

PUBLIC HEARING BY THE PIERCE COUNTY HEARING EXAMINER

In Re:)
)
Administrative Appeal: AA16-07)
Taylor Shellfish Farms)
)
)

**Transcript of Proceeding
Before Terrence F. McCarthy
Friday, November 2, 2007**

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1 **BE IT REMEMBERED** that the continuation of the
2 Hearing of Administrative Appeal AA16-07 was held on Friday,
3 November 2, 2007, at 9:10 a.m., at Pierce County Public
4 Services Building, Public Meeting Room, 2401 South 35th
5 Street, Tacoma, Washington, before Linda M. Grotefendt,
6 Notary Public in and for the State of Washington.

7
8 **THE HEARING EXAMINER:** Good morning, everyone.
9 Please be seated. I apologize to you for being so tardy
10 this morning. I had a double vaccine last night, and my
11 body doesn't like them real well, so I'm a little bit slow
12 in moving.

13 In any event, what I'd like to know, first of all, is,
14 how are we doing as far as a target to finish this up?

15 **MS. GUERNSEY:** Jill Guernsey. For the record, the
16 only thing I would want to say is we don't have any other
17 witnesses to present.

18 **MR. PLAUCHE:** And Samuel Plauche, for the record,
19 for Taylor Shellfish. We'll finish up with Mr. Phipps, and
20 I think we just have one or two more questions for him, and
21 then we'll go to cross. And then we're just going to put on
22 two additional witnesses after that.

23 And then, I believe Mr. Kimball is going to put on Ms.
24 Foss as a witness. So I would assume that we would finish
25 that, collectively, barring significant cross-examination,

1 by noon.

2 THE HEARING EXAMINER: By what?

3 MR. PLAUCHE: By noon.

4 THE HEARING EXAMINER: Really?

5 MR. PLAUCHE: And move into Mr. Bricklin's case.
6 That's my hope -- maybe.

7 THE HEARING EXAMINER: Mr. Bricklin?

8 MR. BRICKLIN: well, with some luck, we might get
9 done today.

10 THE HEARING EXAMINER: with luck, huh?

11 MR. BRICKLIN: Yeah.

12 THE HEARING EXAMINER: Keep me posted.

13 MR. BRICKLIN: Yes.

14 MR. PLAUCHE: And I would just add: As I said in
15 my opening, we may have some rebuttal case, depending on
16 kind of how he goes with his case.

17 THE HEARING EXAMINER: well, I think, for the
18 convenience of all of us, if we have to continue this, we
19 should recognize that and not, you know, work till 5:00 or
20 5:30 tonight when it would be useless to do so. Do you
21 understand what I'm saying?

22 MR. PLAUCHE: I do. I do.

23 MR. BRICKLIN: Yeah. We should check in towards
24 the end of the afternoon and see how we're doing. May I
25 inquire: would your preference be for oral closing

1 arguments, or written closing arguments?

2 THE HEARING EXAMINER: Well, I usually let the --

3 MR. BRICKLIN: The attorneys decide?

4 THE HEARING EXAMINER: -- the attorneys decide what
5 they prefer.

6 MR. BRICKLIN: All right. We'll talk about it
7 during one of the breaks.

8 THE HEARING EXAMINER: And writing is really --
9 actually, I guess I prefer writing, when you come down to
10 it, but oral is okay too.

11 MR. BRICKLIN: All right. Thank you.

12 MR. PLAUCHE: Thank you.

13 MS. GUERNSEY: I just have one preliminary matter.
14 Yesterday, you asked Ty Booth about the burden of proof, and
15 I just wanted to reference you to his Staff Report.

16 THE HEARING EXAMINER: Uh-huh. Which I have
17 located, incidentally. They did find it for me.

18 MS. GUERNSEY: Okay. And he addresses that at the
19 bottom of Page 5. He sets forth the County Code section
20 that deals with that.

21 THE HEARING EXAMINER: Thank you.

22 MR. BRICKLIN: One other item, Your Honor. I've
23 provided you with a copy of our exhibits. They're numbered
24 2 to 47. I previously provided the exhibit list, in an
25 electronic version, of those documents to the other counsel.

1 THE HEARING EXAMINER: Thank you. And those
2 exhibits will be admitted into evidence.

3 MR. BRICKLIN: Thank you.

4 THE HEARING EXAMINER: Are you ready to proceed?

5 MR. KISIELIUS: Yes. We'd like to ask Mr. Phipps
6 to come back up to the witness stand, please.

7 THE HEARING EXAMINER: You've been previously sworn
8 in, sir. You're still under oath.

9 MR. PLAUCHE: I'm sorry, Mr. McCarthy. One
10 preliminary thing, for our clarification purposes. Are you
11 admitting all of the Intervener's exhibits, or will you
12 admit them sequentially, if and when they come in?

13 And it's relevant to our rebuttal case. There's some
14 documents in there that I'm not sure whether he'll use or
15 how he'll use them, that we may want to respond to.

16 THE HEARING EXAMINER: I'll retract my admission.
17 I'll do them one at a time.

18 MR. PLAUCHE: Thank you.

19
20 BRIAN PHIPPS, having been previously sworn
21 upon oath by the Hearing Examiner, testified as follows:

22
23 DIRECT EXAMINATION - (continuing)

24 BY MR. KISIELIUS:

25 Q Mr. Phipps, when we left, we had one last line of questions

1 I wanted to explore with you.

2 THE CLERK: You need to put the microphone on.

3 THE WITNESS: I'm holding it.

4 THE CLERK: Okay.

5 Q Could you remind us? Yesterday, we talked a little bit
6 about the hose that you use during geoduck harvest. Can
7 you remind us again what the pressure is of that hose?

8 A The water pressure of our hose is 50 PSI.

9 Q Okay. And at the close of the day, I was going to enter
10 into evidence the Intervener's Exhibit Number 36.
11 (Produces to witness and attorneys.)

12 THE HEARING EXAMINER: 36 will be admitted into
13 evidence.

14 Q Mr. Phipps, as you know, the Interveners have made the
15 argument that the hose that you use is akin to a drill, and
16 they've submitted this as part of their exhibit list.
17 Could you read the title of this document?

18 A "The Cutability of Rock Using High-Pressure Water Jet."

19 Q And could you please read, in the last paragraph on that
20 first page, the sentence beginning "high-pressure water
21 jets"?

22 A "High-pressure water jets, in this sense, normally refer to
23 pressures between 10 and 400 MPA."

24 Q And what is an "MPA"?

25 A It's a megapascal.

1 Q So when you're comparing -- because you had previously
2 used, for the hose that you use for harvesting -- you had
3 talked about PSI and MPA. Have you converted those? Do
4 you know, for example, what 10 MPA would be?

5 A 10 megapascal is 1450 PSI. And the high range of 400 is
6 58,000 PSI.

7 MR. KISIELIUS: Thank you. I've got no further
8 questions for you.

9 THE HEARING EXAMINER: Anybody else?

10 MS. GUERNSEY: No.

11

12

CROSS-EXAMINATION

13 BY MR. BRICKLIN:

14 Q Mr. Phipps -- this is Dave Bricklin again. At the
15 beginning of your testimony, I thought I heard you say that
16 there were three crews that you had that worked the
17 facility: a planting crew, a harvesting crew, and what was
18 the third one?

19 A The planting crew, harvesting crew, and a maintenance crew.

20 Q Maintenance. Now, the purpose of the tubes and the nets is
21 to obstruct predators from getting into the geoduck seed
22 that you planted; is that right?

23 A Correct.

24 Q And then you recognize, in addition to obstructing the
25 predators, there's also some incidental interference with

1 animal life that occurs. Things that aren't predators get
2 blocked by or caught in those nets at times, too, right?

3 A Correct.

4 Q Let me ask you about the areas that you've planted and the
5 timing of the planting. As I understand it, you've sort of
6 divided the leased area into blocks and planted different
7 blocks in different years. Is that right?

8 A Correct.

9 Q And you started in '01. Is that what you said?

10 A Yes, sir.

11 Q And have you planted a block each year? Do you do this on
12 an annual basis, or do you divide it up into annual
13 increments?

14 A Yes, we have, up to 2006.

15 Q And have you planted a block in '07 also?

16 A We actually put the tubes in and then pulled the tubes out.
17 We did not plant.

18 Q So you started a planting operation. Why did you not
19 follow through on that planting in '07?

20 A We weren't sure if we were going to have enough seed to
21 finish planting those tubes, so we stopped.

22 Q Okay. So you didn't even do it partway. You --

23 A Yeah, we put the tubes in the ground. Yes, sir.

24 Q But I mean, did you put seeds in any of them, or none at
25 all?

1 A No, sir, we didn't.

2 Q I see. So from '01 through '06, you planted different
3 blocks and put the seeds in those tubes?

4 A Correct.

5 Q And including the tubes that you put in in '07, although
6 you didn't use them, were any of those areas a repeat of an
7 area that you had seeded earlier, or were those all new
8 areas as you marched your way down the beach?

9 A That was a repeat planting in areas that we had already
10 planted before.

11 Q They were repeats?

12 A Yes, sir.

13 Q To do a repeat, you must have harvested the area already,
14 right?

15 A Correct.

16 Q So the '01 area, you harvested when?

17 A In '05 and '06.

18 Q '05 and '06? Then you replanted it in '06?

19 A It would have been the end of '05 and '06, yes, sir.

20 Q I see. And then, the area that you planted in '02 -- did
21 you harvest that already?

22 A In 2002, we planted a fairly large chunk, and we had to
23 replant it in 2003 (sic), because, in 2002, we put in --
24 and I don't have my records, but approximately two acres.
25 And we had 20,000 -- 20,000 geoducks out of our 300,000 to

1 survive that year. So we had to replant 2002 in 2004.

2 Q okay.

3 A okay?

4 Q Yes. I think I follow you.

5 A okay.

6 Q And so those haven't been harvested yet?

7 A The 2004?

8 Q The 2002 got replanted in '04.

9 A 2002 got replanted in '04, and they have not been

10 harvested, correct.

11 Q And the '03s? Have they been harvested yet?

12 A They have not. we did samples this summer, and they

13 weren't large enough to start harvesting yet.

14 Q So you would do those next year?

15 A Hopefully, yes. Either late -- this summer -- late next --

16 or late next fall or early next fall.

17 Q All right.

18 A Sorry.

19 Q That's okay. And the '07 tubes that you put in, although

20 you didn't use them, where were those located vis-a-vis the

21 earlier plantings?

22 A That would have been in the '01 planting, the first '01

23 planting. we replanted '07 in '01 (sic).

24 Q Is there any part of the lease area that you anticipate

25 planting at some time that you haven't planted yet?

1 A No, sir.

2 Q In terms of what it constitutes to do the initial
3 development of the lease area, apart from the paperwork
4 stuff, all the permitting and so forth that Ms. Cooper
5 testified about yesterday, studies and that -- but in terms
6 of physically developing the area, what is involved in that
7 before you get to actually putting the tubes in the ground?
8 I think I heard that there was staking of the corners of
9 the lease area. Is that right?

10 A The staking of the corners is actually done by a surveyor,
11 of the property boundaries.

12 Q All right.

13 A We personally will go out and look for, like, fresh-water
14 seepage -- I'm sorry -- fresh-water seepage, the proper
15 substrate, see what kind of predators are in the area;
16 basically, try to learn the area, learn the farm.

17 Q All right. So my question is: In terms of installing the
18 facility, is there any physical action you take to install
19 the facility prior to actually putting the tubes in the
20 ground? Or is the putting the tubes in ground -- that is
21 the installation of the facility?

22 A I will go out myself, a couple times, before we install
23 tubes. But other than that, it's --

24 THE HEARING EXAMINER: Installation?

25 THE WITNESS: -- the tubes are beginning of the

1 farm, yes.

2 Q You go out to survey the -- correct?

3 A Correct.

4 Q But you're not actually doing any work out there?

5 A Surveying is work. I mean --

6 (Laughter.)

7 THE WITNESS: I mean -- sorry, sir.

8 Q Right, but you're not installing anything?

9 A Correct.

10 Q Okay. Thank you for that clarification. Now, you provided
11 some testimony yesterday regarding volumes and numbers,
12 quantities of geoducks out there. And I may have misheard
13 what you said, or something didn't compute for me, so let
14 me see where I made my error here. I thought you said that
15 you had 9,000 geoducks in the ground now. That might be
16 the wrong number right there.

17 A We planted 900,000.

18 Q 900,000. I missed two zeros. All right. 900,000. And is
19 that describing the entire planting from '01 to the
20 present, or is that an annual figure, or what is that?

21 A That's from '03 to '06.

22 Q '03 to '06?

23 A Yes, sir.

24 Q So in terms of what's in the ground now, that's 900,000
25 that's been planted?

1 A Right.

2 Q I got it. All right. And would those, what, cover about
3 roughly eight or 10 acres?

4 A Yeah. I would say more like -- yeah, 10 acres.

5 Q 10 acres.

6 A Yes, sir, correct.

7 Q Now, in the photographs that you were looking at yesterday,
8 on Exhibit 52 -- I'm looking at Photograph C and D in that
9 array, and those photographs show the canopy netting; is
10 that right?

11 A Yes, sir, that is.

12 Q And the canopy netting in those photos is the area covered
13 with green; is that right?

14 A Correct.

15 Q And that green is, what, algae?

16 A Yes. Or seaweed.

17 Q Or seaweed?

18 A Yes.

19 Q All right. And is that typical, that seaweed or macroalgae
20 grows over those canopy nets?

21 A Yes, sir.

22 THE HEARING EXAMINER: I know the exhibit he's
23 talking about. I've seen it. Keep going. Thank you.

24 Q All right. Now, when you describe the harvesting, did you
25 say that the harvesting continues for only nine days at a

1 time?

2 A In the tidal series, yes. Beach harvesting does.

3 Q Beach harvesting does?

4 A Yes.

5 Q And so then you switch to --

6 A A dive harvest.

7 Q Right. So in terms of an area resident viewing things from
8 the shore and seeing commercial activity out there, whether
9 it was beach harvest or tidal harvest, how long would they
10 see the harvesting activity persist?

11 A It depends on how many pounds you are harvesting and the
12 market.

13 Q And what's the range? What's the shortest? What's the
14 longest period of time that you're out there?

15 A Oh, on -- on this site, we harvested 40,000 pounds -- it
16 was 41,000 pounds this last year, and our crews can
17 harvest, on average, 3500 to 4,000 pounds a day, so 10
18 days, on this particular site.

19 Q Did you maintain a barge out at that location for a longer
20 period of time than that?

21 A Our barge was left out there -- we have left it out not
22 longer than 10 days, but it's -- it was left -- if -- I
23 think your -- the pictures, it was put out on April 22nd,
24 is the day we harvested -- or the 21st, we harvested, and
25 it was removed in the beginning of May and moved up to

1 North Bay. So it could have been left longer than 10 days,
2 yes, sir.

3 Q But it's your testimony that it was not left more than two
4 or three weeks? Is that what you're saying?

5 A No. It hasn't been left more than two or three weeks at
6 that point, no.

7 Q And has it been removed and then brought back a short
8 period of time later?

9 A Yes, it has.

10 Q All right. On Exhibit 53 -- do you have that one in front
11 of you also?

12 MR. KISIELIUS: (Produces exhibit to witness.)

13 Q This (indicating)? On the first page of that collection,
14 is that harvester standing in a hole that's been created?

15 A Yes, he is.

16 Q So that hole is about, what, thigh deep, or knee to thigh
17 deep, something like that?

18 A Knee -- knee deep. Usually, they sit, and their knees are
19 bent underneath them -- their feet are bent underneath
20 them, so if...

21 MR. BRICKLIN: Let me grab something here. Just a
22 second. I guess that's all I have for this witness. Thank
23 you.

24 THE HEARING EXAMINER: Thank you, Mr. Phipps.
25 Anybody else?

1 MS. GUERNSEY: No.

2 MR. KIMBALL: One moment, please.

3 THE HEARING EXAMINER: Certainly.

4

5 CROSS-EXAMINATION

6 BY MR. KIMBALL:

7 Q Have you received any complaints from the neighbors when
8 you've been --

9 THE CLERK: I can't hear you.

10 MR. KIMBALL: Thank you.

11 Q Have you received complaints from neighbors when you've
12 been out there?

13 A No, I have not.

14 Q So, from your testimony, I take it that this track -- the
15 harvesting that occurred in '07 was late April to early
16 May?

17 A That was the end of it, yes, sir.

18 Q It started earlier than that?

19 A Yes, sir, it did.

20 Q But approximately 10 to 11 actual days of harvest?

21 A Correct. The Foss farm in the '0- -- the harvest that we
22 did in '07 -- it was under a deeper level of the tide, and
23 there were only certain days that we could get to it.

24 Q Okay. One thing I didn't understand from your testimony
25 is: You have different blocks that you've planted in

1 different years. Do they proceed in any certain order down
2 the beach, north to south?

3 A Yes. They start -- it would be -- 2003 is here
4 (indicating); '4, '5, and then 2006 is here, because we're
5 going back to where we planted in 2001.

6 Q And where was 2001 planted?

7 A 2001 was planted in front of the cabin, just -- it would be
8 north of the cabin, in this area right here (indicating).

9 Q "Cabin." You're talking about the Foss cabin?

10 A Yes, the cabin just at the access road. Correct, sir.

11 Q I'm assuming that, when you park your barge there, it's
12 because you're coming back the next day or within a couple
13 of days?

14 A Yes.

15 Q And you park it relatively close to where your actual
16 harvest is going on?

17 A Yes, sir.

18 Q How many yards would that be from the northern extremity of
19 the Foss property boundary?

20 A We were harvesting in this area, right here, and the
21 northern -- 3- or 400 yards? I mean, without going out
22 there and looking, that would be my best estimate here.

23 Q So close to a quarter mile, possibly?

24 A Yes.

25 Q And the southern boundary of your planting, I think you

1 said, was 800 yards from the boundary with the State park?

2 A Yes, sir.

3 Q So almost half a mile?

4 A Yes, sir.

5 Q would you look at -- let me hand you 52-0 and ask you
6 whether you've seen what is depicted in that picture.

7 A This is a picture of the park boundary, signed, as you're
8 standing on the opposite side of the Foss farm, at the
9 park, looking north towards the Foss property.

10 Q And so that is posted by the park? That looks like an
11 official sign.

12 A Yes, sir, it is.

13 Q The Park Department tells people that this is private
14 property to the north?

15 A Correct.

16 Q Okay. And if we could exchange that for 52-P, I'm going to
17 ask you whether you have seen any signs of that nature.

18 A Yes, sir, I have.

19 Q where?

20 A On the Foss property, at the high-tide mark, up on the
21 shoreline.

22 Q So it's been posted "private property"?

23 A Yes. There is several signs.

24 MR. KIMBALL: Thank you. I don't have anything
25 further.

1 THE HEARING EXAMINER: Anybody else? Thank you,
2 Mr. Phipps.

3 MR. KISIELIUS: Actually, I'm sorry. If I could
4 just make a few clarifications on redirect.

5

6 REDIRECT EXAMINATION

7 BY MR. KISIELIUS:

8 Q Just to be clear, the 2007 tubes that you planted -- do any
9 of them remain on the Foss property?

10 A I think we got them pulled. We finished pulling them this
11 last big series of tides.

12 Q To the north, where there's that residential development,
13 are there any mooring buoys there?

14 A Yes, sir, there are.

15 Q And are there boats moored there?

16 A Yes, sir, there are.

17 Q How long are they moored there?

18 A Most of the summer.

19 MR. KISIELIUS: Thank you.

20 THE HEARING EXAMINER: I'm familiar with the area.
21 Thank you, Mr. Phipps. We appreciate your coming forward.
22 Call your next witness.

23 MR. PLAUCHE: We'd like to call Dr. Jeff Fisher,
24 please.

25 THE HEARING EXAMINER: Dr. Fisher.

1 wouldn't choke today.

2 **Q** Could you please describe your current position of
3 employment?

4 **A** I am a managing principal for the Pacific Northwest
5 operations of Environ International Corporation. We're an
6 environmental science and research consulting firm.

7 **Q** And can you talk a little bit about the scope of your
8 responsibilities at Environ?

9 **A** Well, as the managing principal, I essentially oversee the
10 Portland and Seattle operations of our group. We're
11 relatively new to the Pacific Northwest, although all of
12 our scientists have been working up here for quite some
13 time, and the company's been around 25 years.

14 So in that capacity, I have some administrative
15 duties, probably more than I like; and, also, we're very
16 much a focused firm that examines scientific questions. So
17 I work on projects such as this.

18 **Q** And where were you employed prior to coming to Environ?

19 **A** I was employed as a senior scientist for Entrix, which is
20 another environmental firm. And I was with them for about
21 six and a half years, with a sabbatical I took, halfway
22 through there, as a science fellow with -- American
23 Association for the Advancement of Science fellow, where I
24 was posted to the State Department, in D.C., for two years,
25 and was the State Department's lead on managing the

1 invasive species portfolio.

2 I was also the representative for the National
3 Invasive Species Council and on the Aquatic Needs and
4 Species Task Force in that capacity.

5 Q So I want to focus just a little bit, briefly, on your
6 fisheries activity, your experience with fisheries issues.
7 Can you talk a little bit about what you do in your current
8 capacity with regard to fisheries, analysis of fisheries,
9 and impacts on fisheries?

10 A Certainly. It is the mainstay of what I do, day in, day
11 out. My client base is roughly 50/50, public and private.
12 I work, for example, of behalf of NOAA and U.S. Fish and
13 wildlife Service, evaluating major projects and their
14 potential effects on listed threatened and endangered
15 species.

16 For example, right now, I serve as technical
17 intermediary between the Washington State Department of
18 Transportation and NOAA, advising Washington Department of
19 Transportation on the potential significance of the 520
20 Bridge actions and the widening of that project, or the
21 widening of that bridge and all the other associated
22 construction that goes along with that project. I'm sure
23 I'll be doing that for some time.

24 (Laughter.)

25 Q okay. Can you talk a little bit about how you go about --

1 kind of, the methodology for analyzing fisheries impacts?

2 A Yes. When we're looking at these types of actions, I'm
3 looking, really, at what type of ecological services might
4 be compromised by a proposed action. As it relates to
5 salmonids, our listed salmonid species, or the Chinook and
6 other listed species of relevance locally, there are
7 obviously specific controlling factors that we look at. In
8 short, we try to deconstruct the project action and look
9 at: How did the different elements of a project affect the
10 controlling factors of the environment that are important
11 to the listed species fulfilling their life-history stages?

