regarding any of the five grounds for rescission set forth in PCC  
15 18.140.060. Because Taylor has not made any attempt to meet this initial burden of proof, there  
16 is no burden shifting to the County and intervenor to prove the existence of any disputed facts.  
17 Taylor's failure to meet its initial burden requires denial of its motion without further analysis.

### 21 III. ADOPTION OF COUNTY ARGUMENTS IN OPPOSITION TO MOTION

22 The County is taking a different tact in opposing Taylor's motion. The County joins  
23 Taylor in debating the issue of whether the permit expired. While it does not appear that the  
24 Board's November 9, 2008 Order leaves that issue in the case, in the event we misread the

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26 <sup>1</sup> Ironically, Taylor's motion includes a section entitled "Standard for Rescission." Taylor Mot. at 4.  
But Taylor does not quote, cite, or discuss the standards for rescission in that section (or elsewhere). Instead, Taylor

1 Board's November 9, 2008 Order, we adopt the County's argument that the permit did not expire  
2 as to on-going "construction" on the Foss beaches.

3 IV. THE COUNTY PERMIT'S EXPIRATION CLAUSE WAS BROADER THAN  
4 THE MINIMUM EXPIRATION REQUIREMENTS OF THE SMA

5 If the Board is going to re-address the expiration issue, then in addition to adopting the  
6 County's argument, the Coalition also will demonstrate in this section that the permit's expiration  
7 clause applies not only to new "construction" (as the County argues), but to other forms of  
8 "development" as that term is defined in the SMA.

9  
10 It is true that the SMA's five-year expiration provision applies to "construction activities,"  
11 not all "development" generally. RCW 90.58.143(3). However, the corresponding Ecology rule  
12 is broader and provides that "[a]uthorization to conduct development activities shall terminate  
13 after five years . . ." WAC 173-27-090(2) (emphasis supplied). The SMA expressly authorizes  
14 local governments to "adopt different time limits from those set forth" in RCW 90.58.143(3) "as  
15 a part of action on a substantial development permit." RCW 90.58.143(1).

16  
17 In this case, the permit issued to Taylor in 2000 included an expiration clause which is  
18 different than that set forth in the statute. The permit's five year expiration clause is not limited  
19 to "construction" but rather applies if the "project" for which the permit was granted "has not  
20 been completed within five (5) years after the approval of the permit."

21 There is ample evidence creating multiple issues of disputed fact that the "project . . . has  
22 not been completed within five years" and, certainly, that "construction" under the permit has not  
23 been completed within five years. Evidence on these issues was provided under oath during the  
24 Hearing Examiner proceedings below. We summarize it in the following paragraphs of this

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discusses the burden of proof.

1 memorandum. Excerpts from the transcript are submitted herewith as Appendices A-D to this  
2 memorandum. Other exhibits from the Examiner proceedings are attached as Appendices E-J.  
3 This evidence precludes summary judgment on the expiration issue.<sup>2</sup>

4 A. Facts

5 In 2000, Taylor leased private tidelands along approximately one mile of Case Inlet from  
6 the North Bay Partnership (Foss Lease) for the purpose of establishing a commercial geoduck  
7 farm. The lease area covers approximately 12 acres.

8 Taylor's operations include three phases: planting, cultivation, and harvesting. Taylor  
9 does not plant the entire beach at one time but rather does so in stages. At any given point, some  
10 areas of the beach of the lease area are being planted, others are in cultivation, and others are  
11 ready for harvest (or are actively being harvested). Once an area is harvested, it is replanted  
12 "almost immediately." Tr. 1:161:13 (Cooper). As a result, Taylor's operations constitute "a  
13 perpetual cycle of planting, cultivation, and harvesting." Notice of Appeal, ¶ 4 (App. E).

14 In the planting phase, Taylor inserts PVC pipes into the substrate on one foot centers (i.e.,  
15 up to 43,000 per acre). See e.g., Ex. 150 (photos #3 and #35) (App. F). Employees plant 3-4  
16 baby geoducks by hand into each pipe. As of the Examiner hearing, approximately 900,000  
17 geoducks are in the ground on this site. Tr. 2:16:24 (Phipps).

