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BEFORE THE HEARING EXAMINER  
OF PIERCE COUNTY

TAYLOR SHELLFISH FARMS

Appellant.

NO. AA-16-07

APPEAL APPLICATION NO. 612676

TAYLOR SHELLFISH FARMS'  
POST-HEARING BRIEF

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## I. INTRODUCTION

This is an appeal of Pierce County Administrative Determination SD 22-00, in which the County determined that Taylor Shellfish Farms ("Taylor") must obtain a new Shoreline Substantial Development Permit ("SDP") before continuing operations at its Foss geoduck farm. There are two issues before the Examiner: (1) whether Permit SD 22-00, the SDP for the Foss Farm, has expired; and (2) if the Examiner determines that SD 22-00 has expired, whether the activities at the Foss Farm constitute "development" under the Shoreline Management Act ("SMA") and thus require a new SDP.

With regard to the expiration issue, the County's conclusion that Permit SD 22-00 has expired is clearly erroneous. The County's decision is based on an erroneous interpretation of applicable statutory and regulatory provisions. Furthermore, because the County previously assured both Taylor and the Neighborhood Association Intervenors ("Intervenors") that SD 22-00 did not contain an expiration provision, the County is estopped from asserting that SD 22-00 expired.

If, in spite of the applicable statutory and regulatory language, the Examiner agrees with the County that SD 22-00 expired, the Examiner must then turn to the "development" issue. The Washington Attorney General has formally opined on this issue in Attorney General Opinion ("AGO") 2007 No. 1. Under AGO 2007 No. 1, determining whether a geoduck farm constitutes "development" involves a factual analysis of whether the activities at the farm interfere with the normal public use of the surface waters. Neither the County nor the Intervenors have shown a single instance of the Taylor's Foss Farm actually interfering with the normal public use of surface waters. Rather, the evidence presented at the hearing supports a finding that

1 the Foss Farm does not interfere with normal public use of surface waters and  
2 therefore is not "development" requiring an SDP.

## 3 II. STATEMENT OF FACTS

4 Pursuant to the Hearing Examiner's request, Taylor has prepared proposed  
5 Findings of Fact, which are attached hereto as Attachment A.

## 6 III. STANDARD OF REVIEW

7 Taylor, as Appellant in these proceedings, bears the burden of proving that the  
8 County's administrative determination is "clearly erroneous." PCC 1.22.090(G). A  
9 decision is "clearly erroneous" when the Examiner is left with the firm and definite  
10 conviction that a mistake has been made. *See Ancheta v. Daly*, 77 Wn.2d 255, 259,  
11 461 P.2d 531 (1969); *Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County*,  
12 121 Wn.2d 179, 201, 849 P.2d 646 (1993) *aff'd*, 511 U. S. 700 (1994).

13 The Pierce County Code ("PCC") typically requires the Examiner to give  
14 "substantial weight" to the Department's interpretation of the Code it administers.  
15 PCC 1.22.090(G). However, in this case the Department's decision that the Foss  
16 Farm permit expired is not entitled to deference because, as is discussed in more detail  
17 in Section IV.B, below, that decision is inconsistent with prior County interpretations.  
18 Adjudicative bodies are not required to give deference to an agency interpretation that  
19 is inconsistent with the agency's prior interpretations. *Good Samaritan Hospital v.*  
20 *Shalala*, 508 U.S. 402, 417, 113 S. Ct. 2151, 124 L.Ed.2d 368 (1993) ("An agency  
21 interpretation of a relevant provision which conflicts with the agency's earlier  
22 interpretation is 'entitled to considerably less deference' than a consistently held  
23 agency view.") (citation omitted) *See also Skamania County v. Columbia River*  
24 *Gorge Commission*, 144 Wn.2d 30, 54, 26 P.3d 241 (Agency's interpretation of an  
25

1 ambiguous statute is not entitled to deference when it is inconsistent with the agency's  
2 prior administrative practice).

#### 3 IV. ARGUMENT

##### 4 A. Permit SD 22-00 Has Not Expired.

5 The County's conclusion that SD 22-00 has expired is clearly erroneous and  
6 should be reversed. The provisions upon which the County relies in reaching its  
7 conclusion require only that construction activities related to an approved  
8 development be completed in five years; those provisions do not apply to the ongoing  
9 activities associated with a project that has been fully constructed. Because Taylor  
10 completed construction of its farm within the five year time period, Taylor satisfied  
11 the permit condition.

##### 12 1. **The Five-Year Limitation in SD 22-00 Applies Only to 13 Construction Activities.**

14 The permit condition at issue here, Condition 5 of SD 22-00, requires that the  
15 permit be terminated if the "project for which [the] permit has been granted pursuant  
16 to the Act has not been completed within five (5) years after approval of the permit  
17 by the local government." Ex. 58 at 6. Mr. Booth, the County planner charged with  
18 administration of SD 22-00, described this condition as "boilerplate" and standard to  
19 all shoreline substantial development permits. Transcript of Proceeding Before  
20 Terrence F. McCarthy, Thursday, November 1, 2007, ("Transcript, Nov. 1"), p. 15,  
21 ln. 18-22.

22 As noted in the County's Administrative Determination, RCW 90.58.143  
23 provides the statutory basis for Conditions 4 and 5 of SD 22-00. *See* Ex. 1(D). That  
24 portion of the SMA provides:

- 25 (2) Construction activities shall be commenced or, where no  
construction activities are involved, the use or activity shall be

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1 commenced within two years of the effective date of a substantial  
2 development permit. However, local government may authorize a  
3 single extension for a period not to exceed one year based on  
4 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 on the substantial development permit and to  
the department.

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

12 RCW 90.58.143.

13 By its own terms, the five-year time limit contained in RCW 90.58.143  
14 applies only to "authorization to conduct construction activities." *Id.* This limited  
15 applicability of the five-year time limit is underscored when comparing Subsections  
16 (2) and (3) of the statute. Subsection (2), addressing commencement of the project,  
17 requires that all construction activities *or the use or activity, itself*, ("where no  
18 construction activities are involved") be initiated within two years of permit issuance.  
19 RCW 90.58.143(2). By contrast, subsection 3, addressing permit expiration, requires  
20 only that *construction activities* be completed within five years; subsection (3) does  
21 not require termination of the use or activity itself. The legislature's use of different  
22 statutory language to address commencement, on the one hand, and expiration on the  
23 other is a clear indication that the legislature intended a different result. *See State v.*  
24 *Jackson*, 137 Wn.2d 712, 724, 976 P.2d 1229 (1999) (When the legislature uses  
25 certain statutory language in one instance, and different language in another, courts  
presume a difference in legislative intent.). Thus, the five-year time limit in RCW

1 90.58.143(3) applies only to construction activities, not ongoing uses or activities  
2 associated with a constructed project.

3 The County Code provision implementing RCW 90.58.143(3), as well as  
4 Condition 5 of SD 22-00, use slightly different terminology than the statute itself.  
5 PCC 20.76.030(G)(2 & 3); Ex. 58 at 6; Ex. 59. Indeed, even the state regulation  
6 implementing RCW 90.58.143(3) does not precisely follow the statutory language.  
7 WAC 173-27-090. However, as the Shoreline Hearings Board found in *Yale Estates*  
8 *Homeowners Assoc. v. Cowlitz County*, SHB No. 03-012, 2003 WL 23013601 at \*8  
9 (2003), these variations in terminology cannot act to broaden the applicability of  
10 RCW 90.58.143(3). In *Yale Estates*, the permit condition at issue stated: “This permit  
11 is valid for five years from the date of final approval.” *Id.* The Board rejected the  
12 petitioner’s argument that this condition required that the permit itself expire after five  
13 years. According to the Board:

14 [I]t is obvious from reading the SMA and its regulations, this language  
15 may only apply to the construction authorized under the permit. It  
16 does not and cannot limit the duration of the permit for the  
17 authorization of the use proposed. If it did, a new shoreline permit  
18 would have to be applied for every five years, to lawfully maintain a  
19 shoreline substantial development on the shorelines.

20 *Id.* See also *H & H Partnership v. Dep’t of Ecology*, 115 Wn. App. 164, 170, 62 P.3d  
21 510 (2003) (citing *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 428, 833 P.2d  
22 375 (1992) and holding that an agency cannot modify or amend a statute by  
23 regulation.)

24 In accordance with these authorities, Condition 5 of Permit SD 22-00 requires  
25 only that construction activities be completed within five years of permit issuance.  
That condition does not prohibit the continuing farming activities associated with the  
Foss geoduck farm.



1                   **2. Taylor Satisfied Condition 5 of SD 22-00 by Completing Its**  
2                   **Construction Activities Within Five Years of Permit Issuance.**

3                   In this case, the permit conditions (and the statutory provision upon which they  
4 are based) were satisfied. First, the use or activity associated with the Foss Farm was  
5 initiated well within the two-year time frame established by permit Condition 4 and  
6 RCW 90.58.143(2). Transcript, Nov. 1, p. 184, ln. 11-20.

7                   Second, to the extent that any of the activities associated with the  
8 establishment of the farm constitute "construction," Taylor completed those activities  
9 and established the Foss Farm within the five-year time frame established in  
10 Condition 5 and RCW 90.58.143(3). Over the five years after the issuance of the  
11 permit, Taylor surveyed the farm and established the farm boundaries. Transcript, Nov.  
12 1, p. 128, ln.19. Taylor notified relevant Native American Tribes at the outset of its  
13 operations that it intended to "create" a shellfish farm on the Foss property. *Id.*, p. 128,  
14 ln. 25 - p. 19, ln. 14. *See also* Exhibit 74, Att. 1, Letter dated January 24, 2001, from Bill  
15 Taylor to David Winfrey, Puyallup Tribe. Taylor also registered the Foss Farm with the  
16 Washington Department of Fish & Wildlife, Transcript, Nov. 1, p. 130, ln. 2-5, which  
17 means that the Foss Farm is now an aquatic farm. WAC 220-76-015 ("An aquatic farm  
18 is any facility or tract of land used for private, commercial culture of aquatic products.").  
19 Taylor also obtained a license from the Department of Health to grow food for human  
20 consumption which is based on a water quality assessment. Transcript, Nov. 1, p. 130, ln  
21 6-9. Finally, within five years of permit issuance, Taylor planted the entire farmable area  
22 at the Foss Farm with geoduck seed. Transcript, Nov. 1 at p. 169, ln 13-21; Ex. 154.

23                   Thus, Taylor initiated construction and use of the Foss Farm within two years of  
24 permit issuance and completed all of the actions necessary to construct the Foss Farm  
25 within five years of permit issuance. Taylor thus satisfied Conditions 4 and 5 of Permit

1 SD 22-00. Having now completed construction, Taylor's current cultivation activities on  
2 the Foss Farm constitute operating an existing, established farm. Those activities are not  
3 prohibited by Condition 5 of SD 22-00.

4 **3. The County Was Clearly Erroneous in Analogizing to Ongoing**  
5 **Development Activities Such as Mining.**

6 In its testimony and its staff report, the County compared SD 22-00 to other  
7 permits issued for different types of shoreline development, including dredging  
8 operations and mining operations. *See, e.g.,* Transcript, Nov. 1, pp. 21-22. The County  
9 argued that geoduck farms, like mining and dredging operations, must seek a new permit  
10 every five years.

11 The County's claim that geoduck farming is akin to dredging or mining activities  
12 is clearly erroneous. AGO 2007 No. 1 concludes that geoduck farming is dissimilar  
13 from mining, dredging and other ongoing activities that are typically subject to a five-  
14 year limitation in shoreline permits. *See* AGO 2007 No. 1 at 8-10. Specifically, the  
15 Attorney General concluded that the loosening of the substrate that occurs when  
16 geoducks are harvested could not be legally distinguished from general clam digging  
17 or raking, which do not constitute dredging or mining. The County's claim that  
18 geoduck farming should be treated the same as mining or dredging is inconsistent with  
19 to the Attorney General's Opinion.

20 Moreover, geoduck operations are factually distinct from mining and dredging  
21 operations in terms of completion of "construction." The footprint of mining and  
22 dredging activities continuously expands as long as the use is ongoing. That  
23 expansion occurs vertically, in the case of mining, or horizontally, in the case of  
24 dredging. Because of this expanding footprint, "construction" activities at mining or  
25 dredging operations continue as long as the mining or dredging itself continues. The

1 footprint of a geoduck farm, in contrast, does not continue to expand beyond the  
2 planted acreage once the farm is established. Rather, geoduck planting and harvesting  
3 continues within the established footprint.

4 The mere fact that farming activities continue at a geoduck operation after the  
5 operation is installed does not mean that the geoduck operations constitute ongoing  
6 construction such that a new permit is required. Indeed, activities continue after  
7 construction at many shoreline developments. For example, boat use, moorage, and  
8 other activities continue at marinas or docks well beyond the initial construction.  
9 While a substantial development permit is required for construction of a marina or  
10 dock, the authorization for the continued use of the dock or marina itself does not  
11 expire after five years. *See Yale Estates Homeowners*. Similarly, so long as  
12 construction of a geoduck farm is completed within the five-year time limitation, a  
13 new permit is not required to continue farming activities.

#### 14 **4. Permit Expiration is Not Required to Ensure County Oversight.**

15 Intervenor suggested in their briefing and at the hearing that without a five-  
16 year expiration, the County cannot ensure that geoduck farming activities are  
17 consistent with evolving scientific investigation. *See, e.g.,* Intervenor Coalition to  
18 Preserve Puget Sound Habitat, et al.'s Opening Brief, dated Oct. 19, 2007  
19 ("Intervenor's Pre-Hearing Brief") at 22. Intervenor raise concerns over the  
20 environmental impacts of a geoduck operation and insist that the five-year expiration  
21 is necessary to provide an opportunity to continually review operations for  
22 consistency with scientific literature. *Id.* Intervenor's concerns are unfounded for two  
23 independent reasons.