12 So anything that might interfere, perhaps, with
13 reproduction, with feeding, with rearing or refuge;
14 anything that might lead to direct mortality, or indirect
15 mortality, both in the short term, such as during a
16 construction phase, and/or during the long term, such as
17 in: Once you've built it, then the impact persists, as in
18 the case of the 520 Bridge.

19 Q Okay. Can you talk a little bit, briefly, about your work
20 on mollusk and shellfish issues?

21 A I have -- I've been engaged for -- off and on, to evaluate
22 different environmental -- well, I've assisted Taylor
23 Shellfish, a variety of other growers, and the Pacific
24 Coast Shellfish Growers Association, in evaluating various
25 actions. We -- I was a coauthor on a programmatic

1 biological assessment of the geoduck -- intertidal geoduck
2 culture operations.

3 In 2004, I was the senior scientist that developed the
4 architecture for the study. And then, essentially, I went
5 on sabbatical, so I wasn't engaged in doing the field work
6 that went into that product. But I scoped it out and did
7 senior review once the work was ongoing.

8 I have worked -- I prepared other biological
9 assessments in accordance with Section 7 of the Endangered
10 Species Act. For example, for Taylor's expansion of their
11 floating upwelling nursery system in Oakland Bay. And I've
12 -- I think I work -- through my work with NOAA, I serve,
13 again, as representative, in this case, for the Growers
14 Association, but I tend to work with a lot of the same
15 types of scientists with the regulatory branch of NOAA, in
16 helping them to understand the array of operations that are
17 -- for example, I think it was mentioned yesterday that
18 there's Nationwide Permit 48, which captures all existing
19 shellfish culture operations and for which there is ongoing
20 consultation right now, with the federal services, under
21 the Endangered Species Act.

22 And please stop me if I -- if I babble on too long or
23 if I say some biological term that doesn't fit, all right?

24 Q Thank you. I'd like to just kind of shift the testimony
25 now and ask you a couple of questions about some of the

1 specific issues that have been raised in these proceedings.
2 And one of the issues that has been raised by the
3 Interveners is an allegation that the geoduck aquaculture
4 that's used on this site, or the Foss farm, obstructs fish
5 use of that area. Have you taken a look at that issue?

6 A I have.

7 Q And can you just briefly capture your findings on that
8 issue? Thank you.

9 A Well, as -- as -- as the operations are practiced
10 currently -- I'll reflect on some of the past work we've
11 done, some of the other work that other scientists have
12 done, and work that's been done and contained in other
13 assessments.

14 As it relates to fish use and obstruction, we
15 generally, when we look at obstructing, physical structures
16 that might obstruct migration, these are bulkheads, these
17 are major overwater structures that create shading, that a
18 fish perceives and alters his migratory path as a result of
19 that.

20 There is really nothing in the context of the
21 operations, that I have reviewed, that rise to that. These
22 are -- these aren't structures in that context, and they do
23 not have at -- at the location where they are placed, it's
24 just -- it's not --

25 You know, the shorter answer is I don't see them as

1 blocking migratory pathways or creating those types of
2 obstructions. And, in fact, probably the opposite.

3 Q Okay. I'd like to just introduce a couple of exhibits here
4 with you, and I don't want to dwell on them too much, so
5 I'm going to collapse four studies that I think are
6 similar. And that's going to be Exhibit 100, Exhibit 115,
7 Exhibit 117, and Exhibit 120. (Produces to witness.)

8 Okay. Are you familiar with those studies, Dr.
9 Fisher?

10 A I am.

11 Q Okay. And could you briefly describe what those studies
12 looked at?

13 A Mr. Examiner, I'll start with 100. We'll just go in
14 sequence.

15 Q And just to kind of move along, I don't necessarily want to
16 go into a lot of detail on each of them. If we can kind of
17 capture it in an overview, that would be great.

18 A Yes, sir.

19 THE HEARING EXAMINER: Exhibit 100 will be admitted
20 into evidence.

21 THE WITNESS: Exhibit 100 is a study entitled "The
22 Role of Oyster Reefs as Essential Fish Habitat: A Review of
23 Current Knowledge and Some New Perspectives." And just so
24 that, Mr. Examiner, you understand what the term "essential
25 fish habitat" means in this context, it has a regulatory

1 connotation as recognized under the Magnusen/Stevens
2 Fisheries Conservation Act, and it simply constitutes any
3 habitat for fish populations or shellfish populations for
4 which there has been a federally developed fisheries
5 management plan that is essential for that species to
6 reproduce, to thrive, etcetera.

7 In this case, this was a reviewed study where they were
8 simply evaluating an array of different oyster-reef
9 development projects and -- along the East Coast and Gulf
10 Coast, to evaluate whether or not the reefs and the oyster
11 populations contained with them -- rather the reef structure
12 created by the oysters, the structured habitat, would
13 constitute essential fish habitat.

14 And they summarized here the extensive use by -- by, I
15 think, roughly 78 different fish species, and I can't
16 remember the total number of shrimp and other mobile
17 invertebrates, of these reef structures. And that
18 essentially went into the -- how it is that they provide
19 that essential fish habitat, the three-dimensional array, if
20 you will, that is created by the structured habitat of an
21 oyster reef. Is that sufficient?

22 Q Yes.

23 A I'll try to keep things moving.

24 Q Thank you.

25 A Okay. The -- the next paper is more of a --

1 THE HEARING EXAMINER: Is that 115?

2 THE WITNESS: 115.

3 THE HEARING EXAMINER: That will be admitted into
4 evidence.

5 THE WITNESS: 115 is a research paper,
6 specifically, a West Coast study, done in Willapa Bay,
7 entitled "Habitat Associations of Estuarine Species,
8 Comparisons of Intertidal Mudflat, Seagrass, and Oyster
9 Habitats."

10 And in this case, they were examining what -- they were
11 examining what we call "epifauna," that which grows on these
12 types of structures or in types of structured habitat. And
13 they compared mudflat to eelgrass, seagrass, and oysters in
14 this case, and essentially found that the densities of the
15 epifauna were higher in the structured habitat, and, in this
16 context, that that was the oysters or the eelgrass -- both
17 considered structured habitat.

18 The fish responded to the habitat structure, actually,
19 in this case, more at a geographic scale. Mobile fish --
20 there wasn't a whole lot of -- for the mobile invertebrates
21 and fish, there wasn't a whole lot of -- or significant
22 selection of the habitats, one way or another.

23 So I think it somewhat reflects differences in reef
24 structures between how we raise oysters on the West Coast,
25 in Willapa Bay, versus how they're grown out on the East

1 Coast. Essentially, higher densities of epifauna associated
2 with the structured habitat, and, as I recall, yeah, the --
3 there really wasn't a preference in this case, a significant
4 preference, when they ran the statistics, in the fish and
5 shrimp species' richness, which is the number of species
6 that you identify in a certain area, based upon the areas
7 that they looked at.

8 The next study is one in which they evaluated -- and
9 it's entitled "Testing The Potential" -- this is 117.

10 THE HEARING EXAMINER: This will be admitted into
11 evidence.

12 THE WITNESS: This next study is titled "Testing
13 the Potential Effects of Shellfish Farming on Swimming
14 Activity and Spacial Distribution of Sole in a Mesocosm."
15 And a mesocosm, Mr. Examiner, is just essentially sort of a
16 representative type of environment in which -- it's larger
17 than a test tube, but it's not the grand environment -- the
18 largest environment. So this is tested, essentially, in the
19 environment, but in a localized area.

20 In this study, they basically tagged, with
21 hydro-acoustic tags, sole, and evaluated the use, of the
22 sole, of three different types of habitats. One was with
23 oyster trestles. A second was essentially without any cover
24 on the sand bottom. And the third -- let me refresh my
25 memory real quickly (perusing documents). Oh, yeah. The

1 third was with oyster bags.

2 And in brief, in this case, what they found was a
3 preferential use of the structured habitat provided by the
4 oyster trestles and bag environments over that -- and this
5 is for the number of fish that they evaluated, it wasn't for
6 every single fish -- but significantly higher numbers were
7 using the oyster trestle and spent more time under the
8 structured habitats created by the oyster culture techniques
9 than what's found in the sand flats.

10 During the daytime -- sole are primarily nocturnal
11 feeders, so during the daytime, they would seek refuge
12 within this structured habitat.

13 Q Is that all four?

14 A No. There's one more. Still going. The final study here,
15 evaluating reef functionality --

16 THE HEARING EXAMINER: 120 will be admitted.

17 THE WITNESS: 120.

18 THE HEARING EXAMINER: Uh-huh.

19 THE WITNESS: -- is entitled "Oyster Reef Habitat
20 Restoration; Relationships Between Oyster Abundance and
21 Community Development, Based on Two Studies in Virginia and
22 South Carolina."

23 The premise -- or the question that they were trying to
24 evaluate in this study was whether or not the size of the
25 reef or the size of the oysters in the reef had any

1 controlling factors on the ability of that reef to support
2 or attract fish and invertebrates and epifauna.

3 Two different study designs. One was in a subtidal
4 location. The other was in an intertidal location. And
5 give me just a moment to reflect my one -- some of their --
6 they -- they -- because the areas were so different, they
7 used correlation analysis and were able to identify that,
8 indeed, the bigger the reef structure, the greater the -- in
9 general, the greater the species richness, the number of
10 species using the site, and -- and the greater the
11 diversity, both in fish use and epifaunal abundance.

12 I think the implication for this was looking at the
13 function of oyster reefs, which are largely promoted, by
14 many government agencies and NGOs, as very beneficial
15 ecological restoration projects. And it was designed to try
16 to look at: well, how are we -- if we're promoting this as
17 an ecological restoration, what are the functions we're
18 trying to provide and what is being provided?

19 Q Each of these studies deals with oyster reefs. But does
20 that relate at all to your conclusions regarding the
21 geoduck aquaculture activities, to the nets and their
22 effect on fish-migration habitat obstruction?

23 A well, I think you could draw some parallels, in that the
24 reef structures provide -- the reef, you know, is
25 structured habitat, and, essentially, the -- the tube field

1 and the netting over the tube field provides structured
2 habitat for the settlement of algae that you've seen on the
3 photographs. Those habitat changes attract a different
4 variety of species than would otherwise be able to persist
5 in a sand-flat environment that's highly dynamic.

6 Q I'm going to hand up to you what's been marked as Exhibit
7 106.

8 MR. PLAUCHE: And I'd ask that 106 be admitted into
9 evidence.

10 THE HEARING EXAMINER: It will be admitted into
11 evidence.

12 Q Are you familiar with this study?

13 THE HEARING EXAMINER: 106 is admitted? Thank you.

14 THE WITNESS: I am.

15 Q Could you briefly describe the study?

16 A The study -- should I --

17 Q Read the title. Yeah.

18 A Okay. The study is entitled "A Comparative Evaluation of
19 the Habitat Value of Shellfish Aquaculture Gear, Submerged
20 Aquatic Vegetation, and Nonvegetated Seabed." And it's
21 written by D.L. Paris (phonetic), et al., and it evaluated
22 the role of aquaculture gear as structured habitat and
23 compared that role relative to submerged aquatic vegetation
24 and an unvegetated seabed in Rhode Island.

25 The gear that they were looking at was modified rack

1 and bag culture gear, that's used in the grow-out phase of
2 the Eastern oyster. The submerged aquatic vegetation was
3 the same species as our native eelgrass here, but they were
4 focusing on the Zostera Marina. And the nonvegetated
5 seabed was, you know, principally a sand -- sand bed.

6 They looked at the abundance and diversity of
7 organisms associated with the gear and essentially found
8 increased -- significantly increased richness. The highest
9 levels of richness and diversity -- or richness and
10 abundance in the zones of submerged aquaculture gear. The
11 intermediate values were in the seagrass beds, and the
12 least richness, the lowest levels of richness and
13 abundance, in the sand-flat areas -- or the nonvegetated
14 seabed, rather.

15 Q And I'd ask again: How do those conclusions translate to,
16 if at all, the geoduck aquaculture operations at the Foss
17 farm?

18 A Well, there is -- there is gear used in the raising of
19 geoduck, as has -- Mr. Phipps had discussed. And in that
20 context, the gear is acting as a structured habitat because
21 it's creating a three-dimensional relief in an environment
22 that those of you that walk on a sand beach recognize there
23 isn't a whole lot of.

24 So in that context, it provides the opportunity for
25 the settlement of -- of organisms: barnacles, etcetera,

1 and other associated epibiota that would not necessarily be
2 able to persist. The overlaying of the -- of the tubes, by
3 a predator netting -- or antipredator netting, as it is
4 called, further allows for an increase of the diversity,
5 literally underneath the -- underneath the netting as well
6 as on top of the netting; both through settlement on the
7 nets and the opportunity for settling underneath the net
8 during dispersal mechanisms that are largely responsible
9 for the distribution of the benthic fauna.

10 Q And on that point, I'm going to hand you what's been marked
11 as Exhibit 131.

12 THE HEARING EXAMINER: Did we change books here?
13 Let me check. Yes.

14 MR. PLAUCHE: I pulled them out so I didn't have
15 the binder-collapse problem, so I'm not sure.

16 (Laughter.)

17 MR. PLAUCHE: No offense. I learned.

18 THE HEARING EXAMINER: Binders are awkward. Very
19 helpful, but they're awkward. Exhibit 130?

20 MR. PLAUCHE: 131.

21 THE HEARING EXAMINER: Okay. I think I've got it
22 here. Got it. Thank you.

23 Q And --

24 MR. PLAUCHE: I'm sorry.

25 THE HEARING EXAMINER: Go ahead.

1 MR. PLAUCHE: And this is the last exhibit on this
2 point.

3 Q And, again, this, I think, goes to what you were just
4 talking about, with the potential habitat value of predator
5 netting. Can you describe this study?

6 A Yeah. The study is entitled "Macroalgae Growth on Bivalve
7 Aquaculture Netting Enhances Nursery Habitat for Mobile
8 Invertebrates and Juvenile Fishes," and it was written very
9 recently, and it's published this year, by Monica Powers
10 and three other co-authors.

11 It describes a study that was conducted in South
12 Carolina, where they essentially evaluated the use of -- of
13 four different treatment types: an unvegetated sand flat,
14 an eelgrass bed, a -- without clams and clam netting, and
15 two treatments with clams. One actually had an exclusion
16 net to keep out rays, which like to eat clams.

17 THE HEARING EXAMINER: Uh-huh.

18 THE WITNESS: So a vertical exclusion net as well
19 as netting over individual bags. And then the other one was
20 without that ray exclusion device.

21 And so, essentially, what they were looking at -- and I
22 think I'm just going to summarize a couple of their key
23 findings here -- the -- the numbers of mobile invertebrates
24 over 11 dates -- and this is a two-year study, so it was a
25 fairly intensive study -- were 75 times greater in the

1 seagrass habitat than in the sand flat.

2 The structured habitat that was attached to the bottom
3 mesh provided in the clam beds increased the invertebrates'
4 density by 44-fold over the unstructured sand-flat habitats.

5 The use by fishes, juvenile fishes, was three times
6 greater in the seagrass relative to the sand flats and,
7 depending upon the time at which the data were collected, it
8 was roughly three to seven times greater in the structured
9 habitat created by the clam -- clam beds, and with a range,
10 also, reflecting the difference in the types of the clam
11 beds relative to the two treatments.

12 So, essentially, the beds, they conclude, are providing
13 what you would call biogenic habitat. It's structured
14 habitat from which additional bioorganisms will be
15 attracted, will be enabled to survive, and they create, in
16 essence, a different community structure than was there
17 before. By most researchers' ecological metrics, they would
18 agree that that increase in biodiversity is a good thing.

19 Q And just to kind of encapsulate all of the studies that
20 we've handed out, again, your conclusion on the Foss site,
21 as to whether or not the geoduck aquaculture gear obstructs
22 fishes at the site?

23 A Again, I -- I don't see how there is a mechanism for
24 obstruction. Interesting. I mentioned the work that I've
25 been doing for NOAA. There was a very recent presentation

1 given by Roger Taylor as part of the 520 Bridge project.
2 Salmonids are -- if you picture them swimming along the
3 shoreline, as they are apt to do--especially the smaller
4 ones--they are -- in Lake Washington, we have a very big
5 problem with milfoil, an invasive weed. So, normally,
6 they're going to orient to the position of the bottom.

7 In this case, you know, they're not a vertical issue
8 that they're trying to avoid. They aren't dodging a shade
9 pattern or whatnot. But they are orienting to the
10 structure, and in this case, the hydro-acoustic tracking
11 has shown, very interestingly, that they're perceiving and
12 utilizing the top couple of inches of the milfoil.

13 So they aren't going way down into the milfoil. It's
14 not really obstructing, per se. That's their orientation,
15 so...

16 Q And have you been out on the Foss site?

17 A I have.

18 Q And have your observations, when you've been on the site --
19 have they confirmed or rebutted your conclusion about
20 obstruction of fish?

21 A I was out on the site in late August, and I would say they
22 confirmed my -- my -- my testimony today. I -- I kayaked,
23 both -- very near shore, around the site. I was able to
24 see both areas where they were planning on harvesting or
25 areas that they had stopped harvesting because of the

1 current condition as well as areas that were overlain by
2 predator netting, and I saw those areas again when they
3 were inundated with water.

4 And while I have no qualitative metric to be able to
5 speak to you about, because this was just reconnaissance,
6 there was a clear increase in fish. It appeared to be
7 mainly scup around the perimeter and on top of the netting
8 as I was kayaking over it, relative to adjacent sand-flat
9 areas where that -- that structured habitat did not exist.

10 Q Thank you. Okay, I'd like to move on to, now, just a
11 second allegation from the Interveners. They've also
12 argued that the sediment transport offsite associated with
13 the harvest of geoduck results in a removal of materials,
14 and I'd like you to talk a little bit about that. I'm
15 going to hand you what's been marked as Exhibit 141.

16 MR. PLAUCHE: I'd ask that 141 be admitted into
17 evidence.

18 THE HEARING EXAMINER: 141 will be admitted into
19 evidence.

20 Q Are you familiar with that document?

21 A I am.

22 Q Could you briefly describe that document?

23 A This is a Final Supplement Environmental Impact Statement
24 that was prepared by the Washington State Department of
25 Natural Resources and the Department of Fish and wildlife

1 in 2001, that evaluated the State's commercial geoduck
2 fishery. They examined -- this is subsequent to, I think,
3 the original EIS that was published in '85 or so, to
4 further analyze potential effects and environmental
5 responses from the subtidal geoduck harvest.

6 Q And did that study look at sediment-transport issues?

7 A It did. It did.

8 Q Can you briefly describe the findings in that setting in
9 terms of sediment transport associated with the wild
10 harvest?

11 A Right. Well, the -- the -- they evaluated the method of
12 harvest, which is -- with the exception of being subtidal,
13 is consistent with the intertidal harvest method. And in
14 the EIS, they primarily were citing the studies -- the
15 earlier studies of Goodwin and Peace and Short and Watson
16 that have looked at the sediment-transport issues.

17 And I think Figure 3 within this EIS shows a very
18 interesting diagram of a geoduck harvest hole. And
19 essentially, I think it's consistent with the testimony
20 that's been given by others regarding the depression that's
21 created from a harvest.

22 They conclude -- and based upon the sediment-transport
23 modeling that's been done by Short and Walton and the
24 studies done by Goodwin and Peace, that the displacement of
25 -- it's displacement. It is not essentially removal;

1 doesn't result in a significant net onshore transport of
2 sediment from the subtidal harvest and that the disturbance
3 of the sediment from the harvesting is relatively
4 localized.

5 I think they cite the plume extending -- I'm probably
6 going to get this number wrong, but I think it's about 100
7 -- I don't know, I think it was 60 meters at the greatest
8 length.

9 Q Now, again, that is addressing the subtidal harvest and
10 sediment transport there. How could that translate, if at
11 all, to sediment transport on an intertidal harvest?

12 A Well, recognizing that the geoduck are going to live in
13 sand and/or a sand/mud type of matrix, and recognizing
14 that, in the subtidal environment, you do not have the wave
15 energies and wind-generated current that is as significant
16 on the near shore, what you end up getting is, I think,
17 substrates that have more mud in them relative to sand.

18 And consequently, there's a smaller grain size. When
19 you stir that up, it's generally going to stay in
20 suspension longer. It's lighter. So essentially, more
21 neutrally buoyant.

22 So my -- my interpretation would be that the overall
23 cloud, if you will -- the volume would be greater in a
24 subtidal harvest than what you're going to see in an
25 intertidal situation.

1 I think that's pretty consistent with at least a half
2 a dozen other sites that we've explored where geoduck
3 harvesting has been -- that we've seen.

4 Q And moving on to those observations that you've made at
5 harvest sites. One of the allegations that the Interveners
6 have made in their brief is that the harvesting of an acre
7 of geoduck translates to roughly 130-plus cubic yards of
8 sediment removal from the site.

9 Have you taken a look at that number?

10 A Yes.

11 Q And could you just describe, a little bit, your review of
12 the calculations and the evaluation of that number?

13 A Well, I do think that they were drawing on the number that
14 was put forward in the "Environmental Code of Practices for
15 Shellfish Farmers," in that there will be a local -- you
16 know, a disturbance of one to two inches.

17 I believe they extrapolated that out to essentially
18 interpret that that was a complete scalping of the beach by
19 one to two inches. That -- from my experience of the
20 different harvest operations I've seen, that's just not the
21 case.

22 And I think one of the other things that is neglected
23 in that is the recognition that the geoduck themselves --
24 these are, you know, two- to three-pound animals by the
25 time you harvest them. They represent a volume. So when

1 you are -- I just did some back-of-the-envelope
2 calculations relative to what that would mean.

3 If, for example, you had 25,000 geoduck planted per
4 acre and you made a gross assumption -- and I'm not -- you
5 know, that the specific gravity of geoduck was consistent
6 with water, that, you know, the removal of -- and they
7 would be two pounds at harvest -- I think we were right at
8 about 87 cubic yards of geoduck is removed in a harvest
9 operation.

10 So I do think that there's an element there that -- of
11 just the biomass removal that -- that perhaps wasn't
12 recognized.

13 Q Okay. And final question with regard to the sediment
14 transport. Have you analyzed or evaluated, thought about,
15 the relation of sediment transport caused by or associated
16 with a geoduck harvest as compared to what you would see in
17 sort of naturally occurring events: storms or maybe boat
18 wakes, things like that?