18 One of Taylor's consultant's, Dr. Fisher, repeatedly characterized the tube and net array  
19 as a "structure." See, e.g., Tr. 3:134 -3:135; 3:157 - 3:158 ("the tubes and netting themselves . . .  
20 is the structure I'm referencing"); Tr. 2:37:20 (tubes and nets provide "structured habitat because  
21 it's creating three-dimensional relief"); Tr. 2:35:23 (same). Taylor's representative on regulatory

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26 <sup>2</sup> The undersigned declares under penalty of perjury that the appendices are true excerpts from the  
Examiner proceedings.

1 compliance issues agreed with the County's characterization of the pipes as a "structure." Tr.  
2 1:104:4-13 (Cooper).

3 According to Taylor, the PVC pipes create a barrier which "temporarily protects the  
4 vulnerable juvenile geoducks from predators." Notice of Appeal, ¶ 2 (App. E). Taylor typically  
5 also places large (50' by 50') canopy nets over the tubes. Tr. 1:174:7 (Phipps). Like the pipes,  
6 the purpose of the nets is to obstruct predators from reaching the juvenile geoducks, Tr. 2:11:20  
7 (Phipps); Tr. 2:55:1 (Fisher), but the nets obstruct other animals, too, Tr. 2:11:24 (Phipps); Tr.  
8 2:90:20 (Leudtke); Ex. 150 (photo #34) (App. F); Ex. 152.

9 Taylor's preference is to use "canopy nets," covering the entire array of pipes, but will use  
10 "individual tube nets and rubber bands" if an eagle nest is found in the vicinity. Tr. 4:28:8  
11 (Phipps).  
12

13 The PVC pipes and associated netting usually remain in place for approximately six to  
14 eighteen months, but can be there as long as two years. Tr. 1:161:3 (Cooper).  
15

16 The approximate volume of the PVC tubes inserted into the beach can be calculated.  
17 Depending on the length of the tube inserted into the substrate, the volume of the material  
18 inserted into the beach in a single acre ranges from 12 to 28 cubic yards. Multiplied by the 12  
19 acres in Taylor's Foss lease, the amount of material inserted into the beach amounts to between  
20 144 and 216 cubic yards. Ex. 21 (Ex. H).  
21

22 Four to five years after planting, the geoducks are harvested. Cooper 1:143:3.  
23 Approximately three-quarters of the harvesting is done by "beach harvest" on the beach at low  
24 tide with the use of a water jet; the remainder by "dive harvest", diving when the tide is high and  
25 using a water jet. Tr. 1:180:2 (Phipps). The water jet dislodges the substrate to a depth of three  
26 feet creating a hole large enough that "most of the time" the harvesters dangle their feet in it. Tr.

1 1:182:7 (Phipps). See also Ex. 13 (*Dirty Jobs* video and Phipps narrative in the video) (App. G).<sup>3</sup>  
2 The water jet dislodges sand and other native beach material. Some of the sediments suspended  
3 in the water column during the operation are moved off-site by currents. Tr. 2:180:12 (Parsons  
4 and Ex. 150, photo #47) (App. F); Tr. 3:169:9 (Fisher has seen and measured plume).  
5 Downgradient, the sand sediment settles out, changing the shape and structure of the beach down  
6 current. Tr. 2:180:12 (Parsons); Ex. 150 (Photo #49) (App. F).  
7

8 The PVC tubes and netting create a physical obstruction to the public's use of the area,  
9 including the waters of Puget Sound. The facility occupies a large swath of tidelands, excluding  
10 others from using those tidelands. When the tide is out, the facility interferes with access to  
11 Puget Sound and obstructs beachcombers and other recreational users of the tidelands. When the  
12 tide is in, the tubes and nets obstruct use of the shallow waters of Puget Sound by water craft like  
13 kayaks, canoes, and shallow draft motor boats. E.g., Tr. 2:94:17 (Luedtke); Tr. 3:50:18 (Pinneo).  
14 The tubes and nets also obstruct use of the area by windsurfers, divers and fishers. Tr. 2:128:21  
15 (Daley-fishing); Tr. 2:150:12 (Daley-fishing); Tr. 3:20 - 21 (Paradise-diving); Tr. 3:23 (Paradise-  
16 windsurfers). The obstructive nature of the operations increases during planting and harvesting  
17 when barges, workers, hoses, and other equipment are present.  
18