24 First, Intervenor did not offer any evidence of environmental harm. While  
25 Intervenor's alluded to potential impacts, the evidence at the hearing showed:

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- 1
- 2 ♦ The Foss Farm does not impair fish use. Transcript of Proceeding Before  
3 Terrence F. McCarthy, Friday, November 2, 2007, (“Transcript, Nov. 2”), p. 29,  
4 ln. 1 – p. 42, ln. 9; Transcript of Proceeding Before Terrence F. McCarthy,  
5 Thursday, December 13, 2007 (“Transcript, Dec. 13”) p. 131, ln. 21– p.134, ln  
6 22; Ex. 100; Ex. 106; Ex. 115; Ex. 117; Ex. 120; Ex. 131. In fact, Dr. Fisher's  
7 testimony, and the scientific studies he discussed, indicated that the geoduck  
8 gear at the Foss site likely attracts fish by providing structured habitat for fish  
9 usage. *Id.* In addition, the testimony of David Troutt, the Nisqually Tribe's  
10 fisheries biologist, indicated that spawning geoduck provide an important food  
11 resource for salmon. Transcript of Proceeding Before Terrence F. McCarthy,  
12 Friday, December 14, 2007, (“Transcript, Dec. 14”) p. 9, ln 13-19.
- 13 ♦ The Foss Farm does not negatively impact forage fish. Dr. Fisher's testimony  
14 indicated that the habitat limitation for surf smelt and sand lance is a limitation  
15 on spawning habitat. Surf smelt and sand lance spawn at a significantly higher  
16 tidal elevation than the geoduck operations at the Foss Farm. Transcript, Dec.  
17 13, p. 137, ln. 18 – p. 140, ln 4.
- 18 ♦ In terms of harvest impacts, Dr. Fisher's testimony demonstrated that the  
19 harvest of geoduck do not significantly impact benthic life. Transcript, Dec.  
20 13, p. 142, ln. 17 – p. 145, ln. 22; Ex. 91. The testimony of Dr. Fisher and Mr.  
21 Goodwin also indicated that the turbidity impacts associated with geoduck  
22 harvest are not environmentally significant. Transcript, Nov. 2, p. 43, ln. 10 –  
23 p. 47, ln 12; Transcript, Dec. 13, p. 153, ln 9-22; Ex. 141; Transcript, Dec. 13,  
24 p. 206, ln 12-19. Indeed, Dr. Parsons, Intervenors' expert witness, testified that  
25 he dug test pits on the beaches north of the Foss Farm in an effort to determine  
whether sediment was transported from the Foss site to those northern beaches.  
He found no evidence of such sediment transport. Transcript, Nov. 2, p. 179,  
ln 16-23.
- ♦ With regard to sediment liquification, Dr. Fisher's testimony demonstrated that  
compactability of sediments in a harvest area was comparable to unharvested  
areas within one or two tidal cycles. Transcript, Dec. 13, p. 140, ln. 5 – p. 143,  
ln. 7; *id.* at p.145, ln. 23 – p.148, ln. 8. While Dr. Parsons claimed that a  
harvest area at the Foss Farm was "bombed out" several weeks after harvest,  
Transcript, Nov. 2, p. 79, ln. 3–6, the testimony of Dr. Fisher and Mr. Phipps  
made clear that the areas that Dr. Parsons investigated could not possibly have  
been a geoduck harvest area, as the Foss Farm harvest areas were well below  
the lowest tidal level on the day Dr. Parsons was on the site. Transcript, Dec.  
13, p. 98, ln. 16 – p. 99, ln. 13. The area that Dr. Parsons investigated had  
never been planted with geoduck because it was infested with ghost shrimp,  
which also explains why the sediments in that area were loose and  
unconsolidated. Transcript, Dec. 13, p. 99, ln. 13 – p. 102, ln. 25; Transcript,  
Dec. 13, p. 146, ln. 5 – p. 148, ln. 8.
- ♦ With regard to impacts from the filtration and biodeposition of the geoducks at  
the Foss Farm, Dr. Davis testified that, on a per acre basis, the filtration and  
biodeposition at the Foss Farm is similar to what would be seen at an oyster

1 farm growing single oysters, and approximately 20% of the filtration and  
2 biodeposition that occurs at a typical clustered oyster bed. Transcript, Dec. 13,  
3 p. 176, ln. 19 – p. 183, ln. 18; Ex. 126; Ex. 127. Farming of clustered oysters  
4 has been occurring in this state for over 80 years, and no negative  
5 environmental impacts have been attributed to the filtration and biodeposition  
6 associated with clustered oyster farming. *Id.* at p. 181, ln. 3-13. And both Mr.  
7 Goodwin and Mr. Troutt testified that the density of geoduck found at the Foss  
8 Farm is within the range of densities seen in the wild geoduck beds.  
9 Transcript, Dec. 14, p. 9, ln. 20 – p. 11, ln. 21; Transcript, Dec. 13, p. 200, ln.  
10 14 – p. 201, ln. 25.

11 ♦ With regard to genetic impacts, Dr. Davis testified to the measures in place at  
12 Taylor's hatchery to ensure that the geoduck seed ultimately planted at the  
13 Foss Farm is genetically diverse. Transcript, Dec. 13, p. 183, ln. 21 – p. 184,  
14 ln. 25. Dr. Davis also testified that these hatchery management practices  
15 essentially eliminate the risks to wild geoduck populations when the geoduck  
16 seed is planted. *Id.* This testimony was uncontroverted.

17 While Intervenors raised vague allegations of environmental harm, the actual evidence  
18 at the hearing, as demonstrated above, failed to show any significant negative  
19 environmental impact associated with geoduck farming. Indeed, the testimony  
20 actually showed that geoduck farming likely has a positive impact on fish species.

21 But even if there were some question about environmental impacts, the  
22 inclusion of an expiration provision is not required to address these questions. As the  
23 Examiner is well aware, a permit can include other conditions to give the County an  
24 opportunity to review the operation in light of any new or evolving science. Such  
25 conditions were included in two Shoreline SDPs the Examiner recently issued for  
other Taylor geoduck farms:

Condition 24 shall be revised to read: **This project shall be reviewed  
in five years from the effective date of approval by the Hearing  
Examiner to examine the impacts of operations and each of these  
conditions.**

Ex. 70 at 18 (emphasis in original). *See also* Ex. 69 at 3-4. Thus, recognizing that the  
SDP itself did not expire, the Examiner included a provision that provides an

1 opportunity to review new science in years to come and impose, if necessary,  
2 additional conditions upon the approval. *Id.*<sup>1</sup>

3 Intervenor's have failed to show any adverse environmental effects from the  
4 operations at the Foss Farm. And even if there were evidence that geoduck farms  
5 have potential environmental impacts, the County can use, and has used, other tools to  
6 revisit the permit conditions in light of evolving science in years to come. A permit  
7 expiration provision is not required for that purpose.

8 **B. The County is Estopped from Asserting that Permit SD 22-00 Expired.**

9 Based on the analysis in the preceding sections, the Examiner should find that  
10 Permit SD 22-00 did not expire. Rather, the conditions in that permit required that  
11 Taylor complete construction of the Foss Farm within five years of permit issuance.  
12 Having met that condition, Taylor is permitted to continue farming at Foss under SD  
13 22-00. If the Examiner nevertheless determines that Condition 5 of SD 22-00  
14 operated as an expiration date for all activities associated with that permit, the doctrine  
15 of equitable estoppel precludes the County from reversing its prior interpretations and  
16 concluding that the permit expired.

17 The testimony and exhibits at the hearing made clear that the County  
18 previously stated, both orally and in writing, to representatives of both Taylor and the  
19 Intervenor's, that permits for geoduck farms, including the Foss permit, did not expire.  
20 *See, e.g.*, Transcript, Nov. 1, pp.17-18. Ty Booth, the County's representative who

21 \_\_\_\_\_  
22 <sup>1</sup> Notably, the permits referenced in the text included exactly the same language as Conditions 4 and 5  
23 of SD 22-00, the conditions at issue in this case. Ex. 70 at 15-16. The fact that the Examiner included  
24 a provision to reassess the Permit every five years demonstrates that the Examiner did not believe that  
25 the five-year language was a permit expiration provision. Otherwise, the permit condition giving the  
County the opportunity to assess the permit every five years would have been superfluous. The  
reference to "second" and "third planting cycles" in other conditions in that permit similarly recognize  
that the permit was for ongoing activities and did not expire. *Id.* at 19-20, Conditions 34 – 36.

1 handled SD 22-00, stated to Taylor on multiple occasions that SD 22-00 did not  
2 expire. Transcript of Proceeding Before Terrence F. McCarthy Thursday, November  
3 1, 2007, ("Transcript, Nov. 1"), pp. 17-18. Perhaps more significantly, Vicki  
4 Diamond, Supervisor of Pierce County Current Planning, provided the same  
5 interpretation in writing in response to an inquiry from the Intervenors. Exhibit 66, E-  
6 mail Thread between V. Diamond and L. Hendricks, dated 5/22/2006. Ms. Diamond  
7 transmitted her interpretation from her County e-mail address. *Id.* When asked  
8 whether SDPs for geoduck farms expired, Ms. Diamond stated, without equivocation:  
9 "we have not placed any expirations of this particular activity for several reasons." *Id.*

10 When rendering these earlier interpretations, the County was aware of the  
11 ongoing nature of the operation. For example, in its application materials Taylor  
12 stated its intent to establish "ongoing" geoduck operations at the Foss Farm. Ex. 56 at  
13 2, sect. 8. Similarly, in several of the decision documents, the County acknowledged  
14 Taylor's request for authorization to conduct on-going activities. *See, e.g.*, Ex. 57,  
15 County Staff Report Case No. SD 22-00 at 3, 6, 9 (County Staff repeatedly notes that  
16 after tubes are removed, they "would not be reinstalled on the beach for approximately  
17 four years, at the time when new geoduck are planted"); Ex. 58, Hearing Examiner  
18 Decision, Case No. SD 22-00 at 2 (County Staff notes that after harvest, Taylor "will  
19 then repeat the process").

20 At hearing the County attempted to avoid the implications of these previous  
21 interpretations by arguing that they were offered as "personal opinions," not the  
22 County's "official position." But both Mr. Booth and Ms. Diamond were approached  
23 in their official capacities for an official opinion; neither Taylor nor the Intervenors  
24 asked for these County officials "personal opinion." Taylor corresponded with Mr.  
25 Booth routinely on various aspects related to SD 22-00; Mr. Booth acknowledged in

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1 testimony that he was the planner responsible for the permit and the “closest contact”  
2 Taylor has had at the County. Transcript, Nov. 1, p. 17, ln. 1-8. Ms. Diamond was  
3 approached by the Intervenors through her work e-mail address after a meeting at her  
4 office. Ex. 66. Furthermore, in her response she spoke on behalf of the County  
5 Planning department, as indicated by use of the plural possessive: “we have not placed  
6 expirations.” *Id.* (emphasis supplied). The County’s efforts to now try to  
7 recharacterize these communications as “personal opinions” should be rejected.

8 Under the facts established at hearing, all of the elements of estoppel, outlined  
9 in Appellant’s Pre-hearing Brief, have been satisfied. *See* Appellant’s Pre-hearing  
10 Brief, Section III.D. Both Ms. Diamond and Mr. Booth acknowledged that their  
11 earlier statements were inconsistent with the County’s administrative determination.  
12 Specifically, both Ms. Diamond and Mr. Booth indicated that the permit did not  
13 expire. The evidence further showed that Taylor continued to plant and cultivate  
14 geoduck at the Foss Farm in reliance on those prior County interpretations.  
15 Transcript, Nov. 1, p. 105, ln. 11 – p. 106, ln. 3. Because the interpretation came from  
16 both the staff person in charge of administering Taylor’s permit and the Supervisor of  
17 the County’s Current Planning Department, Taylor’s reliance on those statements is  
18 justifiable. The evidence at hearing also demonstrated that Taylor was injured by its  
19 reliance on County interpretation. Mr. Phipps testified that if Taylor is unable to  
20 continue its operations at the Foss Farm, it will leave over \$20 million in unharvested  
21 geoduck in the ground. Transcript, Nov. 1, p. 171, ln. 17 – p. 172, ln. 6.

22 Additionally, failure to grant the relief under the doctrine of equitable estoppel  
23 will result in “manifest injustice” to Taylor, as Taylor’s injury is based solely on the  
24 fault of the County. Finally, equitable estoppel against the County will not impair its  
25 exercise of governmental functions. Even if the Examiner believes the County’s



1 Administrative Determination is substantively correct (and, as argued above, Taylor  
2 believes the County's Determination is clearly erroneous), a reversal of the County's  
3 Administrative Determination with respect to the Foss Farm will not prohibit the  
4 County from enforcing its interpretation against other parties and new farms where it  
5 has not made contrary representations.

6 **C. Taylor's Geoduck Operations at the Foss Farm Do Not Constitute**  
7 **Development Under the SMA.**

8 If the Examiner upholds the portion of the County's interpretation finding that  
9 permit SD 22-00 expired, then the Examiner must determine whether geoduck  
10 operations at the Foss Farm constitute "development" under the SMA such that Taylor  
11 must obtain a new SDP to continue its operations.<sup>2</sup> As the Examiner is aware, the  
12 Court of Appeals has determined that one Pierce County geoduck farm was  
13 "development" under the SMA and therefore required an SDP. *Washington Shell Fish*  
14 *v. Pierce County*, 132 Wn. App. 239, 251, 131 P.3d 326 (2006), *review denied*, 158  
15 Wn.2d 1027 (2007). However, the hearing evidence in this case demonstrates that  
16 Taylor's Foss Farm is dramatically different than the operation at issue in *Washington*  
17 *Shell Fish*. Indeed, the Foss Farm and the *Washington Shell Fish* farm represent  
18 opposing bookends on the spectrum of "development" under the SMA.