19 A Yeah. I think one of the things we do need to keep in mind
20 is that -- again, this is a -- in a lot of the areas where
21 geoduck are cultured intertidally, and certainly the Foss
22 farm, from what I saw, this a sand-flat environment. This
23 is a dynamic environment. There is rapid sediment turnover
24 in the intertidal zone due to longshore drift.

25 And in -- what my observations on the day I was there

1 relative to other sites that we've looked at -- in fact,
2 the actual current that runs through that site is very
3 significant.

4 And so your actual grain size there -- first, it
5 provides a couple of benefits to the geoduck. It's going
6 to stay pretty aerobic, well oxygenated. But also, the --
7 the other component there is that a hole, if you will, a
8 harvest hole, will be rapidly leveled. That type of
9 leveling would occur, I think, much more rapidly in that
10 system than in another that we've looked at, than is seen
11 in a subtidal condition.

12 Q I think that answered it.

13 A Is that good?

14 MR. PLAUCHE: Yep. And I have nothing further for
15 this witness.

16 MS. GUERNSEY: Nothing.

17

18 CROSS-EXAMINATION

19 BY MR. KIMBALL:

20 Q Jerry Kimball, representing the property owners. Would you
21 look at the figure immediately to your left? This last
22 point you made, about rapid turnover of the intertidal
23 zone, is that in any way demonstrated in the aerial
24 photograph?

25 A Well, let's see. Let me get my bearings here.

1 MR. PLAUCHE: It's the Foss sites on the left, just
2 for clarification; and the Washington Shellfish site on the
3 right.

4 THE WITNESS: Okay. And this is the State park?

5 MR. KIMBALL: Yes.

6 MR. PLAUCHE: Correct.

7 THE WITNESS: Okay. Right. So it appears to me,
8 for example, that -- and when we walked -- it's easier for
9 me to speak to it if I'm on the ground, but the spits that I
10 think were mentioned before is a good example; that there is
11 a lot of accretion that occurs from sand movement down the
12 beach.

13 And so you can see certain spits that are forming in
14 different locations. And you can actually see this
15 projecting up and down the beach where there are -- you
16 know, there is -- there is, you know, essentially what I
17 would construe to be evidence of rapid sediment turnover and
18 movements.

19 Q On the incoming tide, the tide moves north along that
20 shore?

21 A That's my understanding, yes.

22 Q And the cliffs feed new sand down, from rain, from normal
23 erosion activities?

24 A Yes.

25 Q And all of that would be occurring regardless of whether

1 The studies that you referenced initially, Exhibits 100,
2 115, 117, 120, 106, 131 -- those were all studies dealing
3 with oyster aquaculture; is that right?

4 A That was the main focus of those studies, yes.

5 Q None of those studies you've cited have been studies of
6 geoduck aquaculture --

7 THE HEARING EXAMINER: One of them was, the EIS.

8 THE WITNESS: Yeah. He didn't mention that one.

9 MR. BRICKLIN: Right.

10 THE HEARING EXAMINER: I'm sorry.

11 Q Right. Leaving aside the FEIS, none of those scientific
12 studies you referred to were dealing with geoduck
13 aquaculture, were they?

14 A That's correct.

15 Q And you would acknowledge, wouldn't you, that there are a
16 lot of unknown issues -- or a lot of issues that have not
17 been resolved regarding the environmental impacts of
18 geoduck aquaculture?

19 A I would acknowledge that there are issues that have been
20 raised as it relates to geoduck aquaculture.

21 Q And that haven't been studied in the scientific community?

22 A Well, I -- there are -- it would be better if you posed to
23 me an example of a specific issue, I suppose. But there
24 are some issues that -- that have not been resolved. There
25 is a substantial amount of information, though, that is out

1 there related to geoduck aquaculture. So, many of the
2 questions, I do think -- for example, are being explored by
3 Chris Pierce -- we've addressed in our biological
4 assessment.

5 Q You would agree that the harvesting method here involves an
6 obvious disturbance of the natural layering of the
7 sediments, wouldn't you?

8 A At a very local level.

9 Q Well, over the 10 or 12 acres, right?

10 A Yeah, but you need to recognize that, during a tidal cycle,
11 with two to three harvesters, they're going to work a plot,
12 at best, of maybe half an acre. That's working, from what
13 I've seen, extremely fast.

14 In the context of a natural disturbance regime of a
15 winter storm that's going to impact a whole swath of beach,
16 it's, I think, insignificant. And most of the researchers
17 that have looked at this scale of disturbance, relative to
18 that, have concluded that it is an insignificant
19 disturbance regime, relative to natural cycles.

20 Q So you think that these holes that go down two to three
21 feet are an insignificant impact to the natural layering of
22 those sediments?

23 A I would say that what you're -- well, I can speak to Chris
24 Pierce's data. He just presented this two weeks ago. He
25 looked at grain size, before and after harvest, in a test

1 plot. And that was, I think, 20 by -- 20 meters by three
2 meters or so; I think, four rows of geoduck.

3 And, essentially, he found no significant difference
4 in the grain size than would be what you might have
5 predicted; i.e., a loss of the finer sediments. And in
6 fact -- in fact, he found some significance, but it was a
7 slight increase in the more medium size -- or rather in the
8 finer-grain sediments in the sand.

9 Q Are you referring to a presentation he made at the Sea
10 Grant symposium a few weeks ago?

11 A No. This was presented at the British Columbia Shellfish
12 Growers Association.

13 Q Were you present for the Sea Grant symposium that focused
14 specifically on these issues?

15 A Yes.

16 Q All right. And do you acknowledge that the scientists from
17 around the country and around the world who attended that
18 conference identified a large number of data gaps that had
19 to be addressed with regard to the impacts of geoduck
20 aquaculture on the environment?

21 A I certainly acknowledge that there was a large number of --
22 well, I don't know if I'd call it "large," but there was a
23 listing of issues at the end of the symposium. And whether
24 or not they, quote, unquote, "had to be addressed," I think
25 one of the issues that came forward in that was: well, how

1 do these things relate? Are they biologically meaningful?
2 In the relevance of the natural disturbance regime, is this
3 level of disturbance, at the scale it is practiced,
4 biologically meaningful? And so, certainly, yes. Several
5 -- several questions that were out there.

6 And I would -- you know, we've submitted -- I have --
7 I have, myself, three acres of tidelands that essentially
8 is unseeded, and we've submitted grant applications to NOAA
9 to use it as a control site for a baseline study.

10 It's not that there aren't questions out there. And,
11 certainly, we -- as a scientist, yeah, I like answering
12 questions. But in terms of their relevancy to an overall
13 ecological function in the zone where this is practiced,
14 you aren't going from a ground zero, in other words, okay?

15 Q Those questions need to be answered, though, don't they?

16 A You'd have to define which questions for me to answer that
17 question.

18 Q All right. You talked about these oyster reefs and other
19 aquaculture structures that create vertical habitat in
20 these various studies; is that right?

21 A (Witness nods head affirmatively.)

22 Q Is that right?

23 A Yes.

24 Q You have to answer out loud for the record.

25 A Yes. I'm sorry.

1 Q And you were saying that the geoduck structures that are
2 utilized on this Foss leased property would provide similar
3 benefits?

4 A Yes.

5 Q And the geoduck structures you're referring to, then, are
6 the tubes and the netting over the tubes?

7 A Yes. But let's understand what I'm referencing that to is
8 structured habitat, in the same context that the broad
9 array of researchers are evaluating oyster reefs as
10 structured habitat, shellfish aquaculture gear as
11 structured habitat. It's a three-dimensional structure
12 from which a biogenic community can develop.

13 Q All right. The three-dimensional structure, meaning the
14 tubes and the -- the tubes kind of -- I was just thinking
15 of this the other night. The tubes kind of are the wall,
16 and the net is sort of the roof. And we kind of have a --

17 (Laughter.)

18 Q I mean, isn't that effective- -- I mean, functionally,
19 that's what you've got. You have the tubes acting as a
20 wall to keep predators out, and the net acts as a roof to
21 keep predators out. Isn't that effectively what we've got
22 going there?

23 A Well, my understanding of the tubes is really twofold. One
24 is that survival is improved because the risk of
25 desiccation is reduced, because you're essentially creating

1 mini tide pools. And netting, indeed, is put over the
2 tubes to restrict some of the mobile predators, crab and
3 whatnot, and the larger predators, from accessing and
4 chewing down on the farm crop. That's a scientific term:
5 "chewing down."

6 (Laughter.)

7 THE HEARING EXAMINER: Chewing down.

8 MR. BRICKLIN: That's all I have for this witness.
9 Thank you.

10 THE HEARING EXAMINER: That's all? Anything else
11 from anybody? Thank you, Dr. Fisher. We appreciate you
12 coming forward. And we will be taking a 10-minute recess at
13 this point.

14 (Recess taken from 10:28 a.m. to 10:44
15 a.m.)

16 THE HEARING EXAMINER: Good morning. The hearing
17 on the Taylor Shellfish appeal will be reconvened.

18 MR. PLAUCHE: Thank you. I'd like to call Dave
19 Findley, please.

20 THE HEARING EXAMINER: Mr. Findley.

21

22 DAVE FINDLEY, having been first duly sworn
23 upon oath by the Hearing Examiner, testified as follows:

24

25 THE HEARING EXAMINER: would you state your name

1 95 and ask that that be admitted.

2 THE HEARING EXAMINER: Exhibit Number 95 will be
3 admitted into evidence.

4 MR. PLAUCHE: It requires a binder switch.

5 THE WITNESS: Lots of binder issues.

6 THE HEARING EXAMINER: You said Exhibit 95?

7 MR. PLAUCHE: I did.

8 THE HEARING EXAMINER: Thank you. Please go
9 forward.

10 Q Are you familiar with that exhibit, Mr. Findley?

11 A Yes, I am.

12 Q And can you describe that exhibit briefly?

13 A what this is is a summary, a little letter report, that I
14 wrote for -- to Taylor Shellfish. Taylor Shellfish had
15 retained Golder to take a look at the geoduck operations
16 out there at the Foss site.

17 There evidently was a property owner north of the site
18 who had complained that -- or alleged that the geoduck
19 operations were somehow affecting the beach, in terms of
20 his home, and resulting in bluff loss, and so Taylor asked
21 us to go out and take a look at that and provide an opinion
22 on those issues.

23 Q And can you describe, for the Examiner, your methodology in
24 formulating an opinion on those geological processes at the
25 Foss farm?

1 A Yes. It was actually quite straightforward. We looked at
2 aerial photography dating back to 1970, and the approach --
3 or the strategy was essentially to look at the beach on the
4 aerial photographs, both pre- and post-geoduck operations,
5 to see if there was any measurable changes or differences
6 to the beach.

7 Q And did you confirm that aerial surveillance with a beach
8 reconnaissance trip?

9 A Yes, I did. I visited -- actually visited the site at the
10 end of July.

11 Q And that was July of 2007?

12 A Correct.

13 Q Okay. Now I'd like you to turn to Page 5 of your report,
14 please.

15 A (Witness complies.) Okay.

16 Q In that second-to-last paragraph there, beginning "the
17 geoduck beds," could you read that conclusion into the
18 record, please?

19 A Second-from-the-bottom paragraph?

20 Q Yes.

21 A "The geoduck beds that are located along the intertidal
22 zone, Figure 5, may have had some effect on beach processes
23 in the form of locally retaining some beach sand in the
24 area of the plastic tubes. But there is no discernable
25 difference in beach mortality from pre-geoduck operations

1 to the present."

2 MR. PLAUCHE: I have nothing further for this
3 witness.

4 MS. GUERNSEY: Nothing.

5

6 CROSS-EXAMINATION

7 BY MR. KIMBALL:

8 Q Mr. Findley, you were present when I asked a question--

9 THE CLERK: You need the microphone closer.

10 Q --of the prior witness concerning the potential effect of
11 the 2001 earthquake on the high bluff; I guess, the feeder
12 cliffs?

13 A Yes.

14 Q Did that have any potential effect, from the view of the
15 geologist?

16 A I could just speak from a hypothetical standpoint.

17 Q Please.

18 MR. BRICKLIN: Objection, Your Honor; lack of
19 foundation and relevance.

20 THE HEARING EXAMINER: Well, there's not -- you've
21 got to give him a hypothetical.

22 Q In a hypothetical earthquake of between a 6.8 and 7
23 magnitude and high bluff structures similar to that on the
24 Foss property, what is the effect on beach accretion or
25 changes in the beach?

1 A You may have -- there may have been some additional
2 sloughing or bluff loss from the earthquake. But I couch
3 that by saying that I have no firsthand knowledge of this
4 particular site. But that is a known consequence of
5 earthquake ground motions.

6 Q Because an unstable feeder cliff and the shaking can shake
7 more sand down, correct?

8 A Correct.

9 MR. KIMBALL: Nothing further.

10 THE HEARING EXAMINER: Anything, Mr. Bricklin?

11 MR. BRICKLIN: No, I don't have anything for this
12 witness.

13 THE HEARING EXAMINER: Thank you, sir. Appreciate
14 you coming forward.

15 THE WITNESS: Thank you.

16 THE HEARING EXAMINER: May this witness be excused?

17 MR. PLAUCHE: This witness may be excused.

18 THE HEARING EXAMINER: Thank you.

19 MR. PLAUCHE: And that concludes our direct
20 presentation of witnesses. We would like to preserve the
21 right to call any of our witnesses that have already
22 testified and additional witnesses that we've listed as
23 rebuttal witnesses, to rebut any of the evidence that comes
24 in new in Mr. Bricklin's case.

25 THE HEARING EXAMINER: Thank you, sir.

1 MR. KIMBALL: Jerry Kimball, representing North
2 Bay. At this time, we would like to call Leslie Foss.

3
4 LESLIE FOSS, having been first duly sworn
5 upon oath by the Hearing Examiner, testified as follows:

6
7 THE HEARING EXAMINER: State your name for the
8 record, please.

9 THE WITNESS: My name is Leslie Foss. My first
10 name actually is Margaret. Margaret Leslie Foss.

11 THE HEARING EXAMINER: L-e-s-l-i-e?

12 THE WITNESS: Yes, correct.

13

14 DIRECT EXAMINATION

15 BY MR. KIMBALL:

16 Q Ms. Foss, how are you employed?

17 A I'm employed by Everett Community College.

18 Q what do you do there?

19 A I am an instructor.

20 Q In what field?

21 A Early childhood education.

22 Q The property that is depicted in the aerial photo to your
23 left -- can you tell us about your family's involvement
24 with that property?

25 A My grandfather bought this property, I believe, sometime in

1 the '30s. It's been in our family ever since. He handed
2 it down to my father and my aunt. They, in return, handed
3 it down to the rest of us, their children and their
4 grandchildren.

5 Q who owns it currently?

6 A we children and grandchildren own it as a partnership, an
7 undivided partnership.

8 Q And that's North Bay Partnership?

9 A North Bay Partnership, correct.

10 Q what was the purpose of establishing the partnership?

11 A I believe it was to have some type of protection and
12 ownership and some type of description of how we were going
13 to manage the property.

14 Q what are the policies regarding management of the property?

15 A well, we started by looking -- there are 14 of us that do
16 this, and both my father and my aunt had some concern
17 about --

18 Q If you could address the Hearing Examiner.

19 A I'm sorry. Both my father and my aunt had some concern
20 that we would be able to do this in a cooperative method.
21 So that was our purpose in forming a partnership. And we
22 decided that what we wanted to do with this property is
23 keep it in its natural state, much like how it was when my
24 grandpa bought it, and that we wanted it to pay for itself
25 so there would not be any economic squabbling about it, to

1 pay for the taxes.

2 Q when did you first go to that property?

3 A well, I don't know if I can actually remember the first
4 time, but I do remember, very early in my childhood, going
5 out with my grandfather. He used this property as sort of
6 a -- as a project, I would say. He was a man that had lots
7 of energy, and he had certain views in what he wanted to do
8 with it. And he always included all of us to come out.
9 And we dug clams, we dug geoducks, we did what people
10 naturally do on the beach.

11 Q It's a large tract of property?

12 A It is.

13 Q Could you describe that for the Hearing Examiner?

14 A There's approximately 126 acres, with a mile of beach
15 front.

16 Q Have you sold off any of that property?

17 A None.

18 Q Since your grandfather acquired it, it's all --

19 A No, it's still in the original state.

20 Q Have you developed any of it?

21 A No.

22 Q what improvements exist on the property?

23 A we have a little cabin that we've maintained, that has a
24 deck and an outhouse that's been moved once. That's it.
25 Oh, and a rope swing, but...

1 Q Running water?

2 A No. There is a well on the property, but we don't have
3 running water. We tried to do that, but we were
4 unsuccessful.

5 Q And the well has a hand pump?

6 A Yes. It did have a hand pump. It has been removed by
7 people that have come upon the property over the years, so
8 we just chose not to replace it.

9 Q No power?

10 A No power.

11 Q How big is this cabin?

12 A 12 by 20, maybe. I don't -- I don't know.

13 Q How many rooms?

14 A One.

15 Q How often do you use this property?

16 A As often as we can. It's -- it's sort of a hiatus that we
17 use as just going back to nature. I don't know how else to
18 say it. We have certain rules about being there. No cell
19 phones, which, over the years and with our children, has
20 been a hard rule to keep.

21 No electronics. We really want to be there naturally.
22 And we use it -- oh, probably, my family -- I live in Mount
23 Vernon, and we're down, probably, five times during the
24 summer and a couple times during the winter.

25 Q would those be overnight visits?

1 A Definitely.

2 Q Your sister -- does she use it?

3 A I have two sisters. One lives in the area, and she and her
4 family use it more than I do.

5 Q You are the managing partner of this, quote, partnership?

6 A I am by default, yes.

7 Q You're the oldest grandchild?

8 A Yes.

9 Q That's how you got this job?

10 A No. It was just passed to me because my brother-in-law
11 didn't want to do it anymore.

12 Q Tell us about your involvement with Taylor Shellfish and
13 the, quote, geoduck farm.

14 A well, it -- everything sort of came to a head at the same
15 time, in my understanding. Taylor developed seed in the
16 laboratory, so they had a reason to have areas to plant it.
17 we were getting to the point where we had needs for a
18 broader economic base to maintain the property in its
19 state, and it all came together at the same time.

20 And so they approached us through another person, who
21 was Kent Kingman, and I don't know where he is in the story
22 now. But -- so we got together and talked. All of us in
23 my side of the family had some real concerns about this
24 endeavor. We didn't have any idea what would happen, what
25 was going to be the beach erosion. We had issues about --

1 a lot of questions that were unanswered, as we've seen
2 today.

3 And Taylor went forward, to make sure that this was an
4 area that could be developed, or could be grown as a farm;
5 and we went forward on trying to contract a lease agreement
6 with them, of which we restricted use by them.

7 We restricted sound by them. Sound, meaning in their
8 harvesting methods. We had a portion of the lease that
9 said that they follow all the rules and regulations that
10 are set forth as far as aquaculture and farming are
11 concerned. There was a debris clause, that they be
12 responsible for cleaning the debris.

13 I mean, I think that lease is probably about five or
14 six pages long. We tried to put in everything, with the
15 help of our attorney, that we could to protect us.

16 Did that answer your question, or did I get
17 sidetracked?

18 Q That addresses the issue. Sound. Have you been on site at
19 your beach -- have you been at the beach when there was a
20 harvest going on, by Taylor?

21 A Yes. Both -- both hand harvesting and by barge harvesting.

22 Q So the dive harvest and the intertidal, I believe they
23 refer to?

24 A Intertidal, yes.

25 Q Tell the Examiner about the noise level that you

1 **experience.**

2 **A The intertidal harvesting, the beach harvest, it actually**
3 **was very exciting to see, because they pluck the ducks out**
4 **of the sand one at a time, and I had never seen that. So**
5 **as far as sound is concerned, I don't -- I don't remember**
6 **any sound. What I remember was: Oh, my gosh. This is**
7 **incredibly gentle. That's what I remember of it.**

8 **Harvesting from the barge. We were there -- this is**
9 **sort of a wild story and I'll make it quick. We were there**
10 **depositing some of my father's ashes at the time, and there**
11 **was a barge out front. And as we were depositing them, the**
12 **geoduckers, for some reason, were singing.**

13 **So as far as sound is concerned, that didn't -- there**
14 **wasn't any sound other than the singing, which was very**
15 **apropos at the time. Did that answer that?**

16 **Q You didn't hear the pump?**

17 **A No.**

18 **Q You just heard the singing?**

19 **A Yes.**

20 **Q What is your goal for this property, going forward?**

21 **A Well, that's, right now, in question, I think. We do have**
22 **a goal to try to keep it, to hand it down, so that our**
23 **children, and possibly grandchildren, can enjoy it as we**
24 **have.**

25 **Q And some of the next generation are already owners?**

1 A No. Well, yes. I'm sorry. Yes, yes.

2 Q Who are those people?

3 A My sister's sons, Garth and Marshall, and my cousin's
4 daughters.

5 Q And where are the closest neighbors to that property
6 located? And you might want to point that out on the
7 aerial photograph.

8 A The closest neighbors are to the north, which is right up
9 here (indicating).

10 Q Can you see their homes from where the cabin is?

11 A No.

12 Q What is the relationship with the neighbors like?

13 A Well, we've always had somewhat of a symbiotic relationship
14 with the neighbors. They are there more than we are, so we
15 have said -- there's always been an issue of trespassing on
16 our property.

17 I think that it's hard for people to understand that
18 someone owns tidelands from a high tide to the extreme low
19 tide. So they've come on our property to dig clams and
20 harvest oysters, and we have finally said, "You can do that
21 as long as you fill in your holes and if you keep an eye on
22 the property and let us know if somebody comes down to
23 disturb it." That's been our relationship.

24 Q Have there been problems in the relationship -- or issues
25 that have arisen, not necessarily problems?

1 A Well, there are issues now, of course, with this. But I
2 haven't talked directly to anybody. I just know that it's
3 come up through the associations that have formed in the
4 cases.

5 Q And issues with types of use, by others, of your property?

6 A Well, there was a gentleman that owns the closest piece of
7 property who was building a fence, I believe, that ended up
8 being on our property, and we asked him to move that.

9 Q Recreational use?

10 A Yes. There -- well, and I can't say who, but there's been
11 evidence of all-terrain vehicles coming into the property,
12 and so we let them know that that was not suitable for use
13 on our property.