19 The Foss farm is planted in segments, Tr.1:171:7 (Phipps), making all aspects of the  
20 operation ongoing. Inserting 50,000 tubes takes a 6-8 man crew five days. Tr. 4:19:21 (Phipps).  
21 Planting 150,000 geoduck seed in 50,000 tubes takes a 6-8 man crew another five days. Tr.  
22 4:19:2 (Phipps). Harvest of geoducks takes a 3 man crew 20-25 days. Tr. 4:23:2 (Phipps). During  
23 one five month period, Taylor's records indicated barges were present at this site for pulling tubes  
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26 <sup>3</sup> Appendix G will be supplied under separate cover.



1 for 40 days. Tr. 3:108:13 (Phipps). Neighbors believed they were there even longer.  
2 Maintenance and seed survival checks by the project manager and crew managers take four days  
3 a month. Tr. 4:22:1 (Phipps). When the nets are pulled out, the maintenance crew is there  
4 longer. Tr. 4:22:10 (Phipps). Crews harvest during the winter in the middle of the night during  
5 low tide Tr. 4:24:6 (Phipps). Planting of tubes and seed are done April to September on low tide  
6 days. Tr. 4:20:13 (Phipps). Operations on different segments may thus take around 70 to 80 days  
7 or more during the period between February through September, taking into consideration some  
8 overlap in functions. This is approximately one-third of the days for an eight month period  
9 including weekends and holidays.

11 Crew uses scows (barges) to bring in tubes. Tr. 4:19:19 (Phipps). Crews use boats for  
12 harvest and cleanup. TR. 4:25:6 (Phipps). When planting and harvesting operations are in  
13 progress, Taylor flags the waters to keep boaters and divers out of the area. Tr. 1:34:15 (Cooper).  
14

15 In significant respects, Taylor's operations are similar to the operations determined by the  
16 Superior Court to be "development" in *Washington Shell Fish, Inc. v. Pierce County*, 132 Wn.  
17 App. 239 (2006), Tr. 1:127:3 (Cooper), though Taylor's operations have not been so plagued  
18 with loose lines. Both operations have tubes in the tidelands with geoduck seed in the tubes. Tr.  
19 1:127:3 (Cooper). Both operations are for the purposes of culturing and extracting geoduck Tr.  
20 1:127:8 (Cooper). Both operations have hundreds of tubes in the tideland with geoduck seed in  
21 them, inches apart from each other. Tr. 1:127:14 (Cooper). Both operations use dive harvesting  
22 for part of the harvest. Tr. 1:126:8, 1:133:16 (Cooper), Tr. 1:180:2 (Phipps). Both operations flag  
23 the area to preclude recreation users and boaters from the dive harvest area. (Cooper 1:134:15).  
24 Debris is dislodged from both operations. Tr. 11:112:3 (Cooper), Tr. 2:92:7 (Leutdke), Ex. 150  
25 (photo #50) (App. F).  
26

1 The PVC tubes and netting also obstruct native plant, animals, and fish species. Indeed, it  
2 is the very purpose of the predator exclusion devices (the tubes and nets) to obstruct predators,  
3 e.g., wildlife, from occupying their normal habitat. Native species also are inadvertently trapped  
4 under the predator exclusion netting or are caught in the netting. Tr. 2:128:8 (Daley). The entire  
5 facility is one large obstruction to native species in the tidelands.  
6

7 The Environmental Code of Practice (ECOP) (which Taylor generally follows) describes  
8 water jet harvesting as piercing the substrate with the water jet to create a hole: "The nozzle is  
9 inserted next to the geoduck siphon;" and "the average size hole produced is about one-third cubic  
10 feet" in deep water harvests. The ECOP allows water jet pressure up to 100 pounds per square  
11 inch. While this is far less pressure than necessary to drill through rock, it is sufficient to drill  
12 into a beach. Past harvesting at this site by Taylor has resulted in holes being created at least knee  
13 high. Tr. 2:19:13 (Phipps); Ex. 13 (*Dirty Jobs* video) (Ex. G).  
14