19 The SMA defines development as:

20 a use consisting of the construction or exterior alteration of structures;  
21 dredging; drilling; dumping; filling; removal of any sand, gravel, or  
22 minerals; bulkheading; driving of piling; placing of obstructions; or  
any project of a permanent or temporary nature *which interferes with*

23 <sup>2</sup> The SMA requires applicants to obtain permits for "substantial development." The SMA  
24 defines substantial development as "any development of which the total cost or fair market  
25 value exceeds five thousand dollars, or any development which materially interferes with the  
normal public use of the water or shorelines of the state." RCW 90.58.030(3)(e).  
Accordingly, there can be no "substantial development" without "development."

1           *the normal public use of the surface of the waters* overlying lands  
2           subject to this chapter at any state of water level.

3           RCW 90.58.030(3)(d) (emphasis added). *See also* WAC 173-27-030(6); PCC  
4           20.04.130. Accordingly, a project can be development if: (1) it interferes with  
5           normal public use of surface waters; or, (2) it constitutes one of the listed activities.

6           According to AGO 2007 No. 1, geoduck culture does not constitute any of the  
7           specific activities listed in RCW 90.58.030(3)(d). AGO 2007 No. 1 at 6-9. Thus, the  
8           only relevant inquiry in determining whether a geoduck farm constitutes development  
9           is whether the operation interferes with normal public use of the surface waters. *Id.*  
10          at 6. *See also Washington Shell Fish*, 132 Wn. App. at 251. An AGO is entitled to  
11          considerable weight. *See, e.g., Bowles v. Washington Dept. of Retirement*  
12          *Systems*, 121 Wn.2d 52, 63, 847 P.2d 440 (1993); *Holbrook, Inc. v. Clark County*, 112  
13          Wn. App. 354, 362-63, 49 P.3d 142 (2002).<sup>3</sup>

14          The County's Administrative Determination that the Foss Farm involves  
15          interference with normal use of surface waters is based on an assumption that the  
16          operations at the Foss Farm are identical to the *Washington Shell Fish* farm. *See Ex.*  
17          1(D), County Staff Report at 5 (“the *Washington Shell Fish* case determined geoduck  
18          agriculture falls within the definition of development.”). *See also* Intervenors’ Pre-  
19          Hearing Brief at 12 (“Taylor’s ‘Foss Lease’ geoduck aquaculture operation, like all  
20          commercial geoduck operations in South Puget Sound meets the Act’s definition of  
21          ‘development’...”). The County's conclusion is directly contrary to AGO 2007 No.

22          

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23          <sup>3</sup> In addition to the considerable weight to which an AGO is entitled, an even greater weight attaches to  
24          an interpretation when the Legislature acquiesces in that interpretation. *Bowles*, 121 Wn.2d at 63-64.  
25          (The Attorney General opinion constitutes notice to the Legislature of the interpretation of the law, such  
        that an AGO is afforded even more weight when the legislature does not subsequently amend the law).  
        In this case, the Legislature has not acted to modify the relevant SMA provisions since the AGO 2007  
        No. 1 was issued.

1 1, which expressly holds that intertidal geoduck farms do not inherently constitute  
2 development under the SMA. *See* AGO 2007 No. 1 at 8. In fact, according to AGO  
3 2007 No. 1, “nothing in the description of geoduck aquaculture necessitates such  
4 interference [with surface waters].” AGO 2007 No. 1 at 8. Based on this conclusion,  
5 the mere presence of elements common in a geoduck aquaculture operation –  
6 including PVC tubes and cover nets – is insufficient to constitute an interference with  
7 normal public use of the surface waters. Rather, evaluation of the development issue  
8 requires a fact specific review of the particular geoduck farm at issue. AGO 2007  
9 No. 1 at 6.

10 Such a fact-specific comparison demonstrates tremendous differences  
11 between the Foss Farm and the Washington Shell Fish (“WSF”) operations. While  
12 the WSF operations clearly interfered with normal public use of surface waters, the  
13 Taylor Foss Farm just as clearly does not create such interference. Indeed, if any  
14 geoduck operation does not constitute development under the SMA (and AGO 2007  
15 No. 1 indicates that some geoduck farms do not), then the Foss Farm is that  
16 operation.

17 **1. Taylor’s Foss Farm Does Not Interfere With the Normal Public**  
18 **Use of the Surface Waters.**

19 Based on the facts presented at hearing the Examiner should conclude that the  
20 Foss Farm does not interfere with normal public use of the surface waters. The  
21 County has not presented any evidence establishing such interference. In fact, as  
22 noted above, the County failed to look at any facts in reaching its conclusion on the  
23 issue. The only evidence presented by Intervenors on the issue was completely  
24 speculative.  
25

1                   **a.       Characterization of Normal Public Use.**

2                   When reviewing whether a project interferes with normal public use, the  
3 Examiner must first determine the nature of the public use at issue. *Cowiche Canyon*,  
4 118 Wn.2d 801, 818, 828 P.2d 549 (1992) (when determining whether a project  
5 constitutes development under the SMA, “it is plain that normal public use must be  
6 established.”). At the Foss Farm, public use of the surface waters is limited. The  
7 Foss Farm is on tidelands that front a mile of undeveloped private property. Ex. 55;  
8 52(J); Ex. 75(10) and (17-25); Ex. 50. The farmed tidelands are on a private beach  
9 and are approximately ½ mile away from the nearest public beach at Joemma State  
10 Park. County Staff Report at 2; Transcript, Nov. 1, p. 192; Ex. 50; Ex. 52(A). The  
11 farm is not near any normal points of public access to the water. Transcript, Nov. 1,  
12 pp. 187, 192. The closest public access point is the boat launch at Joemma State  
13 Park. Transcript, Nov. 1, p. 191, ln. 25 – p. 192, line 3. Therefore, “normal” public  
14 use of the surface waters at the Foss Farm is limited to boating activities initiated  
15 from off-site access points.

16                   The public use of the surface waters at the Foss site contrasts dramatically  
17 with the public’s use of the surface waters in the vicinity of the WSF operation.  
18 Unlike the Taylor operation at the Foss Farm, the WSF farm was located in a highly-  
19 developed area that is in direct proximity to public uses and access points. *Compare*  
20 Ex. 54 with Ex. 55. *See also* Transcript, Nov. 1, p. 111, ln. 4-16. Much of the  
21 tidelands leased for the WSF farm were leased from the County and were on a public  
22 beach. *See* AGO 2007 No. 1 at 6. *See also* Ex. 54; Ex. 48; Transcript, Nov. 1, p.  
23 189, ln. 25 – p. 190, ln. 3. Those portions of the WSF farm that were not on public  
24 beach were on private tidelands that were not owned by the upland beach front  
25 owners. Transcript, Nov. 2, p. 111, ln. 6-10. As a result, those portions of the WSF

1 farm on private tidelands were immediately between the beach front owners and the  
2 water.

3           Additionally, in contrast to the Foss Farm, portions of the WSF farm were  
4 located immediately in front of prime public points of access for recreational use of  
5 the water. Transcript, Nov. 1, p. 111, ln. 4-16; *id.* at p. 187, ln. 17 – p. 190, ln. 11.  
6 Also, unlike the Foss Farm, the WSF operation used the public access point and  
7 associated parking lot for its operations, restricting the public’s capacity to use the  
8 access point.<sup>4</sup> Indeed, the recreational use in the area of the WSF farm was  
9 established specifically because the area was considered a unique and significant  
10 public amenity – the site conditions made the area one of the premier windsurfing  
11 spots in the northwest.<sup>5</sup> Windsurfers launched directly over the farm.<sup>6</sup> The WSF  
12 operation was openly hostile towards the established recreational uses and, at times,  
13 sought to prohibit and deliberately interfere with the recreational uses in the area.<sup>7</sup>

14           As was demonstrated at hearing, the public use of the surface waters at the  
15 WSF farm was much more significant than any use in the vicinity of the Foss Farm.  
16 The established public use of the surface waters at the WSF farm led to the

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17 <sup>4</sup> Ex. 64, WSF Hearing Examiner decision at 20 (“There is a parking lot that fits 12 to 15 cars with  
18 angle parking. Sometimes Mr. McRae would have his trailer and truck there, because he would launch  
19 almost everyday to work in the area. Sometimes, it would be in the back where it would only take two  
20 parking spots. Sometimes, it would take all 15. He asked Doug if he would back down the ramp so he  
21 would not take up so much space. For the next seven months, not one day went by that his vehicle and  
22 trailer was not parked in such a way as to take up all 15 parking spots.”)

21 <sup>5</sup> Ex. 62 at 122 (“Windsurfing has been going on in this area for about 25 years., I guess. Outside the  
22 Columbia River, this is the premier spot in Washington. You get nice waves that build up through this  
23 area and the tide goes out and opposes the current and makes for nice windsurfing.”). By contrast, even  
24 some of Intervenor’s witnesses acknowledged that they “have not seen windsurfers” in the vicinity of  
25 the Foss Farm. Transcript, Dec. 13 , p. 51, ln 7.

23 <sup>6</sup> Ex. 62, at 119, 124.

24 <sup>7</sup> Ex. 62 at 121-22, 124 (“Washington Shell Fish was completely belligerent... It’s been harassment  
25 right down – we don’t even think he’s harvesting geoducks. Some days he’s out there harassing the  
windsurfers.”)

1 Examiner's and Court's conclusion that the WSF operation interfered with normal  
2 public use of surface waters. *See* AGO 2007 No. 1 at 6 ("The neighboring public  
3 park appears to trigger the interference with public use of the surface waters"). There  
4 are no comparable facts establishing such significant public use of the surface waters  
5 in the vicinity of the Foss Farm.

6 **b. Tubes Do Not Interfere With Normal Public Use of the**  
7 **Surface Waters.**

8 The Intervenor's argue that the PVC tubes used in any geoduck operation  
9 inherently interfere with normal public use of the surface waters. Intervenor's Pre-  
10 Hearing Brief at 4, 20. However, AGO 2007 No. 1 specifically found that geoduck  
11 tubes do *not* inherently interfere with normal public use of the surface water. AGO  
12 2007 No. 1 at 8. ("The PVC pipes protrude only inches and have no more  
13 interference with use of the surface waters than bags of oysters, clam nets, or a small  
14 rock on the shoreline.") Indeed, because the tubes at the Foss Farm are covered with  
15 canopy nets, they do not interfere with normal public use of the surface waters any  
16 more than the tidal bottom itself. *See, e.g.,* Ex. 52(B, C and D). Recreational boaters  
17 or swimmers would need to avoid the tubes only inasmuch as they would need to  
18 avoid hitting the bottom, a normal risk for any boater or swimmer.

19 The only evidence presented in an attempt to demonstrate that the tubes at the  
20 Foss Farm interfered with normal public use of waters was purely speculative. For  
21 example, Ms. Leudtke complained that she would not boat or float over the tube  
22 fields due to fear of running into tubes or gear. Transcript, Nov. 2, p. 84, ln. 22 – p.  
23 85, ln. 4. However, Ms. Leudtke admitted that she never actually tried boating or  
24 floating in the vicinity of the Foss Farm. Transcript, Nov. 2, p. 101, ln. 10 – p. 102,  
25 ln. 6.

1 In fact, the testimony at the hearing showed that the Foss Farm did not  
2 interfere with boat use at the site. Transcript, Nov. 1, p. 193, ln. 17 – p.194, ln. 15  
3 (testimony of Brian Phipps regarding recreational use near the site); Transcript, Nov.  
4 2, pp. 41-42 (testimony of Dr. Fisher regarding capacity to kayak over the tube  
5 fields); Transcript, Dec. 13, pp. 155-156 (testimony of Dr. Fisher regarding ability to  
6 kayak over tube fields); Ex. 52(K, L). Witnesses commented that their capacity to  
7 kayak, for example, was not inhibited by the tube fields. *Id.* Even the testimony of  
8 one of Intervenor's witnesses acknowledges that they could freely paddle over and  
9 past the tube fields to access the private beach and complain to the workers.  
10 Transcript, Dec. 13, p. 54, ln 22-25; *id.* at 58, ln. 3-7.

11 Again, the Foss operation is in marked contrast to the WSF farm in this  
12 regard. The WSF operation used objects other than tubes that were extremely  
13 dangerous to recreational users of the surface water. These included cement-filled  
14 garbage cans<sup>8</sup> as well as “signs” consisting of smaller cement-filled cans with  
15 protruding five-foot long PVC pipes.<sup>9</sup> These objects were particularly dangerous to  
16 recreational boaters and swimmers because, at high tide, the objects sat just below the  
17 surface of the water and presented an unexpected impediment that could cause  
18 significant injury or death.<sup>10</sup> Taylor does not use any similar markers at the Foss  
19 Farm. Transcript, Nov. 1, p. 193, ln 2-11.

21 \_\_\_\_\_  
22 <sup>8</sup> Ex. 62 at 120 (“One of the first things was a cement-filled garbage can very close to the boat dock. It  
was completely covered up at high tide, completely exposed at low tide, and most of the time just  
covered up as a hazard for boaters and windsurfers and things.”). *See also* Ex. 64 at 11; Ex. 62 at 128

23 <sup>9</sup> Ex. 61, Declaration of William A. Garrison, at 2 and Att 1; Ex. 60 at 2 (of the hazards causing injury  
24 are “about ten 4-foot long pipes set in concrete such that they lie just below the water level at medium  
tide. Any recreational user is at risk of getting impaled.”). *See also* Ex. 64 at 11; Ex. 62 at 128.

25 <sup>10</sup> *See* Footnotes 8 and 9, *supra*.

1           **c.       The Canopy Cover Nets Used At the Foss Farm Do Not Interfere**  
2           **With Normal Public Use of the Surface Waters.**

3           Both the County and the Intervenors argue that the cover nets used at the Foss  
4           Farm interfere with normal public use of the surface waters. *See, e.g.*, Transcript,  
5           Nov. 2, p. 85, ln. 1-4. In fact, there is no evidence that the nets have ever come loose  
6           in such a way as to cause actual interference with normal public use of the surface  
7           waters.