14 Q That's not consistent with the atmosphere that you want
15 maintained there?

16 A Thank you. It was not.

17 Q And you've posted signs?

18 A Yes, we have.

19 Q You were present when those were shown to Mr. Phipps?

20 A Yes.

21 Q And there's the park sign, and then there's signs that -- I
22 think you call them "the Ken signs"?

23 A Yes. Ken is my husband, and we call him "the beach
24 sheriff."

25 (Laughter.)

1 Q He makes sure the signs have not been taken down?

2 A Yes.

3 Q You had great concerns when you entered into this process
4 with Taylor. How has that worked out?

5 A It's -- it's worked out beautifully. And we did have great
6 concerns. There was -- in the beginning, it was a -- what
7 I call a steep learning curve, for all of us, I think. And
8 there was trash issues that were a huge concern for us, and
9 we called and met with Taylor and worked those out.

10 And the -- the dialogue with them was that, if you do
11 have issues, please call us, of which we have done, and
12 they have met our concerns. In fact, they've gone beyond
13 meeting our concerns to the point where we have a
14 relationship now that -- you know, Diane Cooper responded
15 to Mr. Kimball about "have you read the lease lately?"
16 It's not something that we look at all the time, to make
17 sure that they're complying with everything. It's a good-
18 enough relationship that we don't need to do that.

19 Q Were there concerns expressed to the partnership, or any of
20 the partners, by the neighbors?

21 A No. Not directly to me, although there might have been to
22 my sister and brother-in-law, but nothing that I'd know of.

23 Q Do you know whether Taylor regularly polices the beach for
24 debris?

25 A They do regularly police the beach.

1 Q Prior to this operation, was there ever debris on the
2 beach?

3 A Well, yeah. I mean, there's beer bottles and different
4 glass debris, different debris from people being on the
5 beach from the park, yeah.

6 Q People trespass, come down from the park?

7 A Yeah. Yes, they do.

8 Q Nobody is there, it's a big beach, and people tend to use
9 it?

10 A Right.

11 Q You have an interest, an economic interest, in this farm
12 operation continuing, correct?

13 A Yes.

14 Q And that is to meet one of the goals of the partnership, to
15 maintain the property?

16 A Correct.

17 Q The property, the upland property -- how is that zoned?

18 A The upland property, we have in a forestry zoning, I
19 believe it's called. We had -- at one time, about 15 years
20 ago, we selectively cut the trees, to try to rid some areas
21 of root rot, and we replanted those trees with Douglas fir
22 and pine trees.

23 Q Is it a mature stand of timber on the property?

24 A Well, in my knowledge of maturity, yes.

25 Q And the logging 15 years ago, was that a clearcut?

1 A No.

2 Q Small sections?

3 A It was -- I think our application was for 30 percent.

4 Q So you thinned it out?

5 A We thinned it to help grow the stand there, to make it
6 healthier, yes.

7 Q Have there been problems, from neighbors, with the timber?

8 A Yes, there have been. We -- a couple of years ago, there
9 was a -- a cutting being done by a neighbor, and the
10 cutter, the logger, came down on our property and cut, oh,
11 quite a few -- about \$30,000 worth of our trees, and that
12 resulted in a lawsuit.

13 Q Do you want to have a good relationship with your
14 neighbors?

15 A Of course.

16 MR. KIMBALL: I don't have anything further. Thank
17 you.

18 MS. GUERNSEY: No questions.

19 MR. PLAUCHE: I just have one question.

20

21 CROSS-EXAMINATION

22 BY MR. PLAUCHE:

23 Q You have indicated that there has been beach debris on
24 the property. would you say that the beach today is
25 cleaner than it was prior to Taylor beginning their geoduck

1 operations? Because of the beach patrols, is what I was
2 focused on.

3 A I would say that, since the netting process to -- and the
4 ridding of the individual nets with the rubber bands, that
5 is true.

6 MR. PLAUCHE: Okay. Thank you. I have nothing
7 further.

8 THE HEARING EXAMINER: Mr. Bricklin?

9

10 CROSS-EXAMINATION

11 BY MR. BRICKLIN:

12 Q So on that littering point, does Taylor patrol your beach,
13 then, and pick up litter that does find its way to your
14 beach from their operations?

15 A Yes. Their operation is on our beach, so yes.

16 Q Right. And so the litter from the operation -- they've got
17 a patrol that comes down and takes care of it on your
18 beach?

19 A Yes.

20 Q Okay.

21 A And we also, when we're there -- if we find anything, we
22 collect it and leave it in the little section, and they
23 pick it up and take it off.

24 Q Do you know whether they provide that service to the
25 neighbors to the north?

1 A I -- I don't know firsthand. I know, through discussions
2 with somebody at Taylor, that they -- there was concern
3 from the neighbors, and Taylor went down and walked the
4 beach with the neighbors, to try to determine exactly what
5 that concern was.

6 Q But to your knowledge, Taylor doesn't regularly pick up
7 litter on the neighbors' beach the way they do on your
8 beach, do they?

9 A Not to my knowledge. I'm sorry (indicating to Hearing
10 Examiner).

11 THE HEARING EXAMINER: That's all right.

12 Q I'm sure I speak on behalf of my clients, who are some of
13 your neighbors to the north there, that they certainly
14 appreciate your allowance for them to come on the property
15 and -- the beachcombers, the recreational clam diggers and
16 the like.

17 I gather that the "no trespassing" signs you've put up
18 recently have been to deal with the ATV sorts of
19 interlopers. Is that correct?

20 A The "no trespassing" signs have been there since the
21 beginning. That's nothing new. They get torn down and
22 done whatever to, so we replace them every year.

23 Q So you put those up, if you will, for the strangers, and
24 you've left the beach open for your neighbors to the north
25 to come on for the beachcombing?

1 A Well, not necessarily. We had an incident recently with
2 people coming down and riding horses on the beach, and we
3 stopped them and said that that was not really permitted.
4 And there was somewhat of an argument about: "well, we've
5 always done this. Nobody's ever here. Who are you?" kind
6 of thing. And we went through, you know, a roundabout
7 thing, trying to say: "Ooh, wait a minute." You know,
8 "one open door doesn't consider the world."

9 Q Right.

10 A So we've had issues like that.

11 Q Right. Okay. But in terms of the more typical
12 beachcombing activities, walking on the beach, kids playing
13 on the beach, wading in the water, those sorts of things --

14 A It's my understanding that the neighbors have their own
15 beach.

16 Q Uh-huh.

17 A I don't really know specifically why they need to come down
18 to our beach. But if they feel that they do, they're
19 welcome to dig clams and have them.

20 Q You were referring to the time about your father's -- the
21 spreading of the ashes--

22 A Yes, sir.

23 Q --and that you heard the singing, didn't hear a pump. Do
24 you know whether the pump was running at that time?

25 A The pump was running, because the divers were under the

1 water, so they were singing from under the water. That's
2 where the singing came from.

3 Q Okay. I guess I'm not going to go there.

4 (Laughter.)

5 Q You said that the lease includes a term that requires
6 Taylor to comply with all of the applicable rules and
7 regulations?

8 A Correct.

9 Q would that include things like the Shoreline Management
10 Act?

11 A I would assume so.

12 MR. BRICKLIN: Thank you. That's all I have for
13 this witness.

14 THE HEARING EXAMINER: Thank you.

15 MR. KIMBALL: Redirect?

16 THE HEARING EXAMINER: Oh, sure.

17

18 REDIRECT EXAMINATION

19 BY MR. KIMBALL:

20 Q The singing from under the water -- is there a
21 communication device between the divers and the boat?

22 A Yes. I'm assuming so.

23 (Laughter.)

24 Q This was not floating up in bubbles?

25 A No.

1 Q You mentioned your grandfather. What was your
2 grandfather's name?

3 A Henry Foss.

4 Q And your father?

5 A Drew Foss.

6 Q And so this is where your father's ashes were spread?

7 A A portion of them. He was big in his life also, so there
8 was a portion spread there and there was a portion in front
9 of the island. Oh, I shouldn't say that, should I?

10 (Laughter.)

11 THE WITNESS: Well, it was pretty obvious. There
12 was a huge tugboat that came out, and that's what we did. I
13 don't know if that's allowed, but it's been done.

14 (Laughter.)

15 MR. KIMBALL: You'll have to ask Ms. Guernsey.
16 Thank you. I have nothing further.

17 THE HEARING EXAMINER: May this witness be excused?
18 Thank you for coming forward, Ms. Foss. Please call your
19 next witness.

20 MR. KIMBALL: I have no further witnesses.

21 THE HEARING EXAMINER: Pardon?

22 MR. KIMBALL: I have no further witnesses.

23 THE HEARING EXAMINER: Very good. Mr. Bricklin?

24 MR. BRICKLIN: You know, I anticipated these
25 witnesses were going to go till lunch, so could we have just

1 a five-minute recess to get organized here on our side of
2 the case?

3 THE HEARING EXAMINER: You sure can.

4 MR. BRICKLIN: Thank you.

5 THE HEARING EXAMINER: Will five minutes be enough?

6 MR. BRICKLIN: Five to 10.

7 (Recess taken from 11:12 a.m. to 11:24
8 a.m.)

9 THE HEARING EXAMINER: The hearing on the Taylor
10 Shellfish appeal will be reconvened. I've had a series of
11 photographs put on my desk while I was out. Is this a
12 marked exhibit?

13 MR. BRICKLIN: Not yet. We would like it to be
14 marked.

15 THE HEARING EXAMINER: The series of photographs--
16 starting out with "On Case Inlet, our tidelands are
17 changing," it looks like quite a pile of pictures--will be
18 marked as Exhibit Number 150 and admitted into evidence, if
19 I can find my stamp.

20 THE CLERK: Right there.

21 MR. PLAUCHE: Mr. McCarthy, just before you admit
22 it, I just wanted to register that we received a copy of
23 this last night. This was not a document that was on the
24 exhibit list. We're not necessarily objecting to it.
25 However, some of the photographs in there appear to cover

1 issues that are outside of the scope of the hearing. we'll
2 object to the relevancy of those as they come in. But I
3 just wanted to sort of alert you to that.

4 THE HEARING EXAMINER: So these were not on the
5 exhibit list. Then they're not admissible unless they're
6 submitted by agreement of the parties.

7 MR. BRICKLIN: No. They were on the exhibit list.

8 THE HEARING EXAMINER: They were?

9 MR. BRICKLIN: Yes. We said we were going to
10 provide photographs. They were identified from the
11 beginning.

12 THE HEARING EXAMINER: Can you give me the number?

13 MR. BRICKLIN: I don't think Counsel is objecting
14 on that basis.

15 THE HEARING EXAMINER: Oh, I thought he was.

16 MR. PLAUCHE: No. I specifically said I'm not
17 objecting to admission of the PowerPoint. There are some
18 pictures in there that I don't believe are relevant, but I
19 will state my objection to those photographs when they come
20 in and see the context in which they're presented.

21 THE HEARING EXAMINER: Then we'll just mark Exhibit
22 150, and we'll go through this picture by picture.

23 MR. BRICKLIN: And we call --

24 THE CLERK: Can you pull the microphone closer?

25 MR. BRICKLIN: Call Sherilee Luedtke as our first

1 witness.

2

3 SHERILEE M. LUEDTKE, having been first duly
4 sworn upon oath by the Hearing Examiner, testified as
5 follows:

6

7 THE HEARING EXAMINER: State your name for the
8 record, please.

9 THE WITNESS: Sherilee Luedtke.

10 THE HEARING EXAMINER: And would you spell your
11 last name?

12 THE WITNESS: L-u-e-d-t-k-e.

13 THE HEARING EXAMINER: L-u-e-d-t-k-e?

14 THE WITNESS: Correct.

15 THE HEARING EXAMINER: Are you an attorney?

16 THE WITNESS: I am.

17 THE HEARING EXAMINER: Are you with a law firm?

18 THE WITNESS: I am. Margullis Luedtke & Ray.

19 THE HEARING EXAMINER: Thank you.

20

21 DIRECT EXAMINATION

22 BY MR. BRICKLIN:

23 Q Thank you, Ms. Luedtke. And we've been introduced already.
24 where do you live?

25 A I live on Case Inlet, at 215th Avenue, KPS.

1 THE HEARING EXAMINER: I haven't met this lady
2 before, Counsel. I just recognized the name.

3 Q And where is that in relationship to the Foss leased lands
4 at issue here?

5 A Directly north.

6 THE HEARING EXAMINER: Is it adjacent to it?

7 THE WITNESS: Yes, it is adjacent to it.

8 Q Does your property line actually share a property line with
9 the Foss property?

10 A My personal property line does not, but one of my
11 neighbors' does.

12 Q On the aerial photograph that's there to your right, can
13 you point out the approximate location of your property?

14 A I'm right about in the middle.

15 Q There's been reference to a row of homes along the beach
16 just north of the Foss property. Is yours one of those
17 homes?

18 A Correct.

19 Q How long have you owned property out there?

20 A Since 1985.

21 Q And how often do you get out there?

22 A I live there full-time.

23 Q And we're going to ask about some of your observations of
24 the Taylor operations. What opportunity have you had, over
25 the several years, to observe Taylor's operations?

1 A I've had multiple opportunities, over many years.

2 Q We have some photographs that we were just talking about,
3 and, Mr. Examiner, you have a set of them before you. We
4 also can put them up on the screen as well, which may be
5 useful. And if we're ready to go with that. And if I --

6 And I guess we're looking at Photograph Number 3 in
7 the package. The photographs are numbered in the lower
8 right-hand corner, Mr. Examiner, both on the screen and in
9 the package before you.

10 First of all, is your property in view in this
11 picture?

12 A Yes, it is. It's right about here (indicating).

13 Q And can you describe where you're pointing to, for the
14 record, for the written record?

15 A Well, for the record, there is a tree right here that's
16 leafed out, with red leaves, and that is on the Hebron
17 property. I am immediately north to that. So the red-
18 leafed tree is hiding my house.

19 Q And generally, the largest visible house there is kind of a
20 grayish house, and you were pointing just to the left of
21 that; is that correct?

22 A Correct.

23 Q All right.

24 A That's -- the tree is blocking the view of my home from
25 this angle.

1 Q All right. Now, what's in the foreground of this picture?

2 A It's one of Taylor's tube fields, geoduck-tube fields.

3 Q Okay. And what's the condition of the tubes in this
4 picture?

5 A Many of them are loose. Some of them are laying on their
6 sides. They're in various states.

7 Q And we've heard the testimony the tubes are inserted into
8 the ground to provide an enclosure for the geoducks to grow
9 in. Do you have an understanding as to why they were in
10 this array at this time?

11 A Well, we would notice that these would come loose. It's a
12 normal action with tide and current.

13 Q Okay. Are these under a net at this time?

14 A No, they're not. The small nets that had been on the
15 tubes, the majority of them have come off.

16 Q All right. Why don't you turn to the next picture, Number
17 4 in the sequence. Where is this picture taken?

18 A This is just south of the row of our homes on 215th Avenue.
19 You can see, in the background, the Kettering's boat is out
20 there on one of the mooring buoys, and they live further
21 north than I do.

22 Q All right. And whose homes are those in the background; do
23 you know?

24 A Pardon me. That may be the McCormick's boat. I'm sorry.
25 Go ahead.

1 Q Is McCormick another neighbor?

2 A Yes, he is.

3 Q And in the foreground, is that the field of goeduck
4 plantings again?

5 A Yes, it is.

6 Q Do you know, from having been out there, how close to the
7 property line do the geoducks approach?

8 A They're on the property line.

9 Q They come right to the property line?

10 A Yes. It's from my understanding of where the property
11 lines are. I understand there's a little bit of a dispute
12 over a fence line and such, and that's very common in this
13 area.

14 Q when you referred to a "property line," were you referring
15 to the Foss property line?

16 A Correct.

17 Q Okay. Thank you. what use have you made of these waters,
18 historically and more recently?

19 A well, I used to fish in this area, and I used to use my
20 float tube, which I no longer do. I also --

21 Q why not?

22 A Because it's not safe to do so. You can't get in the float
23 tube and use your flippers with this stuff underneath the
24 water. You just don't want to do it. So we just, you
25 know, have to avoid this area.

1 I also own a couple boats, and I'm very concerned to
2 use them very much in the area because of intake -- the
3 potential to intake some substance out of the water that's
4 going to impact your propeller, perhaps burn it up.

5 Q If we could go to Photo 6, please.

6 A Okay.

7 Q And what are we looking at here?

8 A We're looking at some loose tubes. They obviously have
9 come out. It's a close-up of the same field that you see
10 in Numbers 4 and 5.

11 Q All right. How about on Photo 8?

12 A Photo 8 is one of the red rock crabs--people used to go out
13 and drop crab pots in this area--and it's trapped
14 underneath one of the large cargo nets.

15 Q Is it able to get out?

16 A No.

17 Q Just there for a visit, or is it --

18 A No. No, it's there -- it's there until it -- I don't know
19 how long it was there, but it was not moving. It was dead.

20 Q Oh, this is a dead crab?

21 A Uh-huh.

22 Q All right. And is that something you've seen just on this
23 one occasion, or is that a more common occurrence?

24 A That's very common to see it. There used to be a lot of
25 wild sea life, whatever you want to call it, animal life,

1 in this area.

2 THE HEARING EXAMINER: I'm sorry. I couldn't
3 understand what you said. Used to be a lot of wild what?

4 THE WITNESS: There used to be a lot of wildlife,
5 crabs, in this area.

6 THE HEARING EXAMINER: Uh-huh.

7 THE WITNESS: And once the harvest has come
8 through, there's not much there.

9 Q Have you noticed any odor associated with this operation?

10 A Yes. In the summertime, the seaweed that collects on top
11 of the cargo nets stinks. And there's also a smell from
12 the fish. There's also bullheads. Small fish get trapped
13 underneath these nets and they die. And the crab die, and
14 that also stinks.

15 Q Does that interfere with your ability to use the surface
16 waters?

17 A Yes, it does.

18 Q Turn to Photo 13.

19 A Yes.

20 Q What is that a picture of?

21 A It's a picture taken from the edge of my property, looking
22 south. It's the commercial traffic going by. I took it as
23 an example of my concerns when a barge is anchored
24 offshore.

25 Q Is that a barge in this picture?

1 A Yes, there is.

2 Q And so this is one of the Taylor barges?

3 A Well, they're not marked, but I would assume so.

4 Q There's a barge that's been parked out there for some long
5 period of time?

6 A At some point.

7 Q All right. Are the Taylor barges studded with
8 reflectorized materials, so that they're visible to other
9 boats out there?

10 A No. There is no marking, no reflective tape. There is no
11 lights. There's no identification.

12 Q Is there any other boating traffic out there that ought to
13 be concerned about the situation?

14 A There's a great deal of recreational boating, as well as
15 commercial boating. Joemma Beach is one of the primary
16 places to launch a boat on the western side of Key
17 Peninsula. So we have motorboats that come by.

18 And we also have people to the north of us who have
19 boats on the water, and they leave before dawn to go
20 fishing, and so I can hear them going by before dawn. And
21 often, after sunset, when it gets dark, people are going
22 home from fishing.

23 We also have a couple of youth camps in the area; one
24 to the north is a Catholic camp, and another -- and they
25 have a couple different sailing vessels. They have one

1 that kind of looks like an old viking ship, and then they
2 have canoes. There are also people that kayak.

3 And there's a great deal of traffic that comes from
4 the Olympia area. People tend to go up around the corner
5 to Gerald's Cove, and you will see just a stream of boats
6 coming on a Thursday or a Friday and heading north for the
7 weekend and then coming back.

8 THE HEARING EXAMINER: How far is that from
9 Gerald's Cove?

10 THE WITNESS: Gerald's Cove is probably 10 nautical
11 miles, somewhere in that -- it's up around the corner to me.

12 Q Okay. Why don't we skip ahead here to Number 21? Tell us
13 what we're looking at in that picture.

14 A This is the barge that's shown up this winter, that houses
15 the pumps, or at least some of the pumps that have been
16 used.

17 Q Okay. So there's been some testimony about how long these
18 barges are out there. From your perception, as being a
19 resident there, how often do you see barges out there?

20 A The barges came in this winter, of 2007, and they stayed
21 for weeks at a time. There would be occasions when the
22 barge would go away, but then it would come back. And I
23 took photographs, over a series of months, of this barge
24 being there. And I'm not the only person who noticed that.
25 My neighbors noticed as well.

1 Q was the barge there often enough that it sort of became a
2 part of the landscape, if you will?

3 A It was part of the landscape, absolutely. It was like it
4 was there to stay, and now we get to look at a barge. And
5 I was concerned about the fact it had no markings, no
6 lights. And I contacted the County, and I was referred to
7 the Corps of Engineers. Then I contacted the Corps of
8 Engineers. They referred me to the County.

9 Q Let's jump ahead to Photo 24.

10 A Yeah. I took -- I took this photograph on the 22nd of
11 April, after they had been harvesting for -- the 22nd of
12 April was a Sunday. They had been harvesting the week
13 before. So it was approximately two days, or two tide
14 cycles, after all of the equipment had left, except the
15 barge was left there.

16 You can see it in the right side of the picture.
17 Maybe you can't from your angle, Your Honor, but you can
18 see that there's a tube, right there (indicating), that is
19 kind of in one of the holes there, that was left by the
20 harvesters.

21 Q All right. And then let's jump ahead to Photo 28.

22 A Okay.

23 Q what is shown in that photograph?

24 A This is an area where they put in the cargo nets, and it
25 shows that there's not complete coverage, that they're not

1 -- they're not secured. It does show some rebar being used
2 for securing of the cargo nets.

3 Q All right. Let's turn ahead to 31.

4 A This is a piece of rebar that was left on the beach after
5 the nets were removed.

6 Q Now, there was testimony yesterday, I believe, that the
7 rebar in this position was just there very temporarily
8 while the workers went and did something else, and the
9 inference was that the workers came back and didn't leave
10 it protruding like that. Is that your experience?

11 A No, it's not. And there were no workers nearby when this
12 photo was taken.

13 Q Turn to Photo 32.

14 A 32 is a photograph that's taken south of the piling line,
15 and so this is an area closer to the beach, to Joemma
16 Beach, and these are some extremely long ropes that have
17 been anchored in the sand.

18 Q And how long have they been there, if you know?

19 A I don't know.

20 Q Let's turn to Photo 34.

21 A This appears to be some type of juvenile fish. I'm not a
22 fish biologist. I can fish, but I don't know, at this
23 stage, whether, you know, this is -- I can't say what kind
24 of fish this is, but it's dead.