15 Harvesting with the water jet is not at all like recreational clam digging or raking.  
16 According to the ECOP, water jet harvest is a highly efficient method of extraction and "100  
17 geoducks per hour can be harvested with this method." On the other hand, the ECOP states that  
18 the hand digging method "can be very difficult and time consuming effort since geoducks are  
19 buried so deeply (36 inches) in the substrate."  
20

21 Water jet harvesting results in the removal of sand and gravel from the beach. ECOP  
22 recognizes that the harvesting will "emulsify" the beach. During these operations, sediments are  
23 disturbed and sediment plumes created. Tr. 3:170:11 ("there is sediment that's disturbed—no  
24 one is denying that") (Fisher). Pictures showed the sediment plumes created by this activity.  
25 See, e.g., Tr. 2:180:12 (Parsons referencing Ex. 150 (photo #47) (App. F)). Prevailing currents  
26 carry the re-suspended materials off the property and deposit it off-site. Tr. 2:180:21 (Parsons

1 referencing line of sediment deposition on Ex. 150, (photo #49) (App. F); Tr. 2:180 -2:184  
2 (“fines” re-suspended from harvesting); Tr. 3:28:24 (Paradise). According to ECOP, “the beach  
3 level will be lowered about one to two inches by the harvest.” Personal observations at this site  
4 indicate the volume lost may be greater than that. Tr. 2:97:22 (Leudtke).

5  
6 One to two inches of lost material equates to approximately 134 to 268 cubic yards of  
7 material per acre. Ex. 26 (App. H). Taylor’s lease covers 12 acres, equating to the dredging and  
8 removal of nearly 1,500 to 3,000 cubic yards of material for each cycle of planting and  
9 harvesting. Moreover, Taylor may make multiple passes across any given tract to avoid leaving  
10 any valuable geoducks in the sand, TR. 1:143:5 (Cooper), further increasing the amount of  
11 material removed. Even if part of the material removed per acre is 60 – 80 cubic yards of  
12 geoduck biomass, Tr. 3:155:5 (Fisher), that leaves 74 to 178 cubic yards of other material  
13 removed per acre.

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15 Agitation dredging is a form of dredging that essentially involves shooting a jet of water  
16 into the substrate and then removing the displaced material through various means, including  
17 allowing currents to remove the dislodged material. Tr. 2:168:12 (Parsons). The water jet  
18 harvest technique for geoducks is functionally the same as agitation dredging. *Id.* Guidance from  
19 WDFW on their habitat conservation plan is that in relation to shoreline activities, semantics  
20 should not obscure the true function of a process. Tr. 2:168:6 (Parsons).

21  
22 In addition to the obstruction with fishing described above, Taylor’s operations interfere  
23 with fishing in a more indirect, but potentially more important way. There is substantial evidence  
24 that these operations interfere with the natural ecosystem and, in particular, the ecosystem upon  
25 which endangered salmon depend. Juvenile salmon heading out to sea hug the shoreline where  
26 food is more plentiful and large predatory fish are absent. The aquaculture facility forces juvenile

1 salmon further offshore, reducing their access to their normal food sources and exposing them to  
2 greater predation. The facility also impairs the growth and abundance of forage fish upon which  
3 the juvenile salmon prey. These forage fish likely utilize the tidelands at issue here for rearing  
4 habitat. Taylor's operations are likely causing a decrease or elimination of forage fish habitat in  
5 this area. Also, the planted geoducks, growing at high densities, consume phytoplankton and  
6 zooplankton which are an important food source for forage fish. These adverse impacts to  
7 salmon, salmon habitat, and the species on which salmon prey for survival ultimately interfere  
8 with the ability of these waters to sustain a recreational salmon fishery. Tr. 2:132 -2:135; 2:138 -  
9 2:142; Tr. 2:147:23 (Daley). Moreover, to the extent these operations result in monocultures  
10 over a large area (like 12 acres), Tr. 2:135:7 (Daley), the cumulative adverse impact on habitat  
11 will increase, Ex. 142 at 503 ("If clam farming is a homogenizing force at large scales, then the  
12 greatest impact of clam aquaculture may result from cumulative impacts of several tenures within  
13 a given geographical area").  
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15