8           To the contrary, the evidence at the hearing showed that Taylor has refined its  
9           method of securing netting over the years to ensure that the nets do not come loose to  
10          create the hazard Intervenors allege. Taylor secures the netting using rebar bent into  
11          the shape of a candy cane that is pushed into the tidelands. Transcript, Nov. 1, p.  
12          177, ln. 24-25; Ex. 52(C); Ex. 75(27). The rebar is closely spaced to ensure that the  
13          netting stays secure. Transcript, Nov. 1, p. 179, ln. 2-12. Maintenance crews are on  
14          site frequently to ensure that the netting is secure. *Id.* at p. 178, ln. 13-24; p. 168, ln.  
15          6-15. Since implementing this system, there have been no problems with nets at the  
16          Foss Farm coming loose. *Id.* at p. 179, ln. 9-12; Transcript, Dec.13, p. 106, ln. 11-14.  
17          Finally, the netting used by Taylor does not float and is therefore not likely to ensnare  
18          boaters, swimmers, or divers even if the securing mechanism comes loose.  
19          Transcript, Dec. 13, p. 106, ln. 15-24.

20          The testimony of the Intervenors' witnesses on this issue is not credible. First,  
21          that testimony is based on speculative concerns. Not a single witness could describe  
22          an instance in which netting from the Foss Farm actually came free to impair a  
23          swimmer, a diver or a boat. *See, e.g.*, Transcript, Nov. 2, p. 101, ln. 10 – p.102, ln. 6;  
24          Transcript, Dec. 13, p. 26, ln 4-15. At best, one of Intervenors' witnesses expressed  
25          concerns based on experiences with other operations that use other types of netting.



1 *Id.* That same witness was not familiar with the methods Taylor used at its facility.  
2 *See, e.g.*, Transcript, Dec. 13, p. 26, ln. 21 – p. 27, ln 3. Because of the heavier type  
3 of netting used by Taylor and Taylor’s methods of securing the netting, there is no  
4 factual basis for Intervenors' speculative concerns. *See, e.g.*, Transcript, Dec. 13, p.  
5 106, ln. 6-24.

6 Second, much of Intervenors' testimony on this subject was shown to be  
7 factually incorrect. For example, one of the Intervenors testified to photographs  
8 allegedly depicting areas where the nets had come loose and washed up. Ex. 150(3);  
9 Transcript, Nov. 2, p. 83, ln. 5-15. However, later testimony demonstrated that the  
10 photographs had been taken while Taylor's employees were in the process of  
11 removing the nets. Transcript, Dec. 13, p. 104, ln. 19 – p. 105, ln. 24.

12 The record contains no evidence that the netting used at the Foss Farm  
13 interferes with the normal public use of the surface waters.

14 **d. Rope, As Used At the Foss Farm, Does Not Interfere With**  
15 **Normal Public Use of the Surface Waters.**

16 The limited use of rope at the Foss Farm does not interfere with normal public  
17 use of surface waters. As described at the hearing, rope is only used at the Foss Farm  
18 for one of two purposes. First, Taylor uses 100 yards of thin bailing twine during  
19 planting at low tide as a guide to measure out rows of tubes and ensure the rows are  
20 straight. *See, e.g.*, Transcript, Nov. 1, p. 192, ln. 21-22. Second, in the rare instances  
21 in which Taylor conducts a dive harvest, rather than a dry harvest, Taylor uses  
22 lengths of rope as a guide on the bottom to keep divers from straying out of the  
23 vicinity of the planted tract. Transcript, Nov. 1, p. 192, ln. 5-18. The ropes used for  
24 these activities are weighted ropes and do not float. *Id.* They are removed after the  
25

1 harvest. *Id.* Accordingly, Taylor’s use of rope at the Foss Farm does not interfere  
2 with normal public use of surface waters.

3 Intervenor presented photographic evidence of a length of rope at the Foss  
4 Farm, insinuating that Taylor did leave lengths of rope in the water at the Foss Farm.  
5 Transcript, Nov. 2, p. 90, ln. 13-19; Ex. 150(32). However, as Taylor’s employee  
6 clarified on rebuttal, that photograph actually depicted an effort by Taylor to respond  
7 to a request from Intervenor that Taylor modify its method for securing its nets.  
8 Transcript, Dec. 13, p. 110, ln. 8 – p. 111, ln. 9. The new technique did not work,  
9 and Taylor removed the rope and did not try that method again. *Id.* Significantly,  
10 even in that one instance, the rope was weighted and would not float. *Id.*

11 By contrast, testimony related to the WSF farm indicated that the operation  
12 left “thousands of feet” or “miles” of nylon rope in the water that came loose and  
13 floated near the surface of the water. The rope entangled boats, and windsurfers,  
14 causing injury.<sup>11</sup> No such evidence was presented regarding the Foss Farm, where  
15 the different materials and practices do not result in rope floating in the water and  
16 interfering with recreational use of the water.

17 **e. Rebar, As Used At the Foss Farm, Does Not Interfere With**  
18 **Normal Public Use of the Surface Waters.**

19 Neither does Taylor’s use of rebar to secure netting at the Foss Farm interfere  
20 with normal public use of the surface waters. The rebar Taylor uses at the Foss Farm  
21 hooks an edge of the netting and is pushed into the sand until the top of the rebar is  
22 flush with the surface of the sand, leaving only the curved portion of the rebar

23 \_\_\_\_\_  
24 <sup>11</sup> Ex. 60 at 2 (“[H]undreds of feet, perhaps miles, of yellow 5/16” rope has been strung along the  
25 bottom of the Bay and is poorly anchored. Pieces have come loose on several occasions and floated to  
the surface. Windsurfers have hit these ropes causing personal injury on at least two occasions.  
Entanglement has also been a problem. One person nearly drowned.”). *See also* Ex. 64 at 11.

1 exposed. Ex. 75(27). In this state the rebar is no different than nearby rocks or shells  
2 and cannot harm recreational users of surface waters. It does not interfere with  
3 normal public use of the surface waters.

4 While Intervenors submitted photographs showing exposed rebar extending  
5 from the sand, *see, e.g.*, Ex. 76(39); Ex. 151; Ex. 150(31), Taylor's employees  
6 testified that these photographs depict the rebar in a temporary condition. Transcript,  
7 Nov. 1, p. 176, ln. 25 – p. 177, ln. 11; Transcript, Dec. 13, p. 111, ln. 21 – p. 114, ln.  
8 20. To remove predator netting at low tide, Taylor employees first pull the rebar out.  
9 *Id.* Rather than discarding the rebar haphazardly to the side, where it might be  
10 overlooked and left behind, Taylor employees are trained to stick the rebar into the  
11 sand, upright, where it is plainly visible to the employees. *Id.* Upon the completion  
12 of net removal, before the tide comes back in, the employees collect the upright rebar  
13 and remove it from the site. *Id.* Thus, Intervenors' testimony that the upright rebar  
14 could cause harm to a swimmer if left in the water at higher tides is unfounded; the  
15 rebar is removed by the time the tide comes back in.

16 **f. Debris From the Foss Farm Does Not Constitute**  
17 **Interference With Normal Public Use of the Surface**  
18 **Waters.**

19 Intervenors also suggested that debris from the Foss Farm interferes with  
20 normal public use of the surface waters. As a preliminary matter, the hearing  
21 testimony did not demonstrate any of the debris to which Intervenors testified is  
22 attributable to Taylor's Foss Farm. Indeed, Intervenors acknowledge that the nets that  
23 washed up onto the beach were either marked as belonging to a different operation or  
24 were cover nets for individual tubes, nets that Taylor no longer uses at the Foss Farm.  
25 Transcript, Dec. 13, p. 38; Transcript, Nov. 1, p. 178, ln. 6-12. Similarly, the  
photographs of tubes on the water bottom were taken near the boat launch at Joemma

1 State Park in the proximity of a different farm. Transcript, Dec. 13, p. 123, ln. 20 – p.  
2 124, ln. 17. Mr. Phipps identified the tubes as being of a tube size used by the  
3 proximate farm, but not by Taylor. Transcript, Dec. 13, p. 122, ln. 20 – p. 124, ln. 17.  
4 Therefore, there is no testimony connecting any of the debris described by  
5 Intervenor’s witnesses to the Foss Farm. Indeed, the owner of the Foss Farm tidelands  
6 testified that, since Taylor modified its operations to use canopy nets, the beach is  
7 cleaner than it was before geoduck farming began. Transcript, Nov. 2 at p. 72, ln. 23  
8 – p. 73, ln. 5.<sup>12</sup>

9 In contrast, the testimony related to the WSF geoduck farm demonstrated a  
10 debris problem that interfered with the normal public use of the surface waters. For  
11 example, as noted above, the operation would frequently lose rope or netting in the  
12 water that could ensnare recreational users. Similarly, the WSF operation used pins  
13 to mark the bounds of the individual beds that came loose and injured recreational  
14 users of the beach.<sup>13</sup> In this case, there is no testimony of similar mechanisms or  
15 injury to recreational users of the beach. The allegations of debris do not establish  
16 interference with normal public use of the surface waters.

---

17  
18  
19 <sup>12</sup> Taylor takes the issue of aquaculture debris very seriously. To address this issue, Taylor and others  
20 in the industry conduct a biennial beach clean up. During this event they walk miles of shoreline,  
21 including the miles of shoreline that are not farmed, and clean up debris. Taylor keeps meticulous  
22 records of the debris recovered and itemizes the aquaculture gear. Transcript, Dec. 13, p. 115, ln 14 – p.  
21 117, ln 5. The records of the most recent biannual beach cleanup demonstrate that the amount of debris  
22 attributable to aquaculture operations is a mere fraction of the debris recovered. *Id.* at p. 116, ln 21 – p.  
21 117, ln. 5. Taylor found only a small amount of rope along ten miles of shoreline but recovered four  
22 and a half cubic yards of non-aquaculture debris. *Id.*

23 <sup>13</sup> Ex. 62 at 141, testimony of Larry Wakefield (“We have had problems with Mr. MCrae’s stainless  
24 steel metal here. Myself, in July, was walking on the beach and got one stuck in the top of my foot.”).  
25 *See also* Ex. 64 at 9 (“There were many reports of netting and other aquaculture debris on the beaches,  
pipes washed up on the shore and stainless steel pins that had worked loose much of which has been  
collected by Staff.”); *Id.* at 12, ; Ex. 62 at p 18, 114.

1                   g.       **Taylor’s Use of Boats at the Foss Farm Does Not Interfere**  
2                               **With Normal Public Use of the Surface Waters.**

3                   The limited extent to which Taylor uses boats at its Foss Farm does not  
4 interfere with normal public use of the surface waters. Despite Intervenor’s allegation  
5 that Taylor moors boats off the Foss Farm for weeks at a time over several months,  
6 Taylor’s business records definitively demonstrate that the use of boats at the site is  
7 much more limited. Transcript, Dec. 13, p. 108, ln. 2 – p. 109, ln. 8. Taylor uses  
8 boats during harvest or planting activities. *Id.* When not in use at the Foss Farm, the  
9 boats are either being used at another location or moored elsewhere. *Id.* Over the  
10 five-month time period about which Intervenor’s witnesses testified, Taylor’s records  
11 establish that one to two boats were moored during activity at the Foss Farm for a  
12 total of only 40 days. *Id.* This limited presence of one or two boats along a  
13 beachfront that stretches over a mile does not interfere with normal public use of the  
14 surface waters.

15                   In contrast to the Foss Farm area, there are nine mooring buoys to the north,  
16 clustered in front of the residences owned by several of the Intervenor’s. Transcript,  
17 Dec. 13, p. 109, ln. 9-20. To the south there are seven mooring buoys clustered near  
18 Joemma State Park. *Id.* With specific reference to the buoys to the north, testimony  
19 established that boats are consistently moored at the buoys from May through  
20 September. *Id.* See also Transcript, Nov. 2, p. 102, ln. 17 – p. 103, ln. 19  
21 (Intervenor’s witness acknowledges boats are moored in front of residences for  
22 “several months”). In this context, one or two boats moored intermittently for 40  
23 days over five months does not interfere with normal public use.

24                   By contrast, in the WSF case, boats were used much more extensively. The  
25 WSF operation used exclusively dive harvest, during which boats stay moored in the

1 water above the divers, blocking passage by other users. Transcript, Nov. 1, p. 126,  
2 ln. 8-20. Additionally, WSF workers harvested wild geoduck, such that their work  
3 window was significantly broader than that of Taylors.<sup>14</sup> Indeed, there was testimony  
4 that WSF would “launch every day to work in the area.”<sup>15</sup> As indicated earlier, the  
5 boats used the same point of access to the water as the public, and the boats would  
6 moor directly in front of the public access point. *See* Sect. IV.C.1, *supra*. Perhaps  
7 most notably, there was evidence that WSF kept boats moored at the site, in front of  
8 the public access point, even when not in use.<sup>16</sup> WSF continually flew diver flags off  
9 the boats – at one point for seven months straight – warning others to stay away from  
10 the area, even when divers were not working.<sup>17</sup> Therefore, WSF’s use of boats in the  
11 area was much more extensive than at the Foss Farm, both in terms of the length of  
12 time they were used and their location. While the WSF boats effectively interfered  
13 with the public’s normal use of the surface waters, no such interference was  
14 demonstrated at the Foss Farm.

15 **h. Taylor’s Foss Farm Does Not Interfere With Recreational**  
16 **Fishing.**

17 Taylor’s operation does not interfere with recreational fishing. While  
18 Intervenors offered two anecdotal and speculative allegations of such interference,  
19 the weight of the evidence presented does not support either. First, Intervenors’  
20 expert witness, Mr. Daley, alleged that the operation excludes fish such that fish  
21 would either avoid, or be trapped in, the Farm. Transcript, Nov. 2 at pp. 131-134.

22 <sup>14</sup> Ex. 64 at 20

23 <sup>15</sup> *Id.*

24 <sup>16</sup> Ex. 60 at 2 (“When not clamming, he moors his boat” at the site in front of the access point).

25 <sup>17</sup> Ex. 64 at 20 (“Sometimes he does not take down his dive flag that is required to be flown when the divers are under water. I asked that he take it down when the divers are not in the water. For the next seven months, not once was the dive flag taken down when boats were moored out there.”)