25 Q Is this typical of what you find under these nets?

1 A Yes.

2 Q All right. And Photo 37?

3 A That shows a crab trapped under the net.

4 Q All right. Let's jump ahead to Photo 49.

5 THE HEARING EXAMINER: No. Wait a minute. You got
6 ahead of me. Exhibit 34. What was the next one you did
7 after that?

8 MR. BRICKLIN: 37 is the dead crab.

9 THE HEARING EXAMINER: All right. I write notes to
10 myself sometimes and I'm slow. Okay.

11 Q Now to 49.

12 A Yeah. I took this picture, actually, in front of our
13 homes. It's some type of brown residue. It's something I
14 have never seen before on the beach.

15 Q So you've been out there for 20-some years, and you've
16 never seen this kind of scum on the beach before?

17 A I have never seen this. And I don't pretend to know what
18 it is, but I've never seen it there.

19 Q And where is this picture in relation to the Taylor
20 operation?

21 A It's directly north.

22 Q Okay. And then Photo 50?

23 A Photo 50 was taken on the 23rd of October.

24 Q Just this year, right?

25 A Correct; about two weeks ago.

1 Q And what's the purpose for including this picture?

2 A Well, I was out there with Mr. Parsons, and there was a
3 crew out there, walking the high-tide line, picking up
4 debris.

5 THE HEARING EXAMINER: Uh-huh.

6 THE WITNESS: It was very foggy that morning, but
7 they did have sacks of debris. And then we watched them
8 walk right past some rebar that was left exposed and some
9 tubes that were still in the sand. But it was, like, there
10 was a tube here and a tube there (indicating), and didn't
11 seem like there was a reason to have those tubes still
12 there. But at any rate, the rebar -- I was surprised that
13 they walked right past that.

14 Q Are those gentlemen shown in the next photo, 51?

15 THE HEARING EXAMINER: Is that Number 50 you're
16 talking about?

17 MR. BRICKLIN: Yeah. I think she was --

18 THE WITNESS: Yeah.

19 MR. BRICKLIN: I don't know if it's shown on 51.

20 THE HEARING EXAMINER: 51?

21 THE WITNESS: Yeah, 51 is a better shot. It's a
22 close-up of two workers dragging the sacks of debris.

23 MR. BRICKLIN: This is one that didn't make the
24 slide show.

25 THE HEARING EXAMINER: Exhibit 151 is a -- I'll let

1 you identify it.

2 MR. BRICKLIN: Yes.

3 THE HEARING EXAMINER: With a microphone, please.

4 Q Ms. Luedtke, do you recognize Exhibit 151?

5 A Yes, I do. I took this picture in June of 2006.

6 Q All right. And where is this located?

7 A It's adjacent to the McCormick property.

8 Q All right. And for what purpose did you take this picture?

9 A I took this because of the grouping of the rebar that you
10 can see in the foreground, in the center.

11 Q All right. Is it a little hard to pick out the rebar if
12 you don't know what you're looking for?

13 A It is.

14 Q And have you prepared a little cutout that will help focus
15 the viewer?

16 A I did.

17 Q And could you demonstrate what you've done there?

18 A Well, I didn't realize this would be admitted, but I put
19 a --

20 THE HEARING EXAMINER: I saw it.

21 THE WITNESS: You saw it? Okay.

22 THE HEARING EXAMINER: I know where it is.

23 THE WITNESS: Yeah. And I photographed this
24 because I was concerned that that was a hazard.

25 Q All right. Are there moon snails on this beach?

1 A Yes.

2 Q Have you seen evidence of moon snails caught in these nets
3 as well?

4 A I have, and my neighbors have as well.

5 THE HEARING EXAMINER: 152 to be identified. 151
6 will be admitted into evidence. I'm going to have to do
7 this on the back, on 152.

8 Q And what is shown as Exhibit 152?

9 A That's an upside-down moon snail.

10 Q Dead, or alive?

11 A It looks dead to me, but...

12 Q Do you normally see --

13 A I'm not a biologist. You don't normally see them upside-
14 down like that.

15 Q Right. Has the Taylor operation obstructed your ability to
16 use the beach and/or the waters?

17 A Yes, it has obstructed our ability to use the waters
18 because of what has been placed in the lower tideland area.

19 Q And could you explain that, please?

20 A Well, when you know that there's rebar and nets and ropes
21 and tubes projecting out of the sand in an area, you --
22 you're on notice that you should probably stay out of that
23 area or you could get caught up in it or your machinery
24 could somehow fail because of something that it would take
25 in.

1 Q All right. The prior witness today made reference to their
2 allowing neighbors to the north to come and do normal
3 beachcombing activities on the Foss property. Were you
4 aware of that invitation?

5 A Yes. That was my understanding. When I -- when I moved to
6 this beach, the people who had lived there much longer than
7 I told me that the Foss family welcomed us to come onto
8 their area to dig clams. They had a different feeling
9 about people from the park, but it was okay with them.

10 And the full-time people did keep an eye on their
11 property as well. We have had vandalism problems. Several
12 of our neighbors have been hit over the years, and so it's
13 just a good idea to help each other out.

14 Q She made some reference to horses coming onto the property.
15 Is that your horse or any of your --

16 A No. No one on our property -- no one on this beach, up
17 215th Avenue, owns a horse. Those horses come from the
18 north, and people also bring their horses from the inland
19 areas to go on the beach.

20 Q How about the reference to an ATV vehicle? Was that your
21 vehicle or any of your neighbors'?

22 A No. Nobody owns an ATV. Those come from the north, up
23 near Camp Gallagher.

24 Q All right. And then there was reference to some illegal
25 logging. Was that any of your group involved in that?

1 A No. That was an allegation that -- when Mr. Carlyle logged
2 the area upland from our beach, several people had issues
3 with that logging operation. It wasn't just the Foss
4 family.

5 Q Right. In the proceedings on this permit application, back
6 in 2000, the Hearing Examiner entered a decision where
7 various findings were made, and one of them was that the
8 tubes would be removed within a year. Have you found that
9 to be an accurate characterization of what's actually
10 occurred on the site?

11 A No, I have not.

12 Q And how so?

13 A Because the tubes have been in place for much longer than a
14 year.

15 Q All right.

16 THE HEARING EXAMINER: What Hearing Examiner
17 Decision and what page?

18 MR. BRICKLIN: That will take me a second to pull
19 that out.

20 THE HEARING EXAMINER: That would help me.

21 MR. BRICKLIN: It was the --

22 THE WITNESS: It was SD22-00.

23 MR. BRICKLIN: Yeah, on this project.

24 THE HEARING EXAMINER: Oh, was it? Okay. It's
25 this one here?

1 MR. BRICKLIN: Yes. Is that sufficient?

2 THE HEARING EXAMINER: That's sufficient. I don't
3 need to know where it is exactly.

4 MR. BRICKLIN: Yes. All right.

5 Q And then, also in that decision, there was a finding that
6 there would be small gasoline pumps mounted on outboard
7 engines. Is that an accurate finding based on the actual
8 experience that's occurred out there?

9 A That is not the totality of what I have seen. They may
10 have used that pump as well as the pumps that they had on
11 the barges. They have brought in boats with pumps on them,
12 and they've also brought in barges with pumps on them.

13 Q All right. There's also a finding in that earlier decision
14 that, after the harvest, the area emulsified, would be
15 slightly softer than the unharvested beach, but would be
16 able to be walked on a few minutes after harvest.

17 Is that an accurate characterization of the situation
18 as you've seen it occur out there?

19 A That is not what has happened, and I've experienced it to
20 be very soft, and you can sink in six to 10 inches in some
21 places.

22 Q All right. And then there was a characterization in that
23 decision -- or a finding in that decision, and I think
24 we've heard testimony to that effect here today, that, as a
25 result of the harvest, the beach level would be lowered one

1 to two inches. Is that consistent with your observation?
2 A No, it's not. It seems to be more significant than one to
3 two inches.

4 Q All right. Have I covered everything you wanted to cover,
5 Ms. Luedtke?

6 A Well, I also feel that the representation that the beach
7 would return to its normal state within two tidal cycles
8 didn't turn out to be what happened. That's what they
9 stated in their application, and I have no reason to
10 believe that they didn't do that in good faith. But what
11 has really happened is quite different.

12 THE HEARING EXAMINER: What has happened?

13 Q Yes. How so?

14 A There have been holes and divots left, and the beach has
15 not returned to the appearance that it had prior to it
16 being planted and harvested. Also, there's not been the
17 return of the crabs and other sea life that existed prior
18 to the planting and harvesting.

19 MR. BRICKLIN: Thank you. That's all I have for
20 this witness.

21 THE HEARING EXAMINER: This would be very good time
22 to go for lunch. 1 o'clock? Is that convenient for one and
23 all?

24 (Recess taken from 11:56 a.m. to 1:05
25 p.m.)

1 THE HEARING EXAMINER: Good afternoon. The appeal
2 on the Taylor Shellfish appeal is -- the Taylor Shellfish
3 appeal is hereby reconvened. And I didn't have anything to
4 drink for lunch.

5 (Laughter.)

6 THE HEARING EXAMINER: Call your next witness,
7 please. Oh, you finished. Oh. No, we just started cross.

8 MS. GUERNSEY: No. I don't have anything.

9 MR. KISIELIUS: Ms. Luedtke, Tadas Kisielius, on
10 behalf of Taylor. I have just a few questions for you.

11

12 CROSS-EXAMINATION

13 BY MR. KISIELIUS:

14 Q First, could you just identify, again, your property on the
15 aerial photograph behind you, just to clarify?

16 A (Witness complies.)

17 Q Okay. Thank you. For clarification, I think, the first
18 time, you were indicating significantly further south.

19 A It's kind of in the middle of the houses. There's some to
20 the north of me and some to the south.

21 Q Above the spit there, that sticks out. North of that spit?

22 A Oh, yes.

23 Q Okay. I want to ask you a couple questions about
24 photographs 3 and 4 from the set.

25 A I have to get my set.

1 MR. KISIELIUS: Could we actually do them so that
2 she could see? Thanks. I think she's going to put them up
3 on the screen so you can --

4 MR. BRICKLIN: The color copies are easier to see.

5 MR. KISIELIUS: Okay.

6 THE WITNESS: From this perspective, it's hard to
7 see. (Witness retrieves notebook.) Okay.

8 Q So these photographs -- you had previously testified that
9 the nets were no longer there. Did you ever see nets on
10 these tubes?

11 A There are nets immediately adjacent to these tubes, and it
12 was a time when there were discussions between people who
13 lived on 215th Avenue and other people in other shoreline
14 groups, with Taylor, about switching from these individual
15 tube tops to using the cargo nets. And so there was a
16 transition time period for putting these cargo nets over.
17 And it was an effort in order to keep the tubes in place.

18 Q Okay. But I guess the question is: You had testified that
19 the tubes were missing and insinuated that they were gone
20 -- I'm sorry, the nets were -- that they were loose, they
21 were gone. So on the tubes that are exposed there, had you
22 seen nets on those tubes?

23 A To the best of my recollection, that area was done.

24 Q And was netted with individual cover nets, or a canopy net?

25 A At one time, there could have been both. But I've also

1 seen the canopy net in the area closest to our homes.

2 Q Okay. And on the date that the photograph was taken, on
3 the dates immediately preceding or after, were you aware of
4 any activity happening at that specific location?

5 A Well, it certainly could have been happening but, since I
6 work, I wouldn't have been there during the daytime.

7 Q And around that time, do you remember getting a phone call
8 from Taylor?

9 A No, I don't.

10 Q You alluded to concerns you had about recreational
11 activities and that you avoided the area for boating
12 purposes and for tube floating. Have you ever had an
13 incident? Has your propeller ever been caught up in
14 netting?

15 A It has not, because I have not gone there since this was
16 put in.

17 Q Have you run into any of the equipment with a boat?

18 A As I said, since this was installed, I have avoided it
19 completely.

20 Q You said you had a concern about tube floating. Could you
21 articulate that a little bit? What exactly is your
22 concern?

23 A Well, when you're in a float tube, your legs are hanging
24 below, and you kick with fins.

25 Q Uh-huh.

1 A And my concern is that I could get caught in a submerged
2 net, I could hit rebar or pipe or something, so I always
3 thought it was best to avoid the area completely.

4 Q So you've avoided it completely. You've never had that
5 happen to you?

6 A No. I'm risk adverse (sic).

7 THE HEARING EXAMINER: Aren't we all?

8 Q And you'd testified to concerns about the barge being out
9 there and boating crashes. Are you aware of any accidents
10 that have happened there, between boats?

11 A Not on that site, but I know of other cases where it has
12 happened.

13 Q But at the Foss site, you're not aware of any accident?

14 A No, thankfully.

15 Q Did you testify that you owned a boat?

16 A I do. I own several boats.

17 Q Several boats. Do you moor them in front of your property?

18 A Yes.

19 Q Do your neighbors own boats?

20 A Yes.

21 Q And do they moor them in front of their property?

22 A Yes.

23 Q Can you estimate how many boats you have moored in the area
24 out in front of those residences?

25 A I'm trying to think of who doesn't own a boat.

1 Q Just a ballpark figure would be helpful.

2 A Eight to 10.

3 Q And how long do you moor your boats out there at any
4 particular time?

5 A It varies. It depends on what people are doing and what
6 the weather is like. Sometimes they're there for months.
7 Sometimes people bring them in and take them back out.

8 Q So you're saying "they." You're testifying to sort of the
9 general group of people. How about you, personally?

10 A My observations.

11 Q Your boat, specifically. How often do you keep yours
12 there?

13 A Well, put one in the water in the spring, and sometimes
14 we'll have two out there.

15 Q And they stay there how long?

16 A They'll be out there for several weeks. They can be pulled
17 for maintenance. You have to clean the bottom, things like
18 that. Maybe you're going to go somewhere else and fish;
19 you pull a boat.

20 Q Okay. When you take your boat out -- you testified that
21 your neighbors, as a group out there, sometimes keep them
22 out there for several months. Are you concerned in terms
23 of navigating past any of those moored boats?

24 A No.

25 Q And why not?

1 A Because I know they're there. I know that they are there.

2 Q Okay. I'd like to ask you a question about Photograph
3 Number 21.

4 A Okay.

5 Q You had testified that the barge was out there -- I think I
6 had written down "weeks at a time," and that it had become
7 part of the landscape. Can you testify as to when you
8 first saw that boat there and how long, exactly, you saw it
9 there?

10 A I believe it was in February of this year.

11 Q And the barge remained there from February until...?

12 A The barge would be there for many days at a time. And
13 sometimes the barge would leave, and it would be gone for a
14 period of time, and then it would come back. And so it
15 just became part of what was going on down at the Foss
16 property. It was -- the barge was now there.

17 Q How many days, at any particular time, would the barge be
18 there?

19 A It could be there for 10 days.

20 Q Okay. You said "February," and the photograph is dated
21 "May." So over that span, how many 10-day periods would
22 you say that you saw it?

23 A I didn't keep a record on a calendar, but it seemed like
24 the barge was always there. It had become a fixture.

25 Q And just even an estimate would be helpful, because...

1 A It would be there every month. It was there for a period
2 of, I would say conservatively, a week to two weeks.

3 Q And starting in February through about when?

4 A I believe it was removed -- there was a large cleanup that
5 was done in May and a lot of tubes were pulled, and
6 harvesting was done at the end of April, so it would have
7 been after that.

8 Q So February --

9 A Sometime in May.

10 Q February through sometime in May?

11 A Uh-huh.

12 Q Okay.

13 A There was a tube barge out there in June.

14 THE HEARING EXAMINER: A what?

15 THE WITNESS: Tube barge; a longer flat barge where
16 they would put the piles of bags with tubes on them.

17 Q And how long was that there, in your observation?

18 A That would come and go. It could be there for two or three
19 days. Sometimes it would be further down, and you couldn't
20 see it from your house.

21 Q Further down along the Foss property?

22 A Correct. Further south.

23 Q And so you had a couple of days, come and go. Again, just
24 a span of from when to when?

25 A I didn't keep track of that.

1 Q Okay. I'd like to ask you a couple of questions about
2 Photograph Number 31.

3 A Yeah.

4 Q Was this the only piece of rebar that you saw?

5 A No.

6 Q No. Could you testify to how many you saw there, that were
7 in that condition?

8 A On this particular day, there may have been three, four.

9 Q And was there any activity happening at the time?

10 A No.

11 Q No. The day before, was there any activity that you were
12 aware of?

13 A Not that I was aware of.

14 Q And how long did that rebar stay there, as best as you
15 could tell?

16 A I don't know.

17 Q Okay. On a similar topic, you've introduced Exhibit 151,
18 which is the --

19 A Yes.

20 Q Similar question. You had highlighted that area with a
21 group of rebar. Were you aware of any activity that was
22 going on that day?

23 A I didn't see any workers when I was taking photographs.

24 Q And how about the day before?

25 A Possibly. I -- something could have been going on when I

1 wasn't there.

2 Q Do you know how long the rebar was there in that state?

3 A I remember seeing this several times before I photographed
4 it.

5 Q Several times over the course of a week? a month?

6 A A week to two weeks.

7 Q Photograph Number 32.

8 A Yeah.

9 Q Are you aware of what function this rope was serving?

10 A I have no idea.

11 Q Do you know why Taylor had that there?

12 A No, I don't.

13 Q Okay. Throughout the course, you have referred to several
14 pictures with crabs and moon snails and fish; and other
15 than your observations as a layperson, do you have any
16 qualifications that help you make your assessment that
17 these animals were dead?

18 A I've been fishing since 1986, so I'm familiar with tide
19 pools. I'm familiar with what -- what swims in our waters,
20 as much as a person (microphone goes off) -- as much as a
21 person would.

22 THE HEARING EXAMINER: Is it disconnected?

23 (Discussion off the record.)

24 THE WITNESS: There we go. Sorry about that.

25 MR. BRICKLIN: Say those last few words again.

1 THE WITNESS: I'm as familiar as a person who has
2 been fishing since 1986 can be with what swims in our
3 saltwater.

4 Q Okay. But no technical background or a science degree or
5 anything?

6 A No. I find that interesting.

7 Q And similarly, do you have any background that would help
8 you make your assessment that those animals that you
9 testified were dead were dead because of the aquaculture
10 and the gear that was there?

11 A They were dead. They weren't moving. And when crabs are
12 alive, you know it.

13 Q But my question at this instance is: The correlation that
14 you're drawing between the dead animal and the gear in the
15 area in which it's located -- you were making the
16 connection that it was dead because of that equipment. Do
17 you have any basis, other than just your observation of
18 seeing it there, that it was due to the equipment that it
19 was dead?

20 A I didn't perform any tests on it, no.

21 Q Photograph Number 49.

22 A Yes.

23 Q You testified about the scum on the beach. Is it your
24 testimony that this scum is the result of the Taylor
25 operation?

1 A My testimony was that I noticed this after the operation
2 came to the Foss area and they had been working down there.
3 I also testified that I didn't know what this was but that
4 I had never seen it before and I have lived there since
5 1985.

6 Q Never seen it before the day you photographed it?

7 A I've never seen a pattern like this, and I've never seen a
8 substance like this on the beach.

9 Q Okay. And Taylor's operations have been going on now for
10 about seven years, and, prior to this date, you had never
11 seen that before?

12 A Correct. But I happened to be home, and I'm not always
13 home.

14 Q Do you know where this photograph was taken in relation to
15 where they were working?

16 A Just north.

17 Q Just north. And when were they working in relation to the
18 day that you took the photograph?

19 A I don't know that for sure.

20 Q I mean, was it a week before? a month before? the day
21 before?

22 A There was activity, I believe, within the week before.

23 Q Okay. You had testimony--again, back to the animals--that,
24 in your observation, there are significantly fewer -- was
25 it crabs that you've noticed, in the area?

- 1 A Yes. Particularly the crabs.
- 2 Q And how were you able to quantify that?
- 3 A By having walked there before the operation began and
4 walking there now.
- 5 Q Okay. But there's no record? It's just sort of your
6 general perception of the number of crabs that you saw?
- 7 A Yeah. After many, many years of walking there.
- 8 Q Okay. You also had testimony that the area, after harvest
9 -- something about six to 10 inches was what you observed:
10 You could sink down six to 10 inches. Is that accurate?
- 11 A Yes.
- 12 Q Is that over the entire stretch of beach? I mean, what
13 general area are we talking about there, where you could
14 sink down six to 10 inches?
- 15 A The area close to Mr. McCormick's property line.
- 16 Q And in your observation of six to 10 inches, is it
17 currently like that? Has it always been like that?
- 18 A Yes, it is currently like that.
- 19 Q So it's your testimony that, from the day that the farm was
20 put in till now, that area, you sink down six to 10 inches?
- 21 A No, that's not my testimony.
- 22 Q Could you --
- 23 A Since the harvesting.
- 24 Q Okay. Since the harvesting?
- 25 A Yes.

1 Q But since the harvesting, that's the perpetual state, in
2 your testimony, that it's six to 10 inches of softness
3 wherever they've harvested, perpetually?

4 A I don't understand what you mean by "perpetually." what --

5 Q I guess, you were contesting testimony that said the area
6 is restored within one to two tidal cycles, and you said
7 that was not accurate.

8 A That's correct.

9 Q So I'm trying to understand: In your estimation, in your
10 perception, how long is the area in that state? And the
11 state that you described was: "I could sink down six to 10
12 inches."

13 A Some areas, it's still like that.

14 Q Okay. And which areas are like that?

15 A In particular, the area closest to our homes.

16 Q You can go ahead and point if that helps.

17 A It's up in this area here (indicating). Now, there may be
18 other areas. I haven't walked the entire area every time
19 there's been a harvest or a planting.

20 Q And this is just for clarification so that I understand
21 your testimony. Are we talking about a large swath
22 everywhere they've harvested, or just select areas?

23 A Again, I haven't walked the entire area.

24 Q Just for the area that you've identified.

25 A Once you sink in, you don't want to keep finding more

1 places to sink in, because you need to get out.

2 MR. KISIELIUS: I have no further questions. Thank
3 you.

4 THE WITNESS: Thank you.

5

6 CROSS-EXAMINATION

7 BY MR. KIMBALL:

8 Q Ms. Luedtke -- is that --

9 A Luedtke.

10 Q Luedtke? The beach that is depicted in 49, is that on my
11 clients' property?

12 A No.

13 Q To your knowledge, has the property line between the
14 McCormick/Zitgo (phonetic) home and my clients' property
15 been surveyed?