16 The geoduck aquaculture industry is in its infancy. There is much that is not yet known  
17 about the impacts associated with these facilities. Ex. 16 (Sea Grant report) (App. I); Tr.  
18 2:143:13 (Daley); Tr. 3:187:11 (Davis referencing Ex. 114). Requiring re-application for a  
19 shoreline permit on a periodic basis will provide the State and the County with assurance that  
20 new information regarding the project's impacts is taken into account.  
21

22 B. Multiple Aspects of Taylor's Project Constitute "Development" (as Defined by the  
23 SMA) and Thus Are Subject to the "Project" Expiration Clause in the 2000 Permit

24 All "development" within the shorelines of the State of Washington must be consistent  
25 with the policies of the Shoreline Management Act and regulations adopted pursuant to the Act.  
26 RCW 90.58.140. If such development is a "substantial development," as that term is defined by

1 the Act, then the developer must obtain a shoreline substantial development permit. Id.

2 Specifically, the Shoreline Management Act states:

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

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

11 RCW 90.58.140.

12 SMA broadly defines "development" as:

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

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

22 For purposes of the Shoreline Management Act implementation, the Department of  
23 Ecology has defined "structure" as "a permanent or temporary or edifice or building, or any piece  
24 of work artificially built or composed of parts joined together in some definite matter." WAC  
25 173-27-030(15). The PVC tubes which Taylor installs in the beach (at the rate of approximately  
26 40,000 per acre) are a "piece of work artificially built." Further, PVC tubes are "joined together  
in a definite manner," in that they are planted in rows and sections to form discrete groupings and  
the large canopy nets hold them together so that they will not dislodge and become marine debris.

1 The Attorney General Opinion, Ex. 68 (2007 AGO , No. 1), concluded that the tubes are  
2 not "structures," but the AGO did not consider at all the part of the definition that states that a  
3 "structure" is "any piece of work artificially built." In addition, the AGO focused solely on the  
4 individual tubes and not the entire configuration, which is, in the words of Taylor's Notice of  
5 Appeal, "constructed" on site. Notice of Appeal (App. E) at 3, ¶ 6.  
6

7 The Legislature has characterized the PVC geoduck predator exclusion devices as  
8 "structures." Specifically, the Legislature has established a requirement for the Sea Grant  
9 program to conduct a study of the "environmental effects of structures commonly used in the  
10 aquaculture industry to protect juvenile geoducks from predation." RCW 28B.20.475 (5)(a).  
11 This recent legislation deals with the same subject as the SMA (i.e., activities in the shorelines).  
12 The two laws should be construed consistently with each other. Halleur v. Spectrum Properties,  
13 Inc., 123 Wn. 2d. 126, 146 (2001).  
14

15 The evenly placed tubes, alone or combined with nets, rubber bands, rebar stakes and  
16 poles, and the extent of the area so configured, form an artificially built piece of work and/or  
17 constitute "parts joined together in some definite manner." For this reason alone, and given the  
18 broad construction of the SMA mandated by the Legislature and the Supreme Court, and given  
19 the Legislature's characterization of these facilities as "structures," the facility constitutes a  
20 "development" as that term is used in the SMA.  
21

22 Taylor's project also constitutes "the placing of obstructions" as that term is used in the  
23 definition of "development" in the SMA. The tubes and netting create a physical obstruction to  
24 the public's use of the tidelands. When the tide is in, the tubes and nets create a physical  
25 obstruction to the use of the waters for boating, diving, fishing, and other recreational pursuits.  
26 The tubes and nets also obstruct native fish species, crabs, and other tideland animals.