1 Mr. Daley's testimony was based on eight hours of research. Transcript, Nov. 2, p.  
2 126, ln. 17-25. Mr. Daley also acknowledged that that he predetermined his concerns  
3 regarding geoduck farming before even initiating his research. Transcript, Nov. 2, p.  
4 153, ln. 3-12. Finally, Mr. Daley acknowledged that he had not read the studies upon  
5 which Taylor's expert based his opinion that the Foss Farm did not interfere with fish  
6 use. Transcript, Nov. 2, p.131, ln. 15.

7 As described in further detail in section III.A.4 above, according to Taylor's  
8 expert witnesses, Dr. Fisher and Dr. Davis, there is significant body of scientific  
9 evidence supporting the conclusion that fish are attracted to the site and actually use  
10 the aquaculture gear at the Foss Farm as habitat. See Transcript, Dec. 13, p. 134, ln.  
11 5 – p. 135, ln. 19; *Id.* at 185, ln. 4-20. These same experts are also fishermen, and  
12 they testified that they have purposefully targeted aquaculture sites when fishing  
13 recreationally because of their conclusion that there are likely more fish in the  
14 vicinity. *Id.*

15 Second, Intervenors complain that recreational fishermen could have their  
16 lures caught up in the aquaculture gear. Transcript, Nov. 2, p.129, ln. 5-9. However,  
17 the risk of getting the lure caught up in the gear is no greater than the risk of getting  
18 the lure caught on the bottom. In other words, as acknowledged by Intervenors'  
19 witness, the only alleged "interference" with fishing is a risk normally associated  
20 with bottom fishing. *Id.* at p. 150, ln 1 - 6.

21 The Foss Farm does not interfere with recreational fishing. If anything, the  
22 farm attracts fish to an area in which they would not typically congregate, increasing  
23 the potential for recreational fishing.

1           **2. Taylor's Operations at the Foss Farm Do Not Constitute Any of**  
2           **the Other Activities Listed in the Definition of Development.**

3           As noted above, AGO 2007 No. 1 determined that geoduck farming does not  
4           constitute any of the items or activities specifically listed as "development" in RCW  
5           90.58.030(3)(d). The Intervenor urge the Examiner to reject AGO 2007 No. 1 and  
6           conclude that geoduck farming constitutes one or more of the listed activities.  
7           Intervenor's Pre-Hearing Brief at 14. The Examiner need only consider these  
8           arguments if he rejects the conclusions of the AGO 2007 No. 1.

9           Taylor will not repeat the legal arguments detailed in its Prehearing Brief that  
10          the Foss Farm operations do not constitute any of the other "development" activities  
11          listed in the statute, including dredging, construction of structures,<sup>18</sup> drilling, removal  
12          of materials, or placing obstructions. Instead, Taylor will only add to the discussion  
13          of the issues of "filling," "removal of materials," and "placing of obstructions" to  
14          address specific factual allegations made by the Intervenor at the hearing.

15                   **a. Geoduck Operations at the Foss Farm Do Not Constitute**  
16                   **"Filling" Under the Definition of Development.**

17          As with the other activities individually listed in the SMA definition of  
18          "development," AGO 2007 No. 1 concludes that geoduck farming activities do not  
19          constitute "filling." *See* Ex. 68, AGO 2007 No. 1 at 6. Despite the Attorney  
20          General's conclusion, Intervenor try to characterize the temporary insertion of the  
21          tubes into the sand as "fill." Transcript, Dec. 13, p. 82, ln. 6-12. The Examiner  
22          should reject this argument. The SMA does not define "fill" or "filling"; however,

23          <sup>18</sup> In its prehearing brief, Intervenor contest the conclusion in the AGO that geoduck farms do not  
24          involve the "construction of structures" and point to the U.S. Army Corps' conclusion that geoduck  
25          apparatus constitute "structures" for purposes of its authority under Section 10 of the Rivers and  
        Harbors Act. *See* Intervenor's Pre-Hearing Brief at 13. The Examiner should reject Intervenor's  
        invitation to rely on an interpretation of a definition from another statute because the SMA provides its  
        own definition of "structures." *Compare* WAC 173-27-030(15) with 33 C.F.R. 322.2. These  
        definitions are different. *Id.*



1 Webster's II New College Dictionary defines "fill" as "to put into as much as can be  
2 held," or "to plug up." The placement of PVC tubes into the substrate simply does  
3 not meet this definition.<sup>19</sup> The Examiner should uphold the Attorney General's  
4 conclusion that geoduck farming does not involve "fill" or "filling."

5 **b. Geoduck Operations at the Foss Farm Do Not Constitute**  
6 **"Removal of Materials" Under the Definition of**  
7 **Development.**

8 AGO 2007 No. 1 concludes that geoduck operations do not constitute  
9 "removal of materials" as used in the SMA. AGO 2007 No. 1 at 7-8. During the  
10 geoduck harvest, the substrate is softened, but not removed. To the extent that any  
11 sediment is removed incident to the removal of each clam, the amount is minimal.  
12 Intervenor argued that the Attorney General's conclusion is incorrect on three factual  
13 grounds. The Examiner should reject each of Intervenor's arguments.

14 First, based on the description of the harvest as lowering the substrate 1-2  
15 inches, Intervenor extrapolate to conclude that 134-268 cubic yards of sand are  
16 removed with a geoduck harvest. Transcript, Dec. 13, p. 79, ln 15 – p. 80, ln. 23.  
17 Intervenor's extrapolation greatly exaggerates the impact of harvest because it is  
18 based on an overly-literal interpretation of two sentences from ECOP, Ex. 51. As  
19 described by Mr. Phipps and Dr. Fisher, only a small segment of the harvested area is  
20 actually lowered. Transcript, Nov. 1, p. 183, ln. 13 – p. 184, ln 20; Transcript, Dec.  
21 13, p. 154, ln. 5 – p. 155, ln 7. A "divot" at the end of each harvest row is lowered,  
22 while the majority of the area that has been farmed is temporarily softened, but not

23 <sup>19</sup> As noted by the Army Corps of Engineers, Seattle Division, which has regulatory authority over  
24 discharge of fill under the Clean Water Act, "normal operations at geoduck farms do not necessarily  
25 result in discharge of dredge or fill material." Ex. 81 at 3. The Corps' interpretation is specific to its  
26 authority under the CWA. However, unlike the definition of "structures" as discussed in note 18, *infra*,  
27 the SMA does not contain its own definition of "fill" or "filling." Therefore, the Corps' interpretation of  
28 those terms in the context of the Clean Water Act is persuasive and supports the AGO's conclusion that  
29 geoduck farming does not involve "fill" or "filling" under the SMA.

1 lowered. *Id.* This phenomenon is depicted in photographs of harvest activities. Ex.  
2 53; Ex. 52(H). In one, Mr. Phipps, himself, is standing in one such divot, but the area  
3 all around him is not similarly lowered. Ex. 52(H). Accordingly, Intervenor's  
4 calculation is flawed because it presumes that the entire area harvested is lowered 1-2  
5 inches, instead of various divots intermittently located in the farmed areas.

6 Intervenor's calculation also fails to account for the animals that are removed  
7 when determining the amount of sediment that is removed.<sup>20</sup> Transcript, Dec. 13, p.  
8 154, ln. 24 – p.155, ln 7; Transcript, Nov. 2, p. 45, ln. 22 – p. 46, ln. 12. Dr. Fisher  
9 testified that the volume represented by the geoduck itself was significant.  
10 Transcript, Dec. 13, p.155, ln 2-7.

11 Second, Intervenor's witnesses presented anecdotal testimony that some of the  
12 sand loosened by the harvest enters the water and is transported by the currents  
13 elsewhere, creating a "sediment plume." According to Intervenor, this "sediment  
14 plume" is evidence of the transport of materials. Transcript, Nov. 2, p. 180, ln. 9 – p.  
15 182, ln 10. Dr. Fisher and Dr. Davis both addressed the veracity of the Intervenor's  
16 characterization of the sediment plume. *See e.g.* Transcript, Dec. 13, p. 153, ln 9-22.  
17 Dr. Fisher has measured turbidity during harvests in nearby waters and concluded  
18 that there is no significant difference in the turbidity between 25 feet offshore down-  
19 gradient from a harvest site and that up-gradient of a harvest site. Transcript, Dec.  
20 13, p. 153, ln. 9-22. By comparison, Intervenor's witness testimony was based solely  
21  
22

23 <sup>20</sup> Removal of geoduck, itself, also does not constitute removal of materials, as was insinuated by the  
24 County. Transcript, Nov. 1 at p. 28, ln 6-9. Otherwise, any removal of shellfish from any property  
25 owner's property would be deemed "development" potentially requiring an SDP. *See, e.g.,* AGO 2007  
No. 1 at 6 ("We find no indication that the SMA has ever treated clam harvesting, alone, as  
development.").

1 on observations of a single photograph which was explained to have been taken  
2 immediately down current of harvesting activities.

3 More importantly, Intervenors' witness' conclusions should be rejected  
4 because they are based on incorrect factual information. While Dr. Parsons testified  
5 about sediments in a photograph, he also testified that he had been told that  
6 harvesting activities were taking place immediately upstream of the photograph.  
7 Transcript, Nov 2, p.182, ln 9-20. In fact no harvest occurred the day the photograph  
8 was taken. The only harvest occurred four days before and approximately 700 yards  
9 away from the site of the photograph. Transcript, Dec. 13 , p. 120, ln. 11 – p. 121, ln.  
10 8. The Examiner should reject Dr. Parson's conclusions and adopt the findings of  
11 Taylor's scientists, which are based on actual investigation of the site.

12 Finally, Intervenors present anecdotal testimony that they have noticed  
13 removal of sand and transport to beaches northwards. *See, e.g.*, Transcript, Dec. 13,  
14 p. 9, ln 16-19. Intervenors attribute this to the operations at the Foss Farm. *Id.*, at p.  
15 8, ln. 12-16. The scientific evidence in the record refutes this claim. Taylor retained  
16 Mr. David Findlay, an engineering geologist, to determine whether the geoduck  
17 operations had been responsible for any beach "mortality," or movement of sand  
18 away from the beach. *See* Exhibit 95. According to his analysis (which included  
19 reviewing historic aerial photographs and site visits), there has been no beach  
20 mortality. *Id.* In fact, he concluded that there were no measurable changes to the  
21 beach due to the geoduck operations. *Id.* Even the Intervenors' expert witness, Dr.  
22 Parsons, after digging test pits on the beaches north of the Foss Farm, found no  
23 evidence of sediment transport onto the neighbors' property. Transcript, Nov. 2, p.  
24 179, ln. 16-23. Thus, despite the neighbor's anecdotal observations, no trained  
25

1 expert, not even Intervenor's own expert, observed the transport of material to  
2 beaches north of the Foss Farm.

3 In sum, there is no credible evidence supporting Intervenor's claim that the  
4 Foss operations result in removal of sediments. Instead, the scientific evidence  
5 supports the Attorney General's conclusion that the geoduck operations at the Foss  
6 Farm do not result in removal of sediments.

7 **c. Geoduck Operations Generally And At the Foss Farm Do**  
8 **Not Constitute "Obstructions" Under the Definition of**  
9 **Development.**

10 AGO 2007 No. 1 concluded that geoduck operations do not constitute  
11 obstructions. As discussed in Taylor's pre-hearing brief, the issue of obstruction  
12 pertains to access to surface water, not, as Intervenor argue, the obstruction of  
13 predators from the geoduck tubes. Appellant Taylor Shellfish Farms Prehearing  
14 Brief, dated Oct. 19, 2007, at 18-19. Taylor will not restate those legal arguments  
15 here. However, even if the Intervenor are correct in claiming that obstruction to fish  
16 is relevant, Intervenor have failed to show, as a factual matter, that any such  
17 obstruction occurs at the Foss Farm.

18 Far from obstructing fish at the site, the actual evidence presented at the  
19 hearing shows that the nets and the tubes create habitat for a variety of species. *See*  
20 Section IV.A.4, *infra*. Photographs show crabs passing freely in and out of the netted  
21 sections. Transcript, Nov. 1, p. 174, ln. 17-22; Ex. 52 (E), (F). Taylor's employees  
22 testified that they observe an abundance of wildlife under the nets that are thriving  
23 when the nets are pulled. Transcript, Dec. 13, p. 107, ln. 1-13. In addition, Taylor's  
24 expert witnesses have conducted both internal reconnaissance and scientific studies  
25 to count the number of species. Transcript, Nov. 2, p. 42, ln. 2-9. The results of the  
studies show more wildlife in the areas with tubes and nets than in areas without. *See*

1 Section IV.A.4, *infra*. The hearing record refutes Intervenor's argument that the tubes  
2 and nets at the Foss Farm constitute obstructions.

3 **3. The County Maintains Regulatory Control Over Geoduck Farms**  
4 **Even if the Examiner Concludes That the Operations at the Foss**  
5 **Farm Are Not Development.**

6 According to AGO 2007 No. 1 and based on the facts presented at hearing,  
7 Taylor's activities at the Foss Farm do not constitute "development" under the SMA.  
8 Intervenor's argue that, as a matter of policy, geoduck aquaculture should be  
9 considered development so that the County can continue to exert regulatory control  
10 over this activity. This policy argument is insufficient to determine the Foss Farm  
11 constitutes development in the absence of evidence of substantial interference with  
12 normal public use of the surface waters. Additionally, the argument is based on faulty  
13 logic.

14 In general, even though geoduck tube aquaculture may not constitute  
15 development under the SMA, local jurisdictions can still impose regulatory oversight  
16 over the activity under the SMA through use regulations or conditional use permit  
17 requirements. *See* AGO 2007 No. 1; *Clam Shacks v. Skagit County*, 109 Wn.2d 91,  
18 94-95, 743 P.2d 265 (1987). *See also* *Kitsap Audubon Soc'y, et al. v. Kitsap County,*  
19 *et al.*, SHB 92-19, 1992 WL 293380 at \*3 (1992). 2) ("Through its Shoreline Master  
20 Program, functioning as use regulations, the County can regulate shoreline uses  
21 regardless of whether they meet the definition of development under the Act."). In the  
22 future, Pierce County could update its Shoreline Management Master Program to  
23 impose use regulations for any use of the shoreline, including geoduck tube  
24 aquaculture, that does not require a substantial development permit.