16 A I haven't observed a survey.

17 Q You have not caused a survey of the location of the Taylor
18 geoduck beds to happen, have you?

19 A I would have no reason to do that.

20 Q So you would agree with me, then, that the survey as to
21 their location in relation to the property line would be
22 much more accurate than your perception, then?

23 A whose survey?

24 Q The survey that was done by Taylor to establish the
25 boundaries of those beds with the Department of wildlife.

1 A Well, you can't tell where those boundaries are when you
2 are on the Foss property.

3 Q Can't tell where what boundaries are?

4 A Survey markers.

5 Q I'm not talking about survey markers. Were you present for
6 the testimony yesterday?

7 A Partially.

8 Q Were you present for testimony that, as part of installing
9 a farm, they have to survey the exact location of their
10 beds, they have to register that as part of the aquatic
11 registration?

12 A I heard that, but I didn't completely understand the
13 testimony.

14 Q So if there was a survey of the physical location conducted
15 and the beds then located within the marked survey, you
16 would agree with me that record would be more accurate than
17 your anecdotal observation?

18 A I don't understand what you mean.

19 Q You didn't have a survey. If they had a survey, their
20 survey trumps your visual observation, correct?

21 A I don't understand what a survey has to do with anything
22 that I said.

23 Q You said that the beds were located immediately adjacent to
24 the boundary line between McCormick and Foss. Or did I
25 misunderstand you?

- 1 A Yes. Yes.
- 2 Q You were trying to give precision to the location of the
3 beds in your testimony, correct?
- 4 A Yes, and they are adjacent to the McCormick property.
- 5 Q And you have no basis upon which to testify to that other
6 than your personal observation, correct?
- 7 A That's correct.
- 8 Q Okay. You are a lawyer by training and profession?
- 9 A That's correct.
- 10 Q You did not keep records of your observations?
- 11 A I kept some records.
- 12 Q You told Mr. Kisielius that you did not keep a calendar of
13 when these events you were talking about occurred.
- 14 A That's correct. I kept records of photographs that I took
15 that were not on my digital camera.
- 16 Q How many photographs have you taken of this site?
- 17 A Many.
- 18 Q More than a thousand?
- 19 A I don't believe so.
- 20 Q 500?
- 21 A I would say hundreds.
- 22 Q And you culled those to come up with the photos that have
23 been in Exhibit Number 150 and 151?
- 24 A Yeah. I did --
- 25 Q Have those been Photoshopped?

1 MR. BRICKLIN: Can she finish --

2 THE HEARING EXAMINER: Let her finish answering the
3 question, please.

4 THE WITNESS: Yes, I chose the representative
5 pictures, and some pictures were fairly redundant, I
6 thought.

7 Q Some were better than others?

8 A You have to pick some. You can't submit every single
9 picture.

10 Q Has there been any photographic program -- these are a
11 digital picture, correct?

12 A Most of them are.

13 Q And the digital pictures -- has there been any digital
14 enhancement?

15 A No. I wouldn't know how to do that.

16 Q You don't have a Photoshop program?

17 A No.

18 Q What program do you use to view and print?

19 A Windows Fax Viewer.

20 Q Does that allow you to put legends to the side?

21 A I did not do the legend.

22 Q Pardon?

23 A I did not put the legends on the photographs.

24 Q Who did that?

25 A Catherine Townsend.

1 Q who is Catherine Townsend?

2 A She is a member of Protect Our Shoreline.

3 Q You emailed, or something, your digital photographs to her?

4 A Correct.

5 Q Then she worked this up?

6 A Correct.

7 Q Have you taken the time to compare the photographs that
8 have been introduced here today with the photographs that
9 you sent to Catherine Townsend?

10 A I have.

11 Q One by one?

12 A Yes, I have.

13 Q when did that occur?

14 A Over a period of time in the last week.

15 Q How many occasions have you gone onto the Foss property to
16 photograph the Taylor Shellfish operation?

17 A I would say several times.

18 Q well, we have photographs in March, we have photographs in
19 April, we have photographs in June, we have photographs as
20 recently as October 23, correct?

21 A Correct. And last year as well.

22 Q So "several." Does that mean a dozen?

23 A That could be an approximation, sure.

24 Q You went on the property for the purpose of taking these
25 photos and reconnaissance regarding what was going on with

1 the Taylor Shellfish operation, correct?

2 A Not entirely. I also like to walk the beach.

3 Q You walked the beach with your camera, and did you take
4 photos of anything other than the geoduck operation for
5 this case?

6 MR. BRICKLIN: Your Honor -- I thought you were
7 done with the question. You're not done? Were you done? I
8 didn't mean to interrupt your question.

9 MR. KIMBALL: If you've got an objection, lodge
10 your objection. Don't interrupt the flow. I would ask the
11 Examiner to please caution Mr. Bricklin to not interrupt
12 flow of cross-examination in that manner. You know, pretty
13 -- I was sitting there with the microphone, and it goes --

14 MR. BRICKLIN: Excuse me. I thought you were done
15 with your question. We're sharing a microphone. So again,
16 sorry. In any event, the objection is that I don't see the
17 relevance of this, and I think he's badgering the witness.

18 THE HEARING EXAMINER: You know what? I don't know
19 what the question was because it wasn't completed.

20 THE WITNESS: I believe the question was do I go
21 onto the property for any reason other than to document, to
22 take pictures of the operation.

23 Q Yes.

24 A And I do.

25 Q And you've gone on the property simply for the purpose of

1 documenting the operation?

2 A No.

3 Q You are under oath, Ms. Luedtke. You are an attorney, a
4 member of the Bar--

5 A Yes, I know.

6 Q --and an officer of the Court.

7 A I walk this beach on a regular--

8 MR. BRICKLIN: Your Honor --

9 THE WITNESS: --basis.

10 MR. BRICKLIN: Excuse me, Ms. Luedtke. Give me a
11 chance to lodge an objection, which is that I think he's
12 badgering the witness, and it's not relevant to the issue.

13 THE HEARING EXAMINER: Sustained.

14 MR. BRICKLIN: Thank you.

15 MR. KIMBALL: Well, in brief response and for the
16 record only -- I understand your ruling, but the veracity --
17 the manner in which these photographs were obtained does go
18 to their admissibility and goes to their weight and their
19 propriety in this record.

20 THE HEARING EXAMINER: My ruling stands.

21 Q You did not keep a record of the comings and goings of the
22 barge?

23 A Only photographically. Many of those pictures are taken
24 from my home.

25 Q why don't you turn to Number 2? Is your home shown in that

1 picture?

2 A Yes, it is. It's the house on the immediate right.

3 Q On the immediate right?

4 THE HEARING EXAMINER: Could you point?

5 THE WITNESS: (Indicating.)

6 MR. BRICKLIN: Far right.

7 THE WITNESS: Far right. Sorry.

8 Q And Number 3?

9 A You can't see my house in this picture, because it is
10 covered by a tree that has leafed out.

11 Q And you cannot see the beds from your home that is covered
12 by the tree, because it's leafed out, correct?

13 A That's not correct. You can walk out onto my patio and you
14 can see. I can also walk out onto my beach and see.

15 Q My question was: You cannot see them from the home?

16 A Inside the house?

17 Q Through the window.

18 A There are some beds at the lower tide that you can see, or
19 that you used to be able to see.

20 Q Prior to this farming operation, you did not see dead red
21 rock crab on the beach?

22 A No. Not -- not at all like -- like we see now.

23 Q You have not kept a count?

24 A No, I have not. I had no reason to.

25 Q Well --

1 MR. BRICKLIN: Your Honor, may I -- excuse me. I'm
2 trying to catch you in between questions here. I know your
3 rules limit the cross-examination of lay witnesses; and
4 while she's an attorney, she's here testifying as a lay
5 witness not as an expert lawyer or anything else, and I
6 would ask the Hearing Examiner to honor that.

7 THE HEARING EXAMINER: Counsel, I've had a very
8 good picture.

9 MR. KIMBALL: Okay. A couple more questions.
10 Q Number 9.

11 A Yes.

12 Q where was that picture taken?

13 A That was taken from Janie Pinneo's yard.

14 Q So that is not on my clients' property?

15 A Correct.

16 Q You don't know where that rubber band came from?

17 A I don't know where it came from, but I have a good idea
18 where it came from, because it looks just like the other
19 rubber bands that are on the tubes on the Foss farm.

20 Q Did you remove that rubber band?

21 A No, I did not.

22 Q That otter didn't let you get very close, did it?

23 A No.

24 Q They're very quick. And you didn't see it very close, did
25 you?

1 A Actually, Janie Pinneo saw this.

2 Q So you have no personal knowledge?

3 A No, and I have not testified to this photograph.

4 Q The barge has been moored in front of the Foss property,
5 correct?

6 A Yes.

7 Q They don't moor motorboats out there, do they?

8 A I don't recall seeing motorboats for any period of time out
9 there. I wouldn't leave one.

10 Q And when you talk about your motorboats going in in the
11 spring -- generally, you put them in in the spring, and you
12 take them out in the fall. You use them during the good
13 weather, and they may come out, for periods of time, to go
14 other places or for maintenance, correct?

15 A That's correct. And sometimes people put them in in the
16 wintertime if we get a stretch of dry weather. There is
17 some fishing to do. Or just boating on a nice, sunny,
18 winter day.

19 Q So if my clients go to their beach and they look down, part
20 of the landscape they see are your boats, right?

21 A Yes, they would.

22 Q The records you've kept -- where are those maintained? The
23 record you've kept regarding your observations, your trips
24 onto the Foss property. To the extent you've kept them,
25 where are they maintained?

1 MR. BRICKLIN: Your Honor, object; the same
2 objection as before.

3 THE HEARING EXAMINER: Mr. Kimball, what are the
4 issues here?

5 MR. KIMBALL: The issues are going to be whether
6 these records are -- to what extent they support her
7 testimony. And I think, Mr. Examiner, you're aware this
8 certainly may not be the last step in this process.

9 THE HEARING EXAMINER: I'm well aware of that. No
10 matter what I do, it's going to be appealed.

11 MR. KIMBALL: My understanding is that, on appeal,
12 your record has to be as complete as it can be.

13 THE HEARING EXAMINER: Exactly. On issues
14 presented.

15 Q You talked about going onto the property with Mr. Parsons?

16 A That's correct.

17 Q who is Mr. Parsons?

18 A Jeff Parsons is an expert that has been retained to discuss
19 geomorphological aspects.

20 Q So retained by whom?

21 A By the Interveners.

22 Q which Intervener? I believe there are, like, five or six.

23 A I believe, as a group.

24 Q Okay. And Mr. Parsons came down, on 215th, to your home,
25 and you took him down onto my clients' property?

1 A 215?

2 Q Isn't 215th Avenue --

3 A Oh, the address. Yes. Yes. 215th Avenue.

4 Q He accessed through there and with you?

5 A Yes, he did.

6 Q Anybody else with you on that trip?

7 A Janie Pinneo, John McCormick.

8 MR. KIMBALL: Okay. Thank you.

9 THE HEARING EXAMINER: Any further questions?

10 Anybody? May this witness be excused?

11

12

REDIRECT EXAMINATION

13 BY MR. BRICKLIN:

14 Q One thing I would just ask is: You made reference to a
15 tube, a float tube, that your feet dangle out of it. Is
16 that a tube you used for fishing purposes?

17 A Yes.

18 Q I see. Thank you.

19 MR. BRICKLIN: That's all I had.

20 MR. KIMBALL: Can I follow up with one thing?

21

22

RE-CROSS-EXAMINATION

23 BY MR. KIMBALL:

24 Q Did you fish before you moved out there?

25 A Before 1985? Yes, I did fish.

1 Q where?

2 A Wisconsin.

3 Q So you moved here from Wisconsin?

4 A And Washington state.

5 MR. BRICKLIN: Your Honor, it goes beyond the
6 scope.

7 THE HEARING EXAMINER: What's the question?

8 MR. BRICKLIN: I asked her if she moved from
9 Wisconsin out here to Puget Sound.

10 THE WITNESS: At some point, yes, I did.

11 Q When?

12 MR. BRICKLIN: Your Honor, relevance, beyond the
13 scope.

14 THE HEARING EXAMINER: Sustained.

15 MR. BRICKLIN: Thank you.

16 THE HEARING EXAMINER: Next witness.

17 MR. BRICKLIN: Wayne Daley.

18

19 WAYNE DALEY, having been first duly sworn
20 upon oath by the Hearing Examiner, testified as follows:

21

22 THE HEARING EXAMINER: And your name, sir?

23 THE WITNESS: My name is Wayne Daley. The last
24 name is spelled D, like in David, a-l-e-y.

25 ///

1 DIRECT EXAMINATION

2 BY MR. BRICKLIN:

3 Q Mr. Daley, what is your professional background?

4 A I'm a fisheries scientist.

5 Q And can you tell the Examiner -- and remember, while I'm
6 asking you the questions, actually, if you could direct
7 your answers to the Examiner. Could you tell the Examiner
8 about your background that relates to your fisheries
9 science expertise?

10 A Yes. I have been working in the field of fisheries in
11 Puget Sound since I graduated from the School of Fisheries
12 at the University of Washington, in 1979. Prior to that
13 time, I was a volunteer on a number of occasions with
14 Washington Department of Game, which is now Washington
15 Department of Fish and Wildlife, on research projects in
16 Puget Sound.

17 My professional activity, the last 12 years, has been
18 as an independent consultant, working in the field of
19 habitat restoration, including bank stabilization on the
20 shorelines of Puget Sound.

21 And I've been a volunteer with the Watershed Committee
22 for the City of Bainbridge Island. And the last five
23 years, we've been doing extensive beach seine sampling for
24 critters that use the beaches along and around the area of
25 Bainbridge Island and the Kitsap Peninsula.

1 Q And you referred to habitat restoration work. Can you
2 explain what that is and maybe give a couple of examples?

3 A It's a combination both of stream and shoreline habitat
4 restoration. And, in the process, it's a matter of
5 assessing the conditions at the site, looking at the plants
6 that are available, the condition of the shoreline, and the
7 area.

8 In most cases, it's either a combination of failing
9 bulkheads or a situation where the shoreline is being
10 impacted and is a situation where we look to reestablish
11 the correct shoreline vegetation and habitat which supports
12 both the shore fish and wildlife, in the water as well as
13 on the shore.

14 Q And have you been retained by the Interveners in this
15 matter?

16 A Yes, I have.

17 Q All right. And what have you done to prepare for your
18 testimony here?

19 A I've been reviewing the published literature concerning
20 geoducks. I spent eight hours in the library at the
21 University of Washington School of Fisheries and
22 Oceanography, looking specifically for information that
23 addresses geoduck aquaculture and/or geoduck culture and,
24 in the process of reviewing that, information as well as
25 material that was available on geoducks in general.

1 Q And was that looking for literature about the environmental
2 impacts of geoduck aquaculture?

3 A That's correct.

4 Q And have you been to the site?

5 A Yes, I have.

6 Q And when were you there?

7 A I was there in July, with Mr. McCormick.

8 Q And he's one of the neighbors along there?

9 A Yes.

10 Q All right. And could you describe what you observed of
11 significance during that site visit?

12 A Walked the area under the guidance of Mr. McCormick, looked
13 at the operation itself. There was a process underway of
14 -- the Taylor Shellfish people were working at the site;
15 observed an area that was netted over the grow-out area;
16 and, in addition, walked along the shoreline and adjacent
17 to the geoduck operation, and encountered a situation,
18 similar to the previous witness, concerning the stability
19 of the sands and soils in the area.

20 Q Why don't you elaborate on that instead of just referencing
21 what another witness said?

22 A Encountered an area probably 100 yards in length that had
23 -- became somewhat -- almost frightening to walk because of
24 the way that I was sinking into the soil and into the sand.
25 And I've walked the beaches in Puget Sound since I moved to

1 Puget Sound in 1961, and I've never encountered this kind
2 of a situation before.

3 Q And when you said "almost frightening," what was
4 frightening about having soft sand?

5 A The way I was sinking to the point where I wasn't sure I
6 was going to be able to get my feet out of the sand without
7 falling on my face.

8 Q Did you see anything else of significance during that site
9 visit?

10 A I did. In the areas that were netted, I did observe dead
11 animals underneath the netting. I observed areas of
12 intensive macroalgae attached to the netting, and just the
13 general condition of the area, in terms of the alteration
14 of the beach habitat.

15 Q You've walked other beaches and probably have seen dead
16 crabs or other animals on a beach from time to time?

17 A I have, but these animals were obviously captured with the
18 netting system and unable to free themselves and appeared
19 to have probably been killed by the presence of the intense
20 sunshine on the area.

21 Q From your perspective, did the facility obstruct access to
22 the waters?

23 A I have been an active fly-fisherman on Puget Sound since
24 the early '60s, and South Sound is one area that we fished
25 regularly for sea-run cutthroat. And the process that we

1 used and the way we fished was with either walking the
2 beaches or using a very flat-bottom, small pram and casting
3 and fishing in shallow water; basically, the depth in the
4 areas that these obstructions are used.

5 And if I were to try and fish that area for sea-run
6 cutthroat in the same manner that I fished it for years, it
7 would be impossible. The lines and the hooks would
8 obviously become entangled with the material that's in the
9 area.

10 Q There was testimony from Mr. Fisher earlier today about the
11 impacts of an operation like this on salmon. Have you
12 looked at that issue yourself?

13 A In my efforts at the University of Washington and reviewing
14 all of the literature that I could find, there was nothing
15 that related the issues, as far as shoreline impacts with
16 geoduck operations or geoduck activities.

17 I found nothing that related to the area -- the types
18 of activities that he was referring to, in terms of their
19 impact on salmon.

20 Q Mr. Fisher cited some studies today, and you were present
21 for his testimony; is that right?

22 A Yes, I was.

23 Q And you heard him refer to a number of studies that were
24 admitted into evidence here. Were those studies ones that
25 stood for the proposition that a geoduck aquaculture

1 operation like this would be harmful to salmon?

2 A Those studies were all in relation to shellfish other than
3 geoduck, and primarily oyster culture. They're two very
4 different types of culture: the type that's going on with
5 the intensity of geoduck culture and what's done with
6 oysters.

7 And particularly, the majority of the studies, with
8 the exception of the study in Willapa Harbor, were all
9 areas totally outside of our region and do not relate to
10 the issues that we're faced with here in Puget Sound.

11 Q When you say "outside of our region," were they somewhere
12 else on the Pacific Coast?

13 A They were on the East Coast and on the Gulf of Mexico.

14 Q Are habitat issues different there?

15 A Significantly. Different water quality, different
16 characteristics of the shorelines, and different critters.

17 Q He made reference to a study that involved a mesocosm? Do
18 I have that --

19 A A mesocosm?

20 Q Mesocosm?

21 A Yes. A mesocosm is a research system, and, actually, I, in
22 my work as a consultant with a large environmental
23 engineering firm, was involved in the designing and the
24 operation, in terms of the life-support system, of
25 mesocosms on the East Coast. So I'm familiar with what

1 they are.

2 And you have a very small sample of an environment
3 that's sort of -- and from a research standpoint, is used
4 to try and replicate what goes on in the wild. But it does
5 not include the entire influence that you would experience
6 along a shoreline, particularly from tidal action. It's
7 very difficult, in a mesocosm, to set up an environment
8 where you have the extreme flushing activities that go on
9 along our beaches.

10 Q In the studies that he cited, were these typically
11 situations where there was active commercial harvesting
12 going on?

13 A In some cases, yes.

14 Q And was that true in all of the studies?

15 A I don't know. I have not read the studies that he cited.

16 Q To your knowledge, were you able to find any studies that
17 addressed the impact of geoduck aquaculture on forage fish?

18 A There were no documents available in any of the research
19 that I did that related to the issue between geoduck and
20 forage fish.

21 Q And why don't you explain, for the record, what forage fish
22 is?

23 A Forage fish are predominantly the three species that have
24 been identified by National Marine Fisheries Service and
25 the federal government as a critical source of food for

1 salmon and the recovery of the listed salmon in Puget
2 Sound. It's sand lance, surf smelt, and herring. And
3 those three species depend on the shorelines of Puget Sound
4 as a critical part of their entire life cycle.

5 Q And are there documented instances of sand lance, one of
6 those forage fish, in this particular area?

7 A Yes, there are.

8 Q And how close?

9 A They're immediately adjacent to this site, along the
10 beaches. Washington Department of Fish and wildlife has
11 maps that show the exact locations where they have observed
12 sand lance in the area adjacent to the Foss farm.

13 Q And when you say "adjacent," do you mean on the Foss farm
14 property itself?

15 A On the beaches, yes.

16 Q And how would an operation like this impact forage fish
17 that is an important food source for the salmon?

18 A Particularly, the sand lance is the critter that we're
19 going to see the most severe impact, because of the nature
20 of their life cycle. They utilize the sandy beaches to
21 spawn in, and they spawn by digging into the sand and
22 burying their eggs in that sand, anywhere from a tidal
23 level of perhaps around plus-5, all the way up to an
24 extreme high-tide area.

25 And these eggs are deposited in the gravel and then

1 emerge, over a very brief period of time after that, as
2 juveniles. The larval stages of those forage fish then
3 depend entirely on that immediate shoreline area as an area
4 to grow and nurture before they get to a size where they
5 can survive in the deeper water. They're very dependent
6 upon the quality of the water in that area as well.

7 Q Is that rearing habitat for those juvenile forage fish also
8 above the plus-5 tide line, or does it extend lower on the
9 beach?

10 A It will extend down beyond that point, but, for the most
11 part, it would be -- you'll find those critters somewhere
12 between 1-zero or plus-5, on up into the high-tide area.

13 Q So would part of that rearing habitat then overlap with the
14 area of the beach that's being used by this operation?

15 A Yes.

16 Q By the Taylor operation?

17 A Yes.

18 Q How would the installation of an operation like this then
19 impact salmon that's attempting to utilize that part of the
20 beach for rearing habitat?

21 A The forage fish, and particularly the smaller larval fish
22 and up into the juvenile sizes, are dependant entirely on
23 phytoplankton and zooplankton as a source of food. And so
24 this water column that's adjacent to this intensive geoduck
25 operation is going to impact -- going to have an adverse

1 reduction in the numbers of phytoplankton and zooplankton
2 in that water column, just from the feeding activity of
3 geoduck.

4 Q Meaning that the geoducks would be consuming the same food
5 source that the sand lance would be depending on?

6 A That's correct.

7 Q You mentioned phytoplankton and zooplankton. would that
8 also be the copepods in that category as well?

9 A They're a benthic community that is in the sand itself, and
10 the larval stages and the juvenile stages of the sand lance
11 are dependent upon those critters that are in the sand as
12 well as floating free in the water.