1           The AGO concludes that the tubes and nets do not constitute an obstruction, even though  
2 the AGO acknowledges that "the tubes could obstruct a walker." The AGO gives no  
3 consideration to the possibility that the tubes and net also constitute an obstruction to fish and  
4 wildlife (even though elsewhere in the AGO, the tubes are characterized as "a temporary barrier"  
5 (AGO at 7)). The AGO also fails to consider whether the project acts as "an obstruction" to  
6 boaters and swimmers. Even as to beach walkers, the AGO does not rule out that these facilities  
7 constitute an obstruction, but rather indicates that the determination should be made on a case-by-  
8 case basis. AGO at 10. For all these reasons, the AGO is not inconsistent with the conclusion  
9 that Taylor's Foss project constitutes "the placing of obstructions" as that term is used in the  
10 SMA, particularly given the broad construction of the SMA mandated by the Legislature and the  
11 Supreme Court.  
12

13  
14           For similar reasons, Taylor's project interferes with the normal public use of surface  
15 waters. The very existence of the tube and net structure, barges, hoses and other devices limits  
16 access to the water and precludes the use of the surface waters by fishers, boaters, divers, and  
17 other recreational users. When the tide line is in the midst of the geoduck facility, all access to  
18 the surface water at that location is precluded. At higher tides, boaters need to avoid the area lest  
19 they hit the bottom on the protruding pipes and nets. Taylor's barges, boats, water jet, hoses, and  
20 work crews obstruct boaters and recreational users during planting and harvesting operations.  
21 When large swaths of tideland are converted to this type of use, as has already happened at the  
22 Foss Lease site, the practical consequence is that the surface water areas are effectively made off-  
23 limits to the public. Indeed, during certain periods of time, Taylor marks the area as off limits to  
24 the public with buoys and stakes. These various activities clearly interfere with the normal public  
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26

1 use of the surface waters. These operations thus “interfere with normal public use of surface  
2 waters” and constitute “development” as that term is used in the SMA.

3 These conclusions are supported by the broad construction of the Act required by the  
4 statute and the Supreme Court. This conclusion also is supported by the Court of Appeals  
5 decision in *Washington Shell Fish* which found the geoduck aquaculture activities there to  
6 constitute “development” because they interfered with the normal public use of the water.  
7

8 Taylor’s project also involve “drilling” as that term is used in the SMA definition of  
9 “development.” The Attorney General states that “[t]he term ‘drilling’ is commonly defined in  
10 terms of creating a hole. See Miriam-Webster online dictionary, Drill ‘2 a (1): to bore or drill a  
11 hole in; (2): to make by piercing action < drill a hole>.” AGO at 7. The AGO concluded that  
12 inserting the tubes into the beach does not constitute “drilling,” but the AGO did not consider  
13 whether use of the water jets during harvesting is “drilling.”  
14

15 The water jet device, as it is used in geoduck harvesting, is a hydraulic “drill” and its  
16 operation constitutes “drilling.” A description of water jet harvesting in ECOP clearly indicates  
17 that it involves piercing the substrate to create a hole: “the nozzle is inserted next to the geoduck  
18 siphon” and “the average size hole produced is about one third cubic feet” in deep water harvest.  
19 Taylor’s witnesses describe the water jets as creating a “hole,” and, for instance, testified that the  
20 harvester sits with “feet dangling in the hole.” TR 1:182:4 (Phipps); Tr 2:19:13 (Phipps). See  
21 also Ex. 13 (CD of “Dirty Jobs” video) (App. G). The conclusion that the use of the water jet  
22 during the harvest operation constitutes “drilling” is further supported by the broad construction  
23 of the Act which is required by the SMA and the Supreme Court.  
24

25 Taylor’s harvesting operations also involve the “removal of sand, gravel and minerals”  
26 from the beach and thus constitute “development” as that term is defined in the SMA. The harvest



1 activity dislodges material that is taken by currents offsite. Thus, the sediment (including sand,  
2 gravel and minerals) is "removed" from the beach and deposited elsewhere. This qualifies as  
3 "development" as that term is used in the SMA and is supported by the broad construction of the  
4 Act required by the Statute and the Supreme Court. More than a *de minimus* amount of material  
5 is removed. See Exhibit 26 (App. H).

7 Taylor's operations also involve placing "fill" in the beds of Puget Sound when it inserts  
8 PVC tubes into the substrate at the rate of up to 43,000 per acre. In just one rotation of planting  
9 on a twelve acre tract, the amount of fill from these tubes range between 144 and 216 cubic yards.  
10 Ex. 21 (App. J). The amount of fill increases as the number of rotations increase. While the  
11 insertion of the tubes may not be "fill" as it is typically envisioned, it is "fill" nonetheless,  
12 especially given the broad construction of the Act required by the statute and the Supreme Court.