25 Additionally, the County's enforcement tools continue to provide a method to  
enforce the terms of the SMA and the County's SMP. If the Examiner now

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1 determines that the activities at the Foss Farm do not constitute development because  
2 they do not interfere with normal public use of the surface waters, the County has not  
3 abandoned its regulatory authority under the SMA. Should the activities at the Foss  
4 Farm ever change such that they begin to interfere with the normal public use of the  
5 surface water, the County can bring an enforcement action against the operators for  
6 failure to obtain a SDP. In fact, that is the exact regulatory mechanism under which  
7 the WSF operation was remedied; the County initiated an enforcement action for  
8 failure to obtain a SSP.

9 **V. CONCLUSION**

10 For the foregoing reasons, Taylor requests that the Examiner reverse the  
11 County's Administrative Determination and conclude that Taylor's permit SD 22-00  
12 did not expire. Alternatively, Taylor requests that the Examiner find that Taylor's  
13 activities at the Foss Farm do not constitute development requiring a SDP.

14 Dated this 22<sup>nd</sup> day of January, 2008.

15 GORDONDERR LLP

16  
17 By: 

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TAYLOR SHELLFISH FARMS' POST-  
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# **ATTACHMENT A**

## PROPOSED FINDINGS OF FACT

### Procedural Posture and General Background.

1. In this case, Taylor Shellfish Farms (“Taylor”) appeals an August 8, 2007, Pierce County Administrative Determination (“AD”), Ex. 1(D). Taylor appeals the County’s conclusion that the Shoreline Substantial Development Permit (“SDP”) Taylor obtained in 2000 to establish a commercial geoduck farm expired. Additionally, Taylor appeals the County’s conclusion that Taylor’s commercial geoduck operations constitute development such that a new SDP is required to continue operations.
2. Taylor’s geoduck operation that is the subject of this case is referred to as the “Foss Farm.” It is located on the east shore of Case Inlet/North Bay and is located north of Whitman Cove, approximately ½ mile northwest of Joemma State Park. Ex. 1, County Staff Report at 2; Ex. 48, Vicinity Map; Ex. 50, Parcel Map; Ex. 55, Aerial Photograph. The shoreline is approximately 1 mile long. Transcript of Proceeding Before Terrence F. McCarthy, Friday, November 2, 2007, (“Transcript, Nov. 2”), p. 63, ln. 11-15. North Bay Partnership owns both the farmed tidelands and the adjacent uplands. *Id.* at 62, ln. 5-9. Taylor leases the tidelands from North Bay Partnership. *Id.* at 66, ln. 5-7. North Bay Partnership intervened in this appeal.
3. Taylor applied for the SDP at issue on April 11, 2000. Ex. 56. On December 6, 2000, the Hearing Examiner held a hearing to consider the permit application. Ex. 58, Report of Examiner on Permit SD 22-00. The Examiner issued SD 22-00 on December 28, 2000. *Id.* See also Ex. 59, SD22-00.

### Description of Planting and Harvesting Activities at the Subject Site.

4. In its operations at the Foss Farm, Taylor generally follows the geoduck farming industry’s “best management practices” as documented in the “Environmental Code of Practice” or “ECOP.” Ex. 51. There are several steps involved.
5. First, a crew of Taylor employees stomp tubes into the substrate at low-tide in even intervals. Transcript of Proceedings Before Terrence F. McCarthy, Friday, December 14, 2007, (“Transcript, Dec. 14”), p. 19, ln. 18 – p. 20, ln. 4. Once planted, the tubes protrude from the substrate 2-3 inches. Ex. 1(E) at 2; Ex. 52(B, C and D). Taylor plants approximately 35,000 tubes per acre. Transcript, Dec. 14, p. 17, ln. 1-5. It takes approximately five shifts at low tide (over five days) for a crew of 6-8 people to stomp 50,000 tubes. Transcript, Dec. 14, p. 25, ln. 24 – p. 20, ln. 4. A shift at low-tide lasts approximately four hours. Transcript of Proceeding Before Terrence F. McCarthy, Thursday, November 1, 2007, (“Transcript, Nov. 1”), p. 179, ln. 19.
6. After the tubes are in the substrate, Taylor plants geoduck seed into the tubes and covers the tubes with large canopy nets. Transcript, Dec. 14, p. 20, ln. 8-16; *id.* at p. 22, ln. 12-23. The canopy nets are 50 feet by 50 feet in size. Transcript, Nov. 1, p. 174, ln. 5-16. They are staked into the ground using bent rebar. *Id.*; Transcript, Nov. 1, p. 177, ln. 24-25; Ex. 52(C); Ex. 75(27). The rebar hooks an edge of the netting and is pushed into the sand until the top



of the rebar is flush with the surface of the sand leaving only the curved portion of the rebar exposed. Ex. 75(27). This process of planting and covering with nets takes a crew approximately five days. Transcript, Dec. 14, p. 20, ln. 8-16; *id.* at p. 22, ln. 12-23.

7. The nets and tubes remain in the ground for approximately 1-2 years. Transcript, Dec. 14, p. 27, ln. 1-3. During that time, Taylor crews periodically visit the site to make sure everything is in order and to “seed sample” to measure the growth of the geoduck. Transcript, Dec. 14, p. 20, ln. 17 – p. 21, ln 8. After 1-2 years, Taylor's crew returns to the farm and removes the nets and tubes. Transcript, Dec. 14, p. 27, ln. 1-3.
8. The geoduck is ready for harvest when they grow to approximately 2 lbs. Transcript, Nov. 1, p. 170, ln 14-24. It takes approximately four to seven years from the time of planting for the geoducks to reach that size. *Id.*
9. At harvest, Taylor typically uses a crew of three to six people. Transcript, Nov. 1, p. 179, ln. 13-17. Transcript, Dec. 14, p. 23, ln. 2 – p. 24, ln 12; *id.* at p. 26, ln. 16-23. There are two methods of harvest: beach harvests, which occur at low tide, and dive harvests, which occur under water when the tide is in. Transcript, Nov. 1, p. 182 ln. 24 – p. 183, ln. 12; *id.* at p. 179, ln. 23 – p. 180, ln 3. Taylor uses predominantly beach harvest at the Foss Farm. Transcript, Nov. 1, p. 126 ln. 11-13; *id.* at p. 180, ln. 2-9.
10. During harvest, Taylor employees make their way through a geoduck bed in rows, using a hose to loosen substrate around the geoduck and extract it from the tideland. Transcript, Nov. 1, p. 181, ln18 – p. 182, ln 23; *id.* at 180, ln. 10-19. *See also* Ex. 53. The hose emits water at low-pressure, 50 psi. Transcript, Nov. 1, p. 184, ln. 21 – p. 185, ln. 7; Transcript, Nov. 2, p. 10, ln. 5- 8. The water is emitted at a pressure less than that emitted from a garden hose. *Id.* The process of harvesting softens the substrate in the geoduck bed and creates a “divot” at that end of each row where substrate is slightly lowered. Transcript, Nov. 1, p.183, ln. 13 – p. 184, ln 20; Transcript, Nov. 2 at p. 43 ln. 10 to p. 47 ln 12; Transcript of Proceeding Before Terrence F. McCarthy, Thursday, December 13, 2007 (“Transcript, Dec. 13”)at p. 154, ln. 5 – p. 155, ln 7; Ex. 53; Ex. 52(H). The harvested area returns to a normal state within one to two tidal cycles after harvest. Transcript, Nov. 1, p. 184 ln. 11-20.
11. In the five years succeeding permit issuance, Taylor planted the entire farmable area at the Foss Farm with geoduck seed. Transcript, Nov. 1, p. 169, ln 13-21. However, Taylor did not plant the entire farm in the first year. Instead, Taylor has planted the farm in segments. *Id.*; Transcript, Dec. 13, p. 97, ln 5 – p. 98, ln 15. The crop on each individual segment is referred to as an “age class.” *Id.* Witnesses from Taylor presented an aerial photograph showing the various segments of the farm and the current age classes on each segment. Ex. 154, aerial photograph with markings. The purpose of planting the farm in segments is to ensure consistency for markets. In addition, each crop is vulnerable to a variety of unpredictable factors that impact the survival rate of each crop, including predation, paralytic shellfish poisoning, or inclement weather, such as heavy rains or flooding, that harm the geoduck. Transcript, Nov. 1, p. 169, ln 22 – p. 170, ln 5; Transcript, Dec. 14, p. 17, ln 25 – p. 18, ln 9. Dividing the geoduck into various age classes minimizes this risk. Transcript, Nov. 1, p. 169, ln 22 – p. 170, ln 5. Additionally, Taylor plants the farm in segments due to limited availability of seed. Transcript, Nov. 1, p. 169, ln 22 – p. 170, ln 5.

**Evidence and Testimony Regarding Whether the Permit Expired.**

12. SD 22-00, Ex. 59, includes the following permit conditions regarding timeframes governing the authorization:

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...
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 years.

13. Mr. Booth, the County planner assigned to SD 22-00, described conditions 4 and 5 as “boilerplate” and standard to all the County’s shoreline substantial development permits. Transcript, Nov. 1, p. 15, ln. 18-21. These conditions satisfy the statutory obligations in RCW 90.58.143(2) and (3). Ex. 1(D), Certified Letter to Taylor Shellfish From Pierce County, dated August 8, 2007. Those statutory provisions state:

(2) Construction activities shall be commenced or, where no construction activities are involved, the use or activity shall be commenced within two years of 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 on the substantial development permit and to the department.

(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.  
RCW 90.58.143.

14. At the outset of its operations, Taylor took several actions to establish the Foss Farm in fulfillment of the statutory requirement to initiate use within two years and complete any construction activity within five years. Taylor surveyed the farm and established the farm boundaries. Transcript, Nov. 1, p. 128. Taylor notified relevant Native American Tribes at the outset of its operations that it intended to "create" a shellfish farm on the Foss property. *Id.* at pp. 128-29; Exhibit 74, Att. 1, Letter dated January 24, 2001, from Bill Taylor to David Winfrey, Puyallup Tribe. Taylor also registered the Foss Farm with the Washington Department of Fish & Wildlife ("WDFW"). Transcript, Nov. 1, p. 130. 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."). Taylor also obtained a license from the Department of Health to grow food for human consumption which is based on a water quality assessment. Transcript, Nov. 1, p. 130. Finally, Taylor planted the entire farmable area within five years of permit issuance. Transcript, Nov. 1 at p. 169, ln 13 – 21; Ex. 154.
15. There is evidence that the County's current position is inconsistent with its historic interpretation of the duration of SD 22-00. The County previously indicated that SD 22-00 did not expire, both orally and in writing, to Taylor representatives as well as representatives of the opposition Neighborhood Associations that have appeared in these proceedings. Ty Booth, the County's representative who handled the County's permit for Taylor, indicated to Taylor, several times, that the permit did not expire. Transcript, Nov. 1, pp. 17-18. Mr. Booth acknowledged in testimony that he was the planner responsible for the permit and "closest contact" Taylor has had at the County. Transcript, Nov. 1, p. 17, ln. 1-8. Additionally, Vicki Diamond, Supervisor of Pierce County Current Planning, provided the same interpretation in writing when approached by members of the opposition Intervenors, at her County e-mail address. Exhibit 66, E-mail Thread between V. Diamond and L. Hendricks, dated 5/22/2006. When asked whether the permit expired, Ms. Diamond stated that it did not. In her response she spoke on behalf of the County Planning Department, indicating, in the plural possessive, that "we have not placed expirations." *Id.* Both Mr. Booth and Ms. Diamond were approached in their official capacities for an official opinion.
16. There is evidence that Taylor would not have initiated or continued its operation on the Foss Farm, but for those prior County interpretations. Transcript, Nov. 1, p. 105, ln. 11 – p. 106, ln. 3. Mr. Phipps testified that if Taylor is unable to continue its operations at the Foss Farm, it will leave over \$20 million in geoduck in the ground, incapable of harvest. Transcript, Nov. 1, p. 171, ln. 17 – p. 172, ln. 6.
17. Additionally, there is evidence that the County knew of Taylor's intent to establish an ongoing geoduck operation. In its application materials Taylor stated its intent to establish "ongoing" geoduck operations at the Foss Farm, once the farm was established. In its application, Taylor indicated the activities would be "on-going." Ex. 56. Similarly, in several of the decision documents, the County acknowledged Taylor's request for authorization to conduct on-going activities. Specifically, in its Staff Report, filed on December 1, 2000, the County staff repeatedly acknowledges that the PVC tubes "would be removed approximately one year after the geoduck is planted. The pipe would not be reinstalled on the beach for approximately four years, at the time when new geoduck are

planted.” Ex. 57 at 3, 6, 9. At the hearing on the permit application, the County again repeated its understanding that the activities at the farm would be ongoing. Ex. 58 at 2.