13 Q would the installation of this densely packed geoduck
14 facility also physically occupy the space that the sand
15 lance would otherwise be occupying?

16 A It's a structure that's there where they would normally be
17 working their way along and utilizing that sand area. So
18 it is definitely a structure that interferes with their
19 normal behavior.

20 Q I'll have you take a look at Exhibit 9. I'll pull that out
21 for you. This is a study by Lindell Young, published in
22 the Journal of Environmental Conservation. Are you
23 familiar with that study?

24 A Yes, I am.

25 Q And does that part address this issue of whether an

1 operation like this would physically displace sand lance
2 habitat?

3 A It addresses the issues concerning that there is such a
4 little amount of knowledge available in terms of what we
5 know about the interaction between the shellfish activity
6 and the critters that are adjacent to it.

7 Q And is that the study that makes reference to these
8 aquaculture operations resulting in a monoculture situation
9 on the beach?

10 A Yes.

11 Q what's a monoculture?

12 A when the entire community of animals and plants is reduced
13 to a single entity.

14 Q Meaning the entity that's being cultured?

15 A Yes.

16 Q You said that the issue of the amount of waste generated by
17 900,000 geoducks planted in an area this size --

18 MR. PLAUCHE: Mr. Examiner, I'm going to object to
19 this. It's gone on a little bit. The one issue, I think,
20 that was relevant on fisheries impacts was whether or not
21 the aquaculture gear associated with a geoduck farm
22 obstructed fish use at the site.

23 Mr. Bricklin is now heading into larger environmental
24 impacts and environmental concerns. To the extent those
25 come in, the hearing is going to go quite long, because

1 we're going to need to rebut all of that, and we do have
2 rebuttal evidence for all that.

3 THE HEARING EXAMINER: It's already come in through
4 Dr. Fisher. It's being challenged now.

5 MR. PLAUCHE: Again, what he's getting into right
6 now, based on that last question, is the amount of waste
7 produced by the geoducks on the site. And, again, we can go
8 there, but Dr. Fisher didn't testify to that. He testified
9 only to the habitat impacts based on the aquaculture gear.

10 THE HEARING EXAMINER: Isn't that an impact?

11 MR. PLAUCHE: It's not an impact that's of a fish
12 -- whether or not it obstructs the fish from using the site,
13 which, the obstruction issue is the relevant issue, to the
14 extent any of it is relevant.

15 MR. BRICKLIN: I think it goes to the issue of the
16 interference with the use of surface water. As this witness
17 and the prior witness has testified, he could use these
18 waters to go fishing. And if the waste from the geoducks is
19 adversely impacting the salmon, then there's no fish to go
20 fishing for.

21 May I continue?

22 THE HEARING EXAMINER: Uh-huh.

23 MR. BRICKLIN: I said may I continue?

24 THE HEARING EXAMINER: Go ahead.

25 MR. BRICKLIN: Thank you.

1 Q So, Mr. Daley, how would the volumes of waste generated by
2 geoducks of this density impact the environment that the
3 forage fish are trying to survive in?

4 A Based on the limited amount of information I could find
5 concerning the activity of geoduck in this kind of a
6 situation, I did some conclusions based on the numbers of
7 critters that are there. The amount of waters that these
8 animals ingest and discharge into the water column resulted
9 in a volume of water being utilized in that area that, in
10 my estimation, is equivalent to the --

11 MR. KIMBALL: Objection. Mr. Examiner, I think the
12 testimony is very clear right now that there's no scientific
13 basis for this, and he's attempting to give a scientific
14 opinion. The rules are clearly established that a
15 scientific opinion has to be based upon a recognized, or at
16 least well-recognized, body of data and/or process generally
17 accepted within the scientific community.

18 THE HEARING EXAMINER: What's the basis of your --

19 THE WITNESS: I've taken from the literature that I
20 found within the School of Fisheries.

21 THE HEARING EXAMINER: What literature?

22 THE WITNESS: This is a study that was in the
23 documents: Goodwin, Shaw, 1984, "Age, Recruitment, and
24 Growth of Geoduck." And based on that information, I was
25 able to determine an estimated amount of consumption by the

1 animals.

2 THE HEARING EXAMINER: I don't find this very
3 helpful. This is just going too far. I'm not -- a 1984
4 study. Please come up with something more current. I'm not
5 going to find this whole area -- you've got two basic issues
6 here. Let's get down to the two issues. We're wandering
7 all over the place.

8 Q Are you familiar with the Newel study?

9 A Yes.

10 Q And that's Exhibit 6, Your Honor. In that study, it states
11 that "potentially adverse effects from fin fish and
12 shellfish aquaculture facilities can result from excess
13 deposition of fecal material"--

14 MR. PLAUCHE: Again, Your Honor --

15 Q --"that may overload" --

16 MR. BRICKLIN: May I finish the question?

17 MR. PLAUCHE: Yeah, I'm sorry.

18 Q -- that "that may overload the underlying sediment
19 particulate or organic material. Bacterial decomposition
20 of this organic material can release more inorganic
21 nutrients and, in extreme situations, cause sediment
22 anoxia, thereby reducing the" --

23 MR. PLAUCHE: He's reading --

24 MR. BRICKLIN: I'm asking a question.

25 Q -- "thereby reducing the biomass and species diversity of

1 benthic fauna." Are you familiar with that --

2 MR. PLAUCHE: I'm going to object to --

3 THE HEARING EXAMINER: What is the purpose of this
4 question? What is the purpose of this question and how does
5 this feed into the issues that we're here for today?

6 MR. BRICKLIN: I was going to ask the witness
7 whether that effect would knit with the reduction in the
8 species diversity in the area of this farm. Would it
9 negatively impact the salmon and thereby negatively impact
10 the abilities to fish these waters.

11 THE HEARING EXAMINER: You're getting too far
12 removed. Please get back to the issues.

13 MR. BRICKLIN: All right. Thank you.

14 Q Mr. Fisher testified -- Mr. Fisher testified --

15 THE HEARING EXAMINER: Dr. Fisher.

16 MR. BRICKLIN: Was it Dr. Fisher? I'm sorry.

17 Q Dr. Fisher testified regarding the obstruction issue of a
18 structure like this, and have you considered the extent to
19 which migrating salmon would be potentially impacted by a
20 structure like this during their migration?

21 A It's totally unnatural habitat. The salmon, as they
22 migrate through this area, are normally finding a sandy
23 bottom without obstructions on it, other than the natural
24 rock and sand that you'll find there, and this is something
25 that's totally foreign to the natural environment on that

1 beach.

2 Q And would that be a good thing, for them to run into an
3 unnatural environment?

4 A It moves those fish out of their normal areas of
5 utilization, so they're being forced into an area where
6 there could be additional predation or areas where there's
7 not as much food for them.

8 Q There was reference, by Dr. Fisher, to an environmental
9 impact statement prepared for subtidal geoduck operations.
10 Do you recall that part of his testimony?

11 A Yes, I do.

12 Q Are you aware, when he attempted to extrapolate from that
13 to this situation -- do you remember that?

14 A Yes, I do.

15 Q Are you familiar with, or aware of, the densities of the
16 plantings that were being studied in that as compared to
17 the densities of plantings in this situation?

18 THE HEARING EXAMINER: I'm not aware that they do
19 plantings in subtidal areas. Do they?

20 MR. BRICKLIN: Well, excuse me. I shouldn't say
21 "plantings."

22 Q The densities of the geoducks in that situation, compared
23 to the planted geoducks in this situation. Thank you for
24 that.

25 MR. PLAUCHE: I'm going to object again, just to

1 the relevance of the density of geoduck.

2 THE HEARING EXAMINER: I think, when you're getting
3 into the --

4 MR. BRICKLIN: May I explain?

5 THE HEARING EXAMINER: Go ahead, but I think these
6 are, basically, almost two different sciences, as I
7 understand.

8 MR. BRICKLIN: Well, that's our point.

9 THE HEARING EXAMINER: Yeah. Well, that's my
10 understanding. It's basically two separate sciences.

11 MR. BRICKLIN: I will move on, then.

12 THE HEARING EXAMINER: Feel free to correct me if
13 you want to, but that's --

14 MR. PLAUCHE: And just, if I may, then, on that
15 issue, I think Dr. Fisher testified that they were two
16 separate sciences, two separate environments. He, I think,
17 in his testimony, explained why he thought the sediment
18 issue, which is what we brought up, translated.

19 THE HEARING EXAMINER: Okay. He's got the floor
20 right now.

21 Q In your review of the literature and your familiarity with
22 it even prior to being retained for this matter, are there
23 writings in the literature which support your conclusion
24 that aquaculture of this type would be a stressor on
25 salmon?

1 A There's no question that there are activities, including
2 aquaculture, along our shorelines that are causing a
3 tremendous stressor. That's why the Governor has declared
4 Puget Sound as an area of importance.

5 MR. KIMBALL: This is nonresponsive to the
6 question.

7 Q Mr. Daley, I wasn't asking whether there are stressors
8 generally. I was asking, in that literature, is
9 aquaculture like this identified as a stressor?

10 A Aquaculture has been identified as a stressor.

11 Q And are these in official publications?

12 A Yes.

13 Q Thank you. Regarding the issue of the importance of having
14 periodic review of an operation like this, in your review,
15 did you determine -- you stated that you were unable to
16 find literature that assessed a number of these issues;
17 specifically, geoducks and issues here in the Puget Sound
18 region. Did you see reports that reached similar
19 conclusions, that data gaps exist regarding these kinds of
20 impacts?

21 A Yes.

22 Q And what reports are you referring to?

23 A There are documents that have been prepared by the Suzuki
24 Association. There are documents that have been prepared
25 by Sea Grant. And there was a recent synopsis of studies

1 in a symposium in Seattle just recently.

2 Q Okay. And what is Sea Grant?

3 A Sea Grant is an organization that's involved in research
4 concerning saltwater environment.

5 Q Is that a federally funded operation that, locally, does
6 business out of the University of Washington?

7 A Yes.

8 Q All right. And handing you Exhibit 16, do you recognize
9 that document as a product of that seminar--

10 A Yes.

11 Q --or conference that you were just referring to?

12 A Yes.

13 Q And does that identify a long list of scientific issues
14 related to this topic that need to be answered?

15 A I have a list of nine items that were taken from this
16 document as well as my own research concerning the unknowns
17 concerning geoduck culture.

18 Q And can you give us an example of some --

19 THE HEARING EXAMINER: Exhibit 16 will be admitted
20 into evidence.

21 MR. BRICKLIN: Thank you, Your Honor.

22 THE WITNESS: There's no data on the retention time
23 of domoic acid associated with PSP in the sands as an item.

24 Q Slow down here.

25 MR. PLAUCHE: I'm just going to object again. He's

1 about to go into a laundry list of environmental issues that
2 we're going to need to rebut. If they come in, we have
3 rebuttal evidence and there are potential exhibits and we've
4 got witnesses here to do it, but it's going to take a while.
5 I don't think it's relevant to the issue of obstruction of
6 use or what time limit -- whether or not this permit
7 expired.

8 THE HEARING EXAMINER: The decision is -- state
9 your question, please.

10 MR. BRICKLIN: He's previously testified as to a
11 number of issues that needed to be examined, in his opinion
12 and in the opinion of the scientists at Sea Grant, and I
13 asked him for a couple of examples, was all I did.

14 THE HEARING EXAMINER: Go ahead.

15 THE WITNESS: As I said, I selected nine, but I'll
16 simply identify: There's no research on the genetic impact
17 of cultured geoducks on wild populations. And there's not
18 data on the actual filtration rate of geoducks in a culture
19 site. And there are significant other areas of concern that
20 have been identified in this report.

21 Q Dr. Fisher made reference to information he gleaned from
22 studies in Lake Washington in relation to the 520 Bridge
23 project.

24 A Yes.

25 Q Do you view that as particularly useful or helpful to this

1 inquiry?

2 A I've been involved in a lot of work in Lake Washington, and
3 I didn't feel that the information was relevant to where we
4 are on this particular site.

5 Q And did any of the studies he cited refer to or examine the
6 issue of impacts on forage fish?

7 A No.

8 MR. BRICKLIN: That's all I have for this witness,
9 Your Honor. Thank you.

10 MS. GUERNSEY: Nothing.

11 MR. PLAUCHE: I have a couple of questions.

12

13 CROSS-EXAMINATION

14 BY MR. PLAUCHE:

15 Q I'm Billy Plauche. I represent Taylor Shellfish in this
16 proceeding, Mr. Daley. You had testified that you've done
17 a fair amount of restoration work or been involved in a
18 fair amount of shoreline restoration work.

19 A Yes.

20 Q Are you familiar with Puget Sound Restoration Fund?

21 A Yes, I am.

22 Q And could you briefly describe what their mission is?

23 A It's a group of private individuals, and the executive
24 director is Betsy Peabody.

25 Q And what --

1 A And they're involved in the process of protecting Puget
2 Sound. A lot of their activities that I'm directly
3 familiar with are the use of, not geoducks, but the use of
4 oyster culture and the use of oysters in cleaning water
5 within the embayments of Puget Sound.

6 Q Are you familiar with burrowing shrimp?

7 A I'm aware of shrimp that are oftentimes referred to as
8 "ghost shrimp," and they're very popular in terms of a fish
9 bait for salmon fisherman.

10 Q And have you ever been in grounds, tidelands, that have
11 been infested by burrowing shrimp or colonized by burrowing
12 shrimp?

13 A Not that I'm aware of.

14 Q You testified that there were a number of animals that you
15 -- I think you said, on your site visit, you had seen
16 captured under the predator netting at the Foss farm
17 geoduck operation.

18 A Yes.

19 Q Did you identify what critters those were?

20 A I saw three different species of crab. There were spider
21 crabs, there was a red rock crab, and there was a third
22 smaller -- very small species of crab that were being
23 confined in a way that they couldn't escape and were dead.
24 There were starfish underneath the netting as well.

25 Q Is that it?

1 A Yeah.

2 Q And you had testified you're a fly-fisherman. You didn't
3 fly-fish at the Foss property, correct?

4 A I have not fly-fished there since that system was
5 installed, no. I have fished that area in years past.

6 Q And had you fished from that property?

7 A In years past. Not since the Foss farm, the aquaculture
8 activities, started there.

9 Q And you testified, I believe, that the goeduck from the
10 Foss farm are farmed at a higher intensity than oysters are
11 farmed. Am I getting that right?

12 A Higher intensity than...?

13 Q Than oysters.

14 A Oysters are farmed in an entirely different format so, in
15 terms of intensity, I couldn't answer that question.

16 Q Okay. I had that you testified that geoduck farming was a
17 more-intense form of shellfish aquaculture. That is not
18 your testimony?

19 A No.

20 Q And I believe you testified that you had not reviewed the
21 studies that Dr. Fisher testified to today?

22 A That's correct.

23 Q You also testified, with regard to the effect of the
24 aquaculture netting at the Foss site on the salmon, that --
25 I believe your testimony was that the net would move the

1 fish out of their natural migration corridor.

2 A Yes.

3 Q Is that correct?

4 A That's correct.

5 Q Okay. And on what do you base your conclusion that it
6 would move the fish out of that natural migration corridor?

7 A The natural habits of the salmon, particularly juvenile
8 salmon, in utilizing the shorelines is the way they swim
9 along the shoreline in search of food. And in that
10 process, if they encounter this type of structure, they're
11 going to be moved out of that area into a different area of
12 the shoreline and away from an area where they would be
13 normally searching for food.

14 Q And do migrating salmon avoid the eelgrass in that same --

15 A Migrating salmon will utilize eelgrass, because there's
16 forage fish present there to eat.

17 Q Okay. And your testimony is that migrating salmon would
18 not use the habitat created by this aquaculture gear for
19 that same reason?

20 A That's correct.

21 MR. PLAUCHE: I have nothing further.

22

23 CROSS-EXAMINATION

24 BY MR. KIMBALL:

25 Q Mr. Daley, good afternoon. I'm Jerry Kimball. I represent

1 the property owners. Your 1979 degree was what degree?
2 A University of Washington School of Fisheries, a bachelor of
3 science.
4 Q You do not have a master's or a Ph.D.?
5 A I do not. I do not have --
6 Q That's fine. You walked the beach July of 2007. When
7 we're talking about the beach -- immediately to your right
8 is an aerial photograph. You walked through
9 Mr. McCormick's house, southward?
10 A That's correct.
11 Q Did you go all the way to Joemma State Park?
12 A No.
13 Q Were there any signs that you encountered between Mr.
14 McCormick's property and my clients' property?
15 A No.
16 Q You indicate you fly-fished for cutthroat?
17 A That's correct.
18 Q Wet, or dry?
19 A Both.
20 Q And if you're wet fly-fishing for cutthroat, you're trying
21 to sink about 18 inches, two feet below the surface,
22 correct?
23 A That's correct.
24 Q That's their habitat?
25 A Yes.

1 Q And the obstruction that you would encounter if you were to
2 fish on my clients' property would be that you might hang
3 up on the bottom?

4 A That's correct.

5 Q And it goes with fishing, doesn't it, Mr. Daley?

6 A Yes.

7 Q You understand that the property on which this operation
8 occurs is owned from the lowest low tide, continuing back
9 through the uplands, by private-property owners?

10 A That's correct. I understand that.

11 Q But you had fished there prior to --

12 A I fished in the waters of the State. When you're on the
13 water, you can fish that area without being on the
14 property.

15 Q I understand that, but you were talking about fly-fishing
16 by walking the shore.

17 A No. I was fly-fishing from a 10-foot pram with a flat
18 bottom.

19 Q The flat bottom would accommodate things like rocks, the
20 normal terrain one sees on the bottom of the shoreline of
21 Puget Sound?

22 A That's correct.

23 Q There's an absence in a portion of the Foss property,
24 because of the prevalence of the feeder cliffs, correct?
25 Not a lot of rocks?

1 A There are not a lot of rocks, yes.

2 Q who is it you're employed by?

3 A I am employed by myself. I worked for a large
4 environmental engineering firm for 17 years.

5 Q As a --

6 A As a bioengineer and a consultant, and I've been working
7 independently out of my home for the last 12 years.

8 Q As a consultant on environmental matters?

9 A That's correct.

10 Q To environmental groups?

11 A That's correct.

12 Q Have you ever testified on behalf of the aquaculture
13 industry or any component of that industry?

14 A I have not.

15 Q You would not do that?

16 A It depends on the circumstances.

17 Q Okay, Mr. Daley. But in 12 years, you have not?

18 A In 12 years, I have not.

19 MR. KIMBALL: Thank you very much.

20

21 REDIRECT EXAMINATION

22 BY MR. BRICKLIN:

23 Q Mr. Daley, have you testified on behalf of developers?

24 A I have testified on behalf of developers in some instances,
25 yes.

1 Q Right.

2 A Last week.

3 Q In fact, you and I were on opposing sides in that case
4 where you were testifying on behalf of a developer, right?

5 A That's correct.

6 Q You don't have any sort of bias against the development
7 community or anything like that, do you?

8 A I take my cases depending on what the circumstances are.

9 Q When I approached you about this case, why did you take
10 this case?

11 A I have a concern about the intensive nature of geoduck
12 farming on the beaches and on the habitat.

13 Q Mr. Kimball asked you whether getting the obstructions
14 caused by the net structure on this property -- I think he
15 tried to say it was just like a typical rock on the bottom
16 of any tidelands. Is there some difference between sort of
17 the coverage of this compared to the normal?

18 A It's not a unique spot. It's a broad area of significantly
19 altered habitat.

20 MR. BRICKLIN: That's all I have. Thank you.

21 MR. PLAUCHE: Just -- I'm sorry.

22 MS. GUERNSEY: No.

23 MR. PLAUCHE: I just have one question on redirect
24 (sic).

25 ///

1 MR. BRICKLIN: Thank you, Mr. Daley.

2 MR. PLAUCHE: Thank you.

3 THE HEARING EXAMINER: We've had two out of six
4 witnesses.

5 MR. BRICKLIN: We're going to be done today, still,
6 hopefully. We'll be moving right along, but maybe not.

7 MR. PLAUCHE: You know, based on that testimony,
8 I'm sorry to say, but we're going to have a good deal of
9 rebuttal testimony.

10 THE HEARING EXAMINER: You do not think we'll
11 finish today?

12 MR. PLAUCHE: I need to rebut now, on the record,
13 these environmental concerns that have been raised.

14 THE HEARING EXAMINER: You've got four more
15 witnesses?

16 MR. BRICKLIN: Yes. I think -- well, it might be
17 five. I have several neighbors who are --

18 THE HEARING EXAMINER: We're going to break.

19 MR. BRICKLIN: I'm going to be pretty quick.

20 THE HEARING EXAMINER: We're going to take a break.
21 You're going to call your offices and get together with
22 everybody and see when you can come back around the 1st of
23 December.

24 (Recess taken from 2:18 p.m. to 2:31 p.m.)

25 THE HEARING EXAMINER: The hearing on Taylor

1 shellfish appeal will be reconvened. I understand that,
2 during the break, we have come up with December 13th and
3 14th to finish up what we don't finish today.

4 How about a couple short witnesses, and then we'll
5 adjourn for the day?

6 MR. BRICKLIN: All right.

7 THE HEARING EXAMINER: Wait a minute.

8 MR. BRICKLIN: Mr. Kimball.

9 THE HEARING EXAMINER: Mr. Kimball. I'm sorry.

10 (Discussion off the record while waiting
11 for Mr. Kimball to re-enter the hearing
12 room.)

13 THE HEARING EXAMINER: Do you want to put another
14 witness on, Counsel?

15 MR. BRICKLIN: Yes, please. We call Jeff Parsons.

16 MS. GUERNSEY: Did everyone hear what the dates
17 are?

18 THE HEARING EXAMINER: The dates are December 13th
19 and 14th.

20 MR. KIMBALL: I was not able to reach my office. I
21 believe that is clear, and I will make sure it is.

22 THE HEARING EXAMINER: Thank you. I understand
23 those are the only two days I had clear between now and
24 January something.