14 The water jet harvest method employed by Taylor constitutes "dredging" as that term is  
15 used in the SMA. The Act and regulations do not define "dredging." However, in the  
16 engineering world, there is a type of dredging, called agitation dredging, which employs  
17 essentially the same techniques as used by Taylor. Given the broad reading of the statute  
18 required by the statute and the Supreme Court, these operations constitute "dredging" as that term  
19 is used in the SMA.

21 As stated earlier, the SMA is to be construed broadly to assure its salutary purposes are  
22 accomplished. Those purposes are advanced by applying the five year term limit to a project like  
23 Taylor's geoduck aquaculture at the Foss beach where so little is currently known about its  
24 impacts. Only by requiring re-application on a periodic basis are the State's interests and the  
25 County's interests in protecting the shoreline environment adequately served. Only through that  
26

1 mechanism can Pierce County be assured that it will be able to take account of new information  
2 regarding the project's environmental impacts that develops as the years pass.

3 In DNR v. Kitsap County, SHB 78-37 (1980 WL 131174), aff'd 107 Wn.2d 801 (1987),  
4 this Board reversed a Kitsap County decision to deny a permit for sub-tidal clamming at Agate  
5 Pass, but added a condition that the substantial development permit expire after five years. That  
6 decision was affirmed by the Supreme Court. See also San Juan County v. DOE, SHB No. 88-52  
7 (1989) (affirming San Juan County Shoreline Program's inclusion of expiration limits for  
8 aquaculture).

9  
10 Based on the foregoing evidence and law, there can be no doubt that Taylor's project  
11 constitute "development" as that term is used in the SMA. Further, because Taylor's existing permit  
12 provides the "project" had to be "completed within five (5) years," none of the foregoing aspects of  
13 Taylor's operations can be continued until Taylor obtains a new permit. Certainly, Taylor is not  
14 entitled to summary judgment on this issue. Numerous facts are in dispute (to say the least)  
15 regarding the nature of Taylor's operations. If anything, the Board should grant summary judgment  
16 in favor of the County and the Coalition because the following relevant facts are undisputed: (1) the  
17 permit expired by its own terms if the "project" was not completed within five years and (2) the  
18 "project" has not been completed. The "project" involves not just the "construction" on which the  
19 County focuses, but the entire operation including liquefying the beaches during harvesting.  
20  
21

## 22 V. CONCLUSION

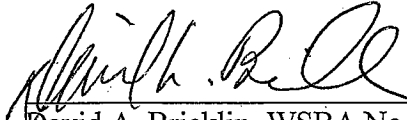
23 For the foregoing reasons, Taylor's motion should be denied. Further, for the reasons stated  
24 in the foregoing memorandum, the Coalition should be granted summary judgment on the expiration  
25 issue.  
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Dated this 16 day of December, 2008, at Seattle Washington.

Respectfully submitted,

BRICKLIN NEWMAN DOLD, LLP

By:   
David A. Bricklin, WSBA No. 7583  
Attorneys for Coalition to Protect Puget Sound  
Habitat

CPPSHSHB\Memo in Opposition to Summary Judgment

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BEFORE THE SHORELINES HEARINGS BOARD  
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

PIERCE COUNTY,

Respondent.

SHB NO. 08-010  
SHB NO. 08-017

DECLARATION OF SERVICE

STATE OF WASHINGTON        )  
  )        ss.  
COUNTY OF KING            )

I, PEGGY S. CAHILL, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the legal assistant for Bricklin Newman Dold, LLP, attorneys for the Coalition to Protect Puget Sound Habitat. On the date and in the manner indicated below, I caused the Memorandum of Coalition to Protect Puget Sound Habitat in Opposition to Taylor Resources, Inc.'s Motion for Summary Judgment to be served on:

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23 DATED this 16<sup>th</sup> day of December, 2008, at Seattle, Washington.

24   
25 \_\_\_\_\_  
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