18. Taylor presented evidence of other SDPs authorizing geoduck operations in which Pierce County included provisions that preserve an opportunity for the County to periodically review the operation in light of any new or evolving science. Ex. 69; Ex. 70 at 18. Specifically, the permit requires that the permit and conditions “shall be reviewed in five years from the effective date of approval by the Hearing Examiner to examine the impacts of operations and each of these conditions.” See Ex. 69 at 3-4; Ex. 70 at 18.
19. Mr. Brad Murphy, a wetland and shoreline specialist in the Southwest Regional Office of the Department of Ecology testified generally regarding County authority to limit permit duration. Transcript, Nov. 1, p. 66, ln 15-24. Mr. Murphy had no involvement with the issuance of SD 22-00, nor did he have any knowledge of the specific site or operation. *Id.* at p. 65 ln. 19 – p. 66, ln. 1. Mr. Murphy indicated that *if* the County had determined the activity was development, that an SDP would be required and that Pierce County has the authority to limit the duration of the SDP. Transcript, Nov. 1, p. 66, ln 15-24. Mr. Murphy did not state an opinion as to whether or not the County had limited the duration of SD 22-00. Furthermore, Ecology has not taken an official position that geoduck operations, in fact, are development under the SMA and has instead convened a stakeholder group to assess the issues. Transcript, Nov. 1, p. 108, ln. 1-7. There is evidence that the state agencies, including Ecology and Natural Resources, have specifically not adopted a position that geoduck operations are necessarily development, consistent with an opinion of the attorney general. See Transcript, Nov. 1, p. 106, ln. 18 – p. 108, ln. 8; Ex. 79, E-mail from Sarah Dzinbal, DNR to T. Clingman, Ecology.

#### **Evidence and Testimony Regarding Whether the Operations Constitute Development.**

20. Both Taylor and the Intervenor presented testimony and evidence regarding whether the activities at the Foss Farm constitute “development” such that a SDP is required. The SMA defines development as:

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

21. Recently, two legal authorities have considered the applicability of this definition in the context of geoduck farming operations. In 2006, the Court of Appeals upheld the Hearing Examiner’s decision that a particular geoduck operation interfered with normal public use of surface water such that it constituted development and required a shoreline substantial development permit. *Washington Shell Fish v. Pierce County*, 132 Wn. App. 239, 131 P.3d 326 (2006). More recently, the Attorney General has reviewed geoduck operations on a broader scale and in light of the Court’s holding in *Washington Shell Fish*. See AGO 2007 No. 1 (“AGO”), Ex. 68. The AGO first determined, consistent with *Washington Shell Fish*,

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

22. Witnesses presented testimony and evidence characterizing the nature of the public use at the Foss Farm. At the Foss Farm, the nature of any public use is limited. The Foss Farm is on tidelands in front of approximately one mile of undeveloped of private property. Ex. 55; 52(J); Ex. 75(10) and (17-25); Ex. 50. The farmed tidelands are on a private beach and are approximately ½ mile away from the nearest public beach at Joemma State Park to the south. County Staff Report at 2; Transcript, Nov. 1, p. 192; Ex. 50; Ex. 52(A). The farm is not in the immediate vicinity of any normal points of public access. Transcript, Nov. 1, p. 187, p. 192. The closest public access point to the water is the boat launch at Joemma State Park. *Id.* Taylor does not use the public point of access or moor boats in that vicinity. Transcript, Vol. 1, p. 191, ln. 25 to p. 192, line 3. Therefore, the only “normal” public uses of the surface water is limited to boating activities when initiated from an off-site point of access.
23. By contrast, there is evidence that the public’s use of the surface waters in the vicinity of the WSF operation, was much more significant. Unlike the Taylor operation at the Foss Farm, the WSF farm was located in an area that is very developed in direct proximity to public uses and access points. *Compare* Ex. 54 with Ex. 55. *See also* Transcript, Nov. 1, p. 111, ln. 4-16. Much of the tidelands Washington Shell Fish farmed were leased from the County and were on a public beach. *See* AGO at 6. *See also* Ex. 54; Ex. 48; Transcript, Nov. 1, p. 189, ln. 25 – p. 190, ln. 3. Those portions of the WSF farm that were not on public beach were on private tidelands that were not owned by the upland beach front owners. Transcript, Nov. 2, p. 111, ln. 6-10. As a result, those portions of the WSF farm on private tidelands were immediately between the beach front owners and the water. Additionally, unlike the Foss Farm, portions of the WSF farm were located immediately in front of prime public points of access for recreational use of the water. Transcript, Nov. 1, p. 111, ln. 4-16 and p. 187, ln. 17 – p. 190, ln. 11. Unlike the Foss Farm, the WSF operation used the public access point and associated parking lot for its business purposes, restricting the public’s capacity to use the access point. Ex. 64, Hearing Examiner decision at 20. The recreational use at the location of the WSF farm was particularly established because it was considered to be a unique and major public amenity – the area’s unique site conditions made it one of the premier windsurfing spots in the northwest. Ex. 62 at 122; Ex. 60, Declaration of Robert C. Paradise at 1; Ex. 64 at 11. Windsurfers launched directly over the farm. *Compare* Ex. 62, at 119, 124 *with* Transcript, Dec. 13 at p. 51, ln 7 (Intervenors’ witness acknowledges that they “have not seen windsurfers” in the vicinity of the Foss Farm). The WSF operation was openly hostile towards the established recreational uses and, at times, sought to prohibit and deliberately interfere with the recreational use. Ex. 62 at 121-22, 124.
24. Witnesses presented evidence and testimony regarding whether the PVC tubes interfere with normal public use of the surface waters. The tubes which are covered with canopy nets protrude only 2-3 inches above the surface of the tideland. *See, e.g.*, Ex. 52(B, C and D). Taylor also uses several PVC tubes that are smaller in diameter to mark its geoduck beds.

Transcript, Nov. 1, p. 193, ln 2-11. These protrude several inches from the ground. *Id.* While one witness for the Intervenor testified that the tubes interfered with her capacity to boat over the tube fields or float over the tube fields, the testimony was speculative. Transcript, Nov. 2, p. 84, ln. 22 – p. 85, ln. 4. The witness, Ms. Leudtke, admitted that she never actually had tried boating or floating in the vicinity of the Foss Farm. Transcript, Nov. 2, p. 101, ln. 10 – p. 102, ln. 6. Testimony from other witnesses was to the contrary. Transcript, Nov. 1, p. 193, ln. 17 to 194, ln. 15; Transcript, Dec. 14, pp. 41-42; Transcript Dec. 13, pp. 155-156; Ex. 52(K, L). Witnesses commented that their capacity to kayak, for example, was not inhibited by the tube fields. *Id.* Even the testimony of one of Intervenor's witnesses, Ms. Pinneo, acknowledges that they could freely paddle over and past the tube fields in order to obtain access to the private beach and complain to the workers. Transcript, Dec. 13, p. 54, ln 22-25; *id.* at p. 58, ln. 3 - 7.

25. By contrast, the WSF operation used objects to mark the bounds its operation that were extremely dangerous to recreational users of the surface water. These include cement filled garbage cans. Ex. 62 at 120; Ex. 64 at 11; Ex. 62 at 128. Also, WSF used "signs" consisting of smaller cement-filled cans with protruding five-foot long PVC pipes. Ex. 61, Declaration of William A. Garrison, at 2 and Att 1; Ex. 60 at 2; Ex. 64 at 11; Ex. 62 at 128. These objects were particularly dangerous to recreational boaters and swimmers because, at high tide, the objects would sit just below the surface of the water and would be an unexpected impediment that could cause significant injury or death. Ex. 62 at 120; Ex. 64 at 11; Ex. 62 at 128; Ex. 61, at 2; Ex. 60 at 2; Ex. 64 at 11; Ex. 62 at 128. Taylor does not use any similar markers at the Foss Farm.
26. Witnesses presented evidence and testimony regarding whether the predator exclusion nets used at the Foss Farm interfere with normal public use of the surface waters. Evidence presented at hearing shows that Taylor has refined its methods of securing netting over the years to ensure that the nets do not come loose to create a hazard. Taylor secures the netting using rebar bent into the shape of a candy cane that is pushed into the tidelands. Transcript, Nov. 1, p. 177, ln. 24-25; Ex. 52(C); Ex. 75(27). The rebar is more closely spaced than at most other operations to ensure that the netting stays secure. Transcript, Nov. 1, p. 179, ln. 2-12. The maintenance crews are onsite with frequency to ensure that the netting is secure. *Id.* at p. 178, ln. 13-24; p. 168, ln. 6-15. Finally, Taylor uses a different kind of netting that does not float up and is not likely to ensnare boaters or swimmers, even if the securing mechanism comes loose. Transcript, Dec. 13, p. 106, ln. 15-24. Witnesses testified that there have been no problems with nets coming loose since implementing this system. Transcript, Nov. 1, at p. 179, ln. 9-12; Transcript, Dec. 13, p. 106, ln. 11-14.
27. Intervenor's witnesses presented testimony regarding nets used at the site. The testimony presented speculative concerns. None of the witnesses described an instance in which the netting actually came free to trap a swimmer, a diver or a boat. *See, e.g.*, Transcript, Nov. 2, p. 101, ln. 10 – p.102, ln. 6; Transcript, Dec. 13, p. 26, ln 4-15. At best, Intervenor's witnesses' fears were based on experiences with other operations that use other types of netting. *Id.* In those instances, the same witnesses were not familiar with the methods Taylor used at its facility. *See, e.g.*, Transcript, Dec. 13, p. 26, ln. 21 – p. 27, ln 3. Additionally, much of Intervenor's testimony on this subject was contested. For example, one of Intervenor's witnesses testified to photographs allegedly depicting areas where the

nets had come loose and washed up. Ex. 150(3); Transcript, Nov. 2, p. 83, ln. 5-15. However, it was later demonstrated that the photographs were taken while the Taylor employees were in the process of removing the nets. Transcript, Dec. 13, p. 104, ln. 19 – p. 105, ln. 24. Rather than evidence of nets coming loose, Intervenors had actually presented photographs of an area in which Taylor had removed the nets as part of the bed maintenance. *Id.*

28. Witnesses presented evidence and testimony regarding whether Taylor used rope at the Foss Farm in such a way as to interfere with normal public use of the surface waters. Rope is only used at the Foss Farm for one of two purposes. First, Taylor uses 100 yards of thin baling twine during planting at low tide as a guide to measure out rows of tubes and ensure the rows are straight. *See, e.g.*, Transcript, Nov. 1, p. 192, ln. 21-22. Second, in the rare instances in which Taylor conducts a dive harvest, rather than a dry harvest, Taylor uses lengths of rope as a guide on the bottom to keep the diver from straying out of the vicinity of the planted tract. Transcript, Nov. 1, p. 192, ln. 5-18. However, those ropes are weighted ropes and do not float. *Id.* They are removed after the harvest. *Id.*
29. By contrast, in the WSF case there was testimony that the operation left “thousands of feet” or “miles” of nylon rope in the water which would come loose and float near the surface of the water and entangle boats, and windsurfers, causing injury. Ex. 60 at 2. See also Ex. 64 at 11
30. Intervenors presented witness testimony of evidence of a long length of rope at the Foss Farm. Transcript, Nov. 2, p. 90, ln. 13-19; Ex. 150(32). However, on rebuttal, a Taylor employee clarified that the photograph actually depicted an effort by Taylor to address concerns of members of the Intervenors. Transcript, Dec. 13, p. 110, ln. 8 – p. 111, ln. 9. Specifically, the photograph shows Taylor’s efforts to try new methods of securing the canopy netting by means other than the rebar, at the request of the members of the Intervenors. *Id.* In the instance depicted in the photograph, Taylor had tried to secure weighted rope along the sides of planted beds and attach the netting to the rope with plastic rings. *Id.* The method did not work, because the canopy netting was able to move along the length of the rope, much like a shower curtain, and would bunch up. *Id.* Taylor removed the rope and did not try that method again. *Id.* Significantly, even in that one instance, the rope was weighted and would not float. *Id.*
31. Witnesses presented evidence and testimony regarding whether the rebar used to secure nets at the Foss Farm interfere with normal public use of the surface waters. The rebar Taylor uses to secure its netting hooks an edge of the netting and is pushed into the sand until the top of the rebar is flush with the surface of the sand, leaving only the curved portion of the rebar exposed. Ex. 75(27). In this state the rebar is comparable to nearby rocks or shells.
32. Intervenors’ witnesses pointed to photographs showing rebar left in a different state, extending out from the sand, with a majority of the length of the rebar exposed. *See, e.g.*, Ex. 76(39); Ex. 151; Ex. 150(31). However, according to testimony of Mr. Phipps of Taylor, these photographs depict the rebar in a temporary condition and are evidence of one of Taylor’s techniques to ensure that the rebar is responsibly removed and not left at the site. Transcript, Nov. 1, p. 176, ln. 25 – p. 177, ln. 11; Transcript, Dec. 13, p. 111, ln. 21 – p. 114,

In. 20. When removing the netting at low tide, Taylor employees pull the rebar out. *Id.* Rather than discarding the rebar, where it would be easy to overlook and leave behind, Taylor employees are trained to plant the pulled rebar into the sand, upright, where it is plainly visible to the employees. *Id.* Upon the completion of the net removal, before the tide comes back in, the employees collect the upright rebar for removal from the site. *Id.* The three photographs of rebar relied upon by witnesses for Intervenors were taken at times when Taylor was pulling nets. Their state in those photos can be attributed to that activity. Transcript, Dec. 13, p. 112, ln. 19 – p. 114, ln. 20.

33. Witnesses also presented evidence and testimony regarding the amount of debris created at the Foss Farm. Intervenors presented testimony of miscellaneous debris, but there was no objective evidence connecting this debris to Taylor's Foss operation. For example, the only nets described to have washed up were either marked as belonging to a different operation or were cover nets for individual tubes, nets that Taylor no longer uses at the Foss Farm. Transcript, Dec. 13, p. 38. Transcript, Nov. 1, p. 178, ln. 6-12. Similarly, the testimony of tubes at the bottom of the water indicated they were found near the boat launch at Joemma State Park in the proximity of a different farm. Transcript, Dec. 13, p. 123, ln. 20 – p. 124, ln. 17. Mr. Phipps identified the tubes as being of a tube size used by the proximate farm, but not by Taylor. Transcript, Dec. 13, p. 122, ln. 20 – p. 124, ln. 17.
34. By contrast there was significant evidence in the WSF case of debris attributable to the WSF operation that interfered with normal public use of the surface waters. For example, as noted above, the operation would frequently lose rope or netting in the water that could ensnare recreational users of the water. Similarly, the WSF operation used pins to mark the bounds of the individual beds that would come loose and injure recreational users of the beach. Ex. 62 at 141; Ex. 64 at 9, 12; Ex. 62 at p 18, 114.
35. To address debris issues, Taylor and others in the industry conduct a biennial beach clean up. During this event they walk miles of shoreline, including the miles of shoreline that are not farmed, and clean up debris. Taylor keeps detailed records of the debris recovered and itemizes the aquaculture gear. Transcript, Dec. 13, p. 115, ln 14 – p.117, ln 5. The records of the most recent biannual beach cleanup demonstrate that the amount of debris attributable to aquaculture operations is a mere fraction of the debris recovered. *Id.* at p.116, ln 21 – p. 117, ln. 5. Taylor found only a small amount of rope along ten miles of shoreline but recovered four and a half cubic yards of non-aquaculture debris. *Id.*
36. Witnesses presented information and testimony regarding the extent to which Taylor's use of boats interferes with normal public use of the surface waters. Taylor's business records demonstrate that the use of boats at the Foss Farm is limited in duration. Transcript, Dec. 13, p. 108, ln. 2 – p. 109, ln. 8. Taylor uses the boats during harvest or planting activities. *Id.* When not in use at the Foss Farm, the boats are either at another location or moored elsewhere. *Id.* Over the period in question, Taylor's records establish that one to two boats were collectively moored during activity at the Foss Farm for only 40 days over five months. *Id.* By contrast there are nine mooring buoys to the north, clustered in front of the residences. Transcript, Dec. 13, p. 109, ln. 9-20. To the south there are seven mooring buoys clustered near Joemma State Park. *Id.* With specific reference to the buoys to the



north, testimony established that boats are consistently moored at the buoys from May through September. *Id.*

37. By contrast, the boat use in the WSF case was significantly more extensive. The WSF operation exclusively used dive harvest, during which boats stay moored in the water above the divers, thereby blocking passage. Transcript, Nov. 1, p. 126, ln. 8-20. Additionally, WSF harvested wild geoduck, such that their work window was significantly broader than Taylor's. Ex. 64 at 20. Indeed, there was testimony that WSF would "launch every day to work in the area." *Id.* The WSF boats used the same point of access to the water as the public and the boats would moor directly in front of the public access point. *Id.* There was evidence that WSF kept boats moored at the site, in front of the public access point, even when not in use. Ex. 60 at 20. WSF would continually fly diver flags off the boats – at one point for seven months straight – warning others to stay away from the area, even when no divers were working. Ex. 64 at 20.
38. Witnesses also presented evidence and testimony regarding the extent to which the operation at the Foss Farm impacts recreational fishing. According to the testimony of Taylor's expert witnesses, Dr. Fisher and Dr. Davis, there is a significant body of scientific evidence supporting the conclusion that fish are attracted to the site and actually use the aquaculture gear as habitat. *See* Transcript, Dec. 13, p. 131, ln. 21 – p.134, ln 22; *id.* at p. 134, ln. 5 – p. 135, ln. 19; *id.* at 185, ln. 4-20; Transcript, Dec. 14 at p. 9, ln 13–19; Transcript, Nov. 2, p. 29, ln. 1 – p. 42, ln. 9; Ex. 100; Ex. 106; Ex. 115; Ex. 117; Ex. 120; Ex. 131. Without the gear, there is very little suitable habitat in the area. Transcript, Dec. 13, p. 135, ln. 2-19. Therefore, the fish congregate in the vicinity of the tubes. *Id.* Accordingly, these same expert witnesses who are also fishermen, testified that they have purposefully targeted aquaculture sites when fishing recreationally because of their conclusion that there are likely to be more fish in the vicinity. *Id.* While Intervenor's expert witness, Mr. Daley, presented testimony to the contrary, Mr. Daley's testimony was based on limited research. Transcript, Nov. 2, p. 126, ln. 17-25. Mr. Daley also acknowledged that he had predetermined concerns regarding geoduck operations prior to initiating his research. Transcript, Nov. 2, p. 153, ln. 3-12. Mr. Daley also acknowledged that he had not read the studies upon which Taylor's experts relied, Transcript, Nov. 2, p. 131, ln. 15. Finally, while Mr. Daley voiced a concern that recreational fishermen could have their lures caught up in the aquaculture gear, *id.* at p. 129, ln. 5-9, he acknowledged that the risk of getting the lure caught up in the gear was comparable to the risk of getting the lure caught on the bottom. *Id.* at p. 150, ln 1 - 6.
39. For purposes of determining whether the operation at the Foss Farm constitutes "removal of materials," or "dredging" or "filling," witnesses presented evidence and testimony regarding the amount of sediment that is allegedly removed at a geoduck harvest. On behalf of Intervenor, Ms. Hendricks presented testimony that a harvest on 1 acre would result in removal of 134-268 cubic yards of sand. Transcript, Dec. 13, p. 79, ln 15 – p. 80, ln. 23. Intervenor's testimony is based on an overly-literal interpretation of two sentences from ECOP and presumes that the entire farmed acre will be lowered 1-2 inches after harvest. However, as described by Mr. Phipps and Dr. Fisher, only a small segment of the farmed area is lowered after harvest. Transcript, Nov. 1, p. 183, ln. 13 – p.184, ln 20; Transcript, Nov. 2, p. 43, ln. 10 – p. 47, ln 12; Transcript, Dec. 13, p. 154, ln. 5 – p. 155, ln 7. Harvests create a "divot" at the end of each harvest row which is temporarily lowered, while the

majority of the area that has been farmed is temporarily softened, but not lowered. *Id.* This phenomenon is depicted in photographs of harvest activities. Ex. 53; Ex. 52(H). In one, Mr. Phipps is standing in one such divot, but the area all around him is not similarly lowered. Ex. 52(H). Accordingly, Dr. Fisher and Mr. Phipps demonstrated that Intervenor's calculation is flawed because it presumes that the entire harvest area is lowered 1-2 inches, instead of various divots intermittently located in the farmed areas. Moreover, even if Intervenor's were correct in their presumption that the entire area is lowered 1-2 inches, their calculation does not take into account the animals that are removed when determining the amount of sediment that is removed. Transcript, Dec. 13, p. 154, ln. 24 – p.155, ln 7.

40. Intervenor's witnesses presented anecdotal testimony that some of the sand loosened by the harvest enters the water and is transported by the currents elsewhere, creating a "sediment plume." According to Intervenor's expert witness, Dr. Parsons, this "sediment plume" is evidence of the transport of materials. Transcript, Nov. 2, p. 180, ln. 9 – p. 182, ln 10. The testimony was based on photographs allegedly showing "scum" in the waters that purported to be near a harvest site. Transcript, Nov 2, p. 182, ln 9-20. The factual information that he was presented and upon which his conclusions are based was contested. While Dr. Parsons testified that he was told the harvesting activities were taking place immediately upstream of the photograph, Transcript, Nov 2, p. 182, ln 9-20, Mr. Phipps testified based on business records that there was no harvest that day. Transcript, Dec. 13, p. 120, ln. 11 – p. 121, ln. 8. The only harvest occurred four days before and approximately 700 yards away. *Id.*
41. Dr. Fisher and Dr. Davis both addressed the veracity of the Intervenor's characterization of the sediment plume. *See e.g.* Transcript, Dec. 13, p. 153, ln 9-22. Dr. Fisher has measured turbidity during harvests in nearby waters and concluded that there is no significant difference in the turbidity between 25 feet offshore down-gradient from a harvest site and that up-gradient of a harvest site. Transcript, Dec. 13, p.153, ln 9-22.
42. Additionally, on the issue of alleged sediment transport, Mr. McCormick and Ms. Pinneo, both neighbors living north of the Taylor farm, present anecdotal testimony that they have noticed removal of sand and transport to beaches northwards. *See, e.g.,* Transcript, Dec. 13, p. 9, ln 16-19; *id.* at p. 63, ln. 21 – p. 64, ln. 7. Intervenor's attribute this to the operations at the Foss Farm. *Id.* at p. 8, ln. 12-16. Mr. David Findlay, one of Taylor's expert witnesses presented a scientific study that rebutted these anecdotal observations. Transcript, Nov. 2, p. 57, ln 13 – p. 59, ln. 1. Mr. Findlay was retained to determine whether the geoduck operations had been responsible for any beach "mortality," or movement of sand away from the beach. *See Exhibit 95.* According to his research (which included reviewing historic aerial photographs and site visits) he concluded that there had been no beach mortality. *Id.* He concluded that there were no measurable changes or differences to the beach due to the geoduck operations. *Id.* Even the Intervenor's expert witness, Dr. Parsons, after digging test pits, found no evidence of sediment transport from the Foss Farm to the neighbors' property. Transcript, Nov. 2, p. 179, ln 16-23.
43. Finally, witnesses presented evidence and testimony regarding whether Taylor's operations constitute obstructions because of the alleged impacts on fish. The Foss Farm does not impair fish use of the site. Transcript, Nov. 2, p. 29, ln. 1 – p. 42, ln. 9; Transcript, Dec. 13, p. 131, ln. 21 – p. 134, ln 22; Ex. 100; Ex. 115; Ex. 117; Ex. 120. In fact, Dr. Fisher's

testimony, and the scientific studies he discussed, indicated that the geoduck gear at the Foss site likely attracted fish by providing structured habitat for fish usage. *Id.* In addition, the testimony of David Troutt, the Nisqually Tribe's fisheries biologist, indicated that spawning geoduck provide an important food resource for salmon. Transcript, Dec. 14, p. 9, ln 13-19. Photographs show crabs passing freely in and out of the netted sections. Transcript, Nov. 1, p. 174, ln. 17-22; Ex. 52 (E), (F). Taylor's employees also testified that they observe an abundance of wildlife under the nets that are thriving when the nets are pulled. Transcript, Dec. 13, p. 107, ln. 1-13. In addition, Taylor's expert witnesses have conducted both internal reconnaissance and scientific studies to count the number of species. Transcript, Nov. 2, p. 42, ln. 2-9. The results of the studies show more wildlife in the areas with tubes and nets than in areas without. Transcript, Dec. 13 at p. 143, ln. 8 – p. 145, ln. 6.

### **Evidence Regarding Additional Environmental Issues.**

44. Additionally, though it is not relevant to the issues on appeal, Intervenors presented testimony regarding alleged potential impacts of geoduck farming. The actual evidence at the hearing failed to show any significant negative environmental impact associated with geoduck farming. Indeed, the testimony actually showed that geoduck farming likely has a positive impact on fish species.
45. The Foss Farm does not negatively impact forage fish. Dr. Fisher's testimony indicated that the habitat limitation for surf smelt and sand lance is a limitation on spawning habitat. Surf smelt and sand lance spawn at a significantly higher tidal elevation than the geoduck operations at the Foss Farm. Transcript, Dec. 13, p. 137, ln. 18 – p. 140, ln 4.
46. In terms of harvest impacts, Dr. Fisher's testimony demonstrated that the harvest of geoduck did not significantly impact benthic life. Transcript, Dec. 13, p. 142, ln. 17 – p. 145, ln. 22; Ex. 91. The testimony of Dr. Fisher and Mr. Goodwin also indicated that the turbidity impacts associated with geoduck harvest are not environmentally significant. Transcript, Nov. 2, p. 43, ln. 10 – p. 47, ln 12; Transcript, Dec. 13, p.153, ln 9-22; Ex. 141; Transcript, Dec. 13, p. 206, ln 12-19. Indeed, as previously noted, Dr. Parsons, Intervenors' expert witness, testified that he dug test pits on the beaches north of the Foss Farm in an effort to find that sediment was transported from the Foss site to those northern beaches. He was able to find no such evidence. Transcript, Nov. 2, p. 179, ln 16-23.
47. With regard to sediment liquification, Dr. Fisher's testimony demonstrated that compaction of sediments in a harvest area was comparable to unharvested areas within one or two tidal cycles. Transcript, Dec. 13, p. 140, ln. 5 – p. 143, ln. 7; *id.* at p. 145, ln. 23 – p. 148, ln. 8. While Dr. Parsons claimed that an area that had been harvested was "bombed out" several weeks after harvest, Transcript, Nov. 2, p. 179, ln. 3-6, the testimony of Dr. Fisher and Mr. Phipps made clear that Dr. Parsons could not possibly have investigated any geoduck harvest areas, as those areas were below the lowest tidal level on the day Dr. Parsons was on the site. Transcript, Dec. 13, p. 98, ln. 16 – p. 99, ln. 13. The area that Dr. Parsons investigated had never been planted with geoduck because it was infested with ghost shrimp, which cause the sediments to become loose and unconsolidated. Transcript, Dec. 13, p. 99, ln. 13 – p. 102, ln. 25; Transcript, Dec. 13, p. 146, ln. 5 – p. 148, ln. 8.
48. With regard to impacts from the filtration and biodeposition of the geoducks at the Foss Farm, Dr. Davis testified that, on a per acre basis, the filtration and biodeposition at the Foss Farm is similar to what would be seen at an oyster farm growing single oysters, and approximately 20% of the filtration and biodeposition that occurs at a typical clustered oyster

bed. Transcript, Dec. 13, p. 176, ln. 19 – p. 183, ln. 18; Ex. 126; Ex. 127. Farming of clustered oysters has been occurring in this state for over 80 years, and no negative environmental impacts have been attributed to the filtration and biodeposition associated with clustered oyster farming. *Id.* at p. 181, ln. 3-13. And both Mr. Goodwin and Mr. Troutt testified that the density of geoduck found at the Foss Farm is within the range of densities seen in the wild. Transcript, Dec. 14, p. 9, ln. 20 – p. 11, ln. 21; Transcript, Dec. 13, p. 200, ln. 14 – p. 201, ln. 25.

49. With regard to genetic impacts, Dr. Davis testified to the measures in place at Taylor's hatchery to ensure that the geoduck seed ultimately planted at the Foss Farm is genetically diverse. Transcript, Dec. 13, p. 183, ln. 21 – p. 184, ln. 25. Dr. Davis also testified that these hatchery management practices essentially eliminate the risks to wild geoduck populations when the geoduck seed is planted. *Id.* This testimony was uncontroverted.