25 ///

1 **JEFF PARSONS, having been first duly sworn**
2 **upon oath by the Hearing Examiner, testified as follows:**

3
4 **THE HEARING EXAMINER: State your name for the**
5 **record, please.**

6 **THE WITNESS: Jeff Parsons.**

7
8 **DIRECT EXAMINATION**

9 **BY MR. BRICKLIN:**

10 **Q Mr. Parsons, what's your profession?**

11 **A I'm currently an environmental consultant, and my training**
12 **is in civil engineering.**

13 **Q And do you have an area of specialization?**

14 **A Yes, I do. I've worked primarily with coastal processes in**
15 **a variety of locations, primarily sediment-transport-**
16 **related issues.**

17 **Q All right. Is that also known as geomorphology?**

18 **A Yes, and I have called myself a coastal geomorphologist.**

19 **Q All right.**

20 **THE CLERK: Could you lift that microphone up a**
21 **little?**

22 **THE WITNESS: Sure.**

23 **THE CLERK: Not just a little; a lot.**

24 **THE WITNESS: A lot. Is that better?**

25 **THE CLERK: Not really.**

1 THE WITNESS: Is that better?

2 THE CLERK: Speak loudly.

3 THE WITNESS: Okay.

4 Q And some witnesses have taken it off their lapel and just
5 held it like a microphone.

6 A Okay.

7 Q So if you're comfortable doing that, you may do that. The
8 other thing I'd say is, while I'm going to be asking you
9 the questions, please direct your answers to the Examiner.

10 How long have you been doing research in coastal
11 processes?

12 A I've been doing work with coastal-transport problems for
13 about 15 years.

14 Q And in what settings and applications?

15 A A variety of settings, ranging from places abroad -- like,
16 for instance, Italy, Papua New Guinea, places like that.
17 But primarily, in the last, say, eight years, I've been
18 focused primarily here in Puget Sound.

19 Q Have you worked for private landowners?

20 A Yes.

21 Q Government agencies?

22 A Yes.

23 Q Have you done work for any State of Washington agencies?

24 A Yes, I have.

25 Q And what was that?

1 **A** well, most recently, I have been working with the WDFW, the
2 Department of Fish and Wildlife, writing their guiding
3 documentation for their habitat conservation plan, which is
4 the way that they address issues related to the Endangered
5 Species Act when they grant hydraulic approval of different
6 projects; the hydraulic-project approval.

7 **Q** HPA?

8 **A** HPAs, yeah, is the --

9 **Q** So that was a lot of words there. Can you kind of boil
10 that down as to what the work is you're doing for the
11 agency?

12 **A** Sure. The specific role that I had was to write about
13 different shoreline modifications and dredging and how
14 those affect the environment.

15 At my firm, we actually have a lot of people from a
16 lot of different disciplines, and I worked with a number of
17 fisheries biologists that handled the more biological or
18 ecological components of that, and my role was to look at
19 the physical disturbances and the different types of
20 engineering aspects that could happen along the shoreline.

21 And there was another, separate thing, just because of
22 the way they broke it out, that related to dredging, and I
23 also handled that.

24 **Q** what degrees did you get in school that would relate to
25 this kind of work?

1 **A** **I have a bachelor's, master's, and Ph.D. from the**
2 **University of Illinois, in civil engineering. And I also**
3 **spent three years in a fellowship at MIT, looking at**
4 **geological processes. And again, they were primarily --**
5 **those geological processes were primarily in the marine**
6 **environment.**

7 **Q** **And did your doctoral thesis have anything to do with**
8 **sediment transport?**

9 **A** **Yes, it did.**

10 **Q** **Do you hold any teaching positions?**

11 **A** **Yes. Yes, I do. I am an -- I can't remember whether it's**
12 **affiliate or adjunct professor at the University of**
13 **washington in civil engineering, oceanography, and earth**
14 **and space sciences.**

15 **Q** **In that capacity, do you teach courses in coastal**
16 **geomorphology and sediment transport?**

17 **A** **Yes. Before I started working at Hererra, which is the**
18 **firm I now work for, I was a full-time professor at the**
19 **University of Washington and taught a number of courses**
20 **ranging from shoreline policy, for undergraduates, to more**
21 **high-level courses geared towards coastal geomorphology and**
22 **sediment transport.**

23 **Q** **What have you done to prepare for your testimony in this**
24 **case?**

25 **A** **I'm here -- I'm going to look at my notes, make sure I get**

1 everything. So I looked at the peer-reviewed scientific
2 literature that I have access to as a UW faculty member. I
3 also looked through the entire list of literature cited by
4 opposing counsel, and I identified, in that list, three --
5 three particular articles that were relevant to, sort of,
6 physical processes associated with these practices, and
7 that was a Short and Walton report. That's actually cited
8 in the Attorney General opinion. And there was -- I don't
9 remember the year on that. It was something like 1992.

10 There was a Golder report that had to do with the
11 coastal geomorphology of the particular site that we're
12 talking about today; and then the Attorney General's
13 opinion that he issued -- that he issued earlier this year.

14 I also looked at the Washington coastal atlas. They
15 have a wealth of data on Department of Ecology's web site
16 related to different aspects of this -- of the near shore.

17 I spoke to a number of local residents. I conducted
18 two site visits; one which was during the day, at about a
19 plus-2 low tide, so plus-2 feet above mean low or low
20 water.

21 And during that particular site visit, I walked south
22 from John McCormick's property, and I don't know how far I
23 got. I don't believe I went all the way to Joemma. It was
24 kind of my intention, but I sort of -- I felt like I had
25 seen enough and then came back. And then, the second one,

1 I actually went out in the middle of the night this last
2 weekend.

3 Q why did you go out in the middle of the night?

4 A Because low tides in the fall and winter occur -- what I
5 would consider good low tides, the extremely low tides,
6 occur in the middle of the night. And that was actually a
7 minus-3, so I was able to see probably the entire -- I'm
8 not sure how far out until you get to the end of this
9 geologic feature that we call a low-tide terrace, but I
10 think I probably saw most of it.

11 And so I did that. And on that particular occasion,
12 instead of walking south, I walked north, all the way to,
13 basically, the end of the houses, in that stretch where
14 there are houses. And let's see.

15 Q Did you do any physical examination of the beach?

16 A Yes. On the private-property owner -- or on the private
17 owner's land, in the stretch there, I dug a few test pits,
18 to identify -- to see if there were any -- any material
19 that I could identify as being what I would consider
20 unnatural.

21 And yeah. And I didn't find anything unnatural,
22 although it was very odd. I did -- when I was digging one
23 of these pits -- and I've been told since then, it's
24 extremely unusual to happen, but I actually found a sand
25 lance. When I was digging, it sort of popped out of the

1 beach; sort of surprised us all.

2 And that was, again -- that was fairly near the
3 middle of these properties. Because this is potentially --
4 what WDFW calls a "potentially covered species," which
5 means it's not -- doesn't have any special listings as of
6 yet, I took note of it and spoke to folks at WDFW who were
7 very happy to know that I found a sand lance in a place
8 that they hadn't, in that particular location, documented
9 it before.

10 Q what did you observe regarding the physical integrity of
11 the beach?

12 A The beach is all completely unconsolidated sand for the
13 entire length of the beach that I observed. And the
14 uppermost beach, which we generally call the foreshore,
15 which is the steep portion leading right into the uplands,
16 that did have some cobble in it that was interspersed
17 intermittently along the shoreline. It was particularly
18 pronounced right in front of John McCormick's property.

19 But other than that, it was a very sandy beach, and it
20 looked like a lot of that sand had been delivered there
21 recently, but recently in a geologic sense, which means
22 over the last, you know, decades.

23 Q And in terms of the composition of the beach, were there
24 any areas that seemed unusually hard or unusually soft?

25 A So in walking the beach, there was one area that was

1 extremely soft on both of my visits, and that was about 100
2 to 150 feet of the beach immediately in front of John
3 McCormick's property. Because of the property line, it
4 actually sort of strikes the beach obliquely. In other
5 words, the area that's underneath his bluff is actually
6 owned by the Foss family.

7 And in that area, it was sandy as well, although it
8 was -- it was somewhat more mixed in what I would call --
9 it had a larger range of grain sizes than a lot of the
10 other places on the beach. We would call that, I believe,
11 well-graded. In other words, having lots of different-
12 sized material in it.

13 And it was extremely loose and, just in walking over
14 it, I sunk in about somewhere between six to 10 inches, so
15 covering -- enough to cover my feet, go up a few inches on
16 my shin. And it was very distinct area, and it was also
17 the same area that I was informed, by John McCormick, as
18 the area that had been harvested earlier this year.

19 Q As a result of your investigation, did you reach any
20 assessment as to what the cause of that particularly soft
21 area would have been?

22 A I wasn't -- I didn't realize what it was very well on the
23 first visit. The tide, at that time, was only slightly
24 below where that area was. That area was generally -- it
25 was a swath of the long shore, or in the area, basically,

1 that had been harvested, plus a few feet on either side, a
2 few tens of feet.

3 And I can't remember. Could you repeat the question?
4 I was going somewhere, and I kind of lost my train of
5 thought.

6 Q My question was whether you'd developed an opinion
7 regarding the cause of that soft area.

8 A Oh, yes. Yeah. Thank you. what I realized was that this
9 was -- it looked to be liquified, and looked liquified --
10 it most likely related to the fact that there was a large
11 quantity of water seeping out of the beach. Yeah.

12 Q And what do you attribute that to?

13 A well, it could -- could originate from a variety of
14 different sources.

15 Q Are you familiar with the harvesting techniques that are
16 employed by this company?

17 A Yes.

18 Q what do you understand those to involve, as it relates to
19 this issue?

20 A Injection of water into the beach, to fluidize the bed and
21 extract the geoducks.

22 THE HEARING EXAMINER: Uh-huh.

23 Q And in terms of your understanding of the volumes of water
24 that are used in that operation, how does that relate to
25 your assessment of the cause of this fluidized area that

1 you encountered?

2 A So, again, like I said, there could be a number of causes
3 of the volume of water coming out, one of which is that it
4 could be a natural phenomenon. However, there were a
5 number of other places where I did notice seeps along the
6 beach, and none of them were fluidized to the same degree
7 as particularly in front of John McCormick's property.

8 Now -- so it could be natural, but it also could be
9 influenced by the activity, especially since it was
10 entirely coincident with that same harvesting area.

11 Q What do you mean by that?

12 A In other words, basically, you could tell -- even though it
13 was marked, you didn't need to know where the edge of the
14 harvesting area was, because, when you could walk on the
15 ground as if it was normal, you knew where that was,
16 because it stopped. So you could almost identify the area
17 that had been harvested that way.

18 Q Did the fluidized area extend beyond the margin of the
19 harvest area?

20 A Slightly. About some tens of feet outside of that, which
21 did actually go onto Mr. McCormick's property by that same
22 tens of feet.

23 Q Have you ever observed that degree of fluidization on a
24 shoreline before?

25 A No.

1 Q Did that fluidization persist after a major storm came
2 through the area?

3 A Yes.

4 Q You said you were out there on more than one occasion?

5 A Yes. Both of those occurrences happened after there was
6 some sort of arrangement, between Mr. McCormick and Taylor,
7 that they would not harvest within some amount of feet from
8 this shoreline. And that storm had occurred probably about
9 a week or two before I had gotten there. I can't remember
10 what the date was. I think it was October 16th, was when
11 that storm occurred.

12 Q So it's your understanding that had been an arrangement,
13 several months earlier, where Taylor agreed not to --

14 A Yeah.

15 MR. PLAUCHE: Excuse me. I'm going to object just
16 because this was the subject of a settlement negotiation and
17 an agreement between Taylor and Mr. McCormick that I don't
18 think is appropriately the subject of this proceeding.

19 MR. BRICKLIN: Just trying to establish the point
20 in time at which the last harvesting occurred.

21 MR. PLAUCHE: I think you were -- you were asking
22 the substance of the settle- --

23 MR. BRICKLIN: That's all.

24 MR. PLAUCHE: If that's all it is --

25 MR. BRICKLIN: That's all.

1 MR. PLAUCHE: But I think he was getting --

2 THE WITNESS: That was my only intention. I knew
3 that that storm had occurred after harvesting stopped. That
4 was the only reason I was talking about that.

5 Q There was testimony this morning, by Dr. Fisher, regarding
6 an analysis done regarding subtidal geoducks. And I'll be
7 very quick, Mr. Examiner, because I heard you express your
8 opinion about this. But are you familiar with that study?

9 A Yes. That was the Short and Walton report that I had
10 mentioned, correct.

11 Q For purposes of determining fate and transport of sediment,
12 is that a useful study, in terms of assessing the impacts
13 in the subtidals within the intertidal zone?

14 A It's useful to the extent that it serves as a baseline
15 case. But in terms of being applicable to this particular
16 problem, I would say it doesn't have much to do with it,
17 because there are a number of differences between the
18 intertidal and subtidal lands, and, you know, I could go on
19 and on about them. Slope --

20 THE HEARING EXAMINER: You don't need to.

21 THE WITNESS: Okay.

22 Q Thank you. You mentioned earlier that you've been involved
23 in different things, including, I think, for the Department
24 of Fish and Wildlife, that involved dredging. Based on
25 your understanding of the harvesting operations that are

1 utilized here, would you consider those to constitute
2 dredging?

3 A Yes.

4 Q And why is that?

5 A In -- and this comes out of my experience working with the
6 WDFW on this habitat conservation plan. And their guidance
7 to us was that there are a number of activities that can
8 occur on the shoreline. And, basically, what their
9 guidance was was that, basically, don't get caught up in
10 semantics.

11 If a particular project has the environmental
12 ramifications of another process, then that process should
13 be included and we should talk about it in our literature
14 review.

15 And in my experience, with what I've seen, say, for
16 instance, on the "Dirty Jobs" episode, as well as pictures
17 that were provided to me by Mr. Bricklin, I see no
18 difference between what's going on there and dredging.

19 There's a particular kind of dredging called agitation
20 dredging, which is essentially shooting a water jet into
21 the subsurface and then, through any number of means --
22 whether it be pumping or, basically, removal by a machine,
23 or even just letting the current take the sediment away --
24 that's dredging.

25 And I see, essentially, no difference between that

1 particular kind of process and the process that is used to
2 harvest the geoducks.

3 MR. BRICKLIN: Very good. That's all I have for
4 this witness. Thank you. Stay up there, because these
5 other gentlemen may have some questions.

6 MS. GUERNSEY: Nothing.

7 MR. BRICKLIN: Ms. Guernsey may have some questions
8 for you.

9 MS. GUERNSEY: No.

10 MR. PLAUCHE: I do have a couple of questions.

11

12 CROSS-EXAMINATION

13 BY MR. PLAUCHE:

14 Q I'm Billy Plauche. I represent Taylor Shellfish. Just
15 bear with me for a moment here. I've got to get to the
16 right spot in my notes.

17 You testified that you had experience, I believe, with
18 -- you have written about shoreline modification, the
19 effect of shoreline modifications, I think, in Puget Sound?

20 A Yes.

21 Q In that regard, have you looked at the effect of bulkheads
22 in Puget Sound?

23 A Yes, I have.

24 Q Okay. And is there any loss of sediments associated with
25 the construction of the typical bulkhead?

1 A Yes.

2 Q And can you quantify that? I'm asking you to do a sort of
3 gross estimate based on a typical residential bulkhead.

4 A So the problem with that -- and I wouldn't even want to
5 give you a number, because there are some places where the
6 bulkheads do not affect anything at all; that, if the
7 shoreline is accreting -- in other words, growing, which
8 actually happens quite a bit around Puget Sound, the
9 bulkheads have no effect.

10 However, there are other places, and I'll just give
11 you a for instance, in West Seattle, where you have an
12 eroding shoreline, and the bulkheads that have been there
13 for 70 years have caused several feet of erosion. In fact,
14 probably upwards of 10 feet of erosion.

15 So I guess that's -- I guess that's the answer you
16 were looking for: A lot to nothing and everything in
17 between.

18 Q That's exactly what I was looking for. Thank you. And
19 that erosional effect -- would you consider that dredging?

20 A No. No. That -- because there's a word that we can
21 attribute it to, and that is "shoreline hardening."

22 Q Okay.

23 A And so that's -- that is exactly what that is. That -- in
24 other words, there is a name that we can associate it with.
25 Or bulkheading, I believe, is actually in the SMA. I

1 believe that's the word that's used. So therefore, there
2 is a direct word that we can use.

3 Q And from your work on hydraulic-project approvals, is it
4 your understand that a dredging operation requires an HPA?

5 A Yes, I believe it does.

6 Q You testified that, as you were out there, you saw a sand
7 lance. I couldn't tell, from where you were pointing on
8 the aerial photograph, as to where exactly that was.

9 A About right there (indicating), in the middle of the
10 properties.

11 Q In the middle of the Foss property?

12 A No, no, no. Not the Foss property. It was actually on
13 private properties adjacent to the Foss property. So it
14 was actually --

15 Q You're pointing to the Foss property.

16 A Am I?

17 Q Yeah.

18 A Oh, yeah. Sorry. Oh, okay. I usually use -- okay. Yeah.
19 So it's up here (indicating).

20 Q And that's adjacent to the residential neighborhood north
21 of the --

22 A It's in front of -- it's right offshore of the residential
23 neighborhood.

24 Q Okay. Are you familiar with burrowing shrimp in Puget
25 Sound?

1 A Yes, I am.

2 Q And you've been on a burrowing shrimp bed in Puget Sound?

3 A In fact, there are some on the Foss property.

4 Q Okay. And did you encounter those as you were walking
5 through the private property?

6 A Yes.

7 Q And did they impair your ability to walk? You were talking
8 about this sinking into the sand. Did they impair --

9 A No.

10 Q They did not? How did you identify the recently harvested
11 area? You had several pieces of testimony where you
12 appeared to be pretty precise in your delineation of that
13 harvest area.

14 A My -- my main -- well, it's -- to me, it was obvious where
15 it was. But basically, John McCormick was out there with
16 me at the time, and he said, you know, "They went from
17 right about here to right about there."

18 And I could see the sediment -- the nature -- the
19 structure of the sediment in that area is somewhat
20 different than it is on adjacent shorelines, and so that's
21 one way I could tell.

22 Q But you testified that that sediment difference carried
23 over a couple of feet on either side. So that's a fairly
24 precise definition of the harvest area.

25 A So -- yeah. So, in other -- just to be specific, so the

1 sediment difference actually ended, only the sediment
2 difference was strictly in the harvest area. The
3 liquification of the bed actually extended a little bit
4 away from that.

5 So, in other words, the sediments looked like the
6 sediments on the rest of the beach, but the bed was
7 somewhat liquified. And that was in this transition region
8 between where the harvesting had taken place and basically
9 adjacent to the shoreline areas.

10 Q And you testified that was in the area directly adjacent to
11 Mr. McCormick's property boundary; is that correct?

12 A Exactly.

13 Q Okay. Now, you testified, with regard to your definition
14 of dredging, that this activity constituted dredging, that
15 that was based on guidance that you had from Washington
16 Department of Fish and wildlife, that, if it has the
17 effect, "don't get hung up on semantics," I think is what
18 you said.

19 A Yes.

20 Q That was from the Department of Fish and wildlife; that was
21 not from the Department of Ecology; is that correct?

22 A That is correct.

23 Q And that was not in relation to the Shoreline Management
24 Act; is that correct?

25 A No, it was not. However, I should mention that, again, in

1 my shoreline policy class, obviously, we're going to talk
2 about the Shoreline Management Act quite a bit, and my
3 interpretation of that law is -- and, again, it's just my
4 interpretation, my opinion -- is consistent with that
5 particular guidance that was given to us by WDFW.

6 Q That's your interpretation. That's not --

7 A That's my opinion.

8 Q It's not agency opinion, and you're not an attorney,
9 correct?

10 A No.

11 Q Thank you.

12 MR. PLAUCHE: I have nothing further.

13

14 CROSS-EXAMINATION

15 BY MR. KIMBALL:

16 Q I'm Jerry Kimball, representing the property owners. You
17 referred to "private property," and then you referred to
18 the other property. You understand that the Foss property
19 is private property?

20 A Yes, I do.

21 Q You understand that they own that land from the lower low
22 water way up into the uplands?

23 A Yes, I do.

24 Q As I understand your testimony, your first visit was on a
25 plus-2 tide?

1 A Yes, it was.

2 Q That's plus-2.0, not plus-.2?

3 A Exactly.

4 Q what date was that?

5 A That date --

6 Q Approximately. Or if you have notes that would refresh
7 your recollection, that would be fine.

8 A It was what I would call late October.

9 Q That was the first visit?

10 A First visit, yes, correct.

11 Q And then you went back, I think you said, last weekend?

12 A Yeah. About one week later.

13 Q And it was a minus --

14 A 3.

15 Q Minus-3.0?

16 A Yeah.

17 Q The first visit, you started from the McCormick residence
18 and went south but not quite as far as Joemma?

19 A I don't know how far I went. There's not any signs. Or at
20 least I didn't encounter any signs saying "you are entering
21 the State park now." It's all, as you know, undeveloped.
22 So I walked down past -- past where the creek comes out,
23 somewhere in here (indicating).

24 Q Past where the Foss cabin is?

25 A It was foggy, so I don't know.

1 Q And was it on the first, or second, venture that you dug
2 these test pits?

3 A That was the second -- that was the second occasion.

4 Q That was this last weekend?

5 A Yes.

6 Q How deep did you dig them?

7 A Not very. Only, I would say, a foot or two.

8 Q Okay. And I wasn't clear. You said you started on that
9 and you went north. Where did you start?

10 A At John McCormick's property. Actually, I didn't dig any
11 pits on John's property. I only dug pits further north.

12 Q So you went from the south end of the row of houses to the
13 north end of the row of houses?

14 A Exactly.

15 Q That would be 150 yards?

16 A Yeah. A little more than that, but...

17 Q You didn't do any test pits on the Foss property?

18 A No, I did not.

19 Q The test pits -- did you record your data in any scientific
20 journal? Or, I mean, did you record it physically?

21 A Yes. I recorded it, and I keep a field book.

22 Q You kept a field book. Did you sample?

23 A In the sense that, when I recovered what turned out to be a
24 sand lance -- I'm not a biologist, and I work with a lot of
25 biologists, and I wanted to make sure that it was indeed a

1 sand lance, and I knew that WDFW was sensitive to that sort
2 of information, and so I did actually sample the sand
3 lance.

4 Q When you say "sample," you took it with?

5 A I took it with me.

6 Q Dead sand lance?

7 A Yeah. It got dead, yeah.

8 Q It was live sand lance; became dead sand lance?

9 A Exactly. But I think it was going to become a dead sand
10 lance, because I was digging it up out of the --

11 Q Because of your digging?

12 A Because of my digging, yes. Exactly.

13 Q Okay. And you dug this with a shovel?

14 A Yeah.

15 Q So you weren't taking a core sample--

16 A No.

17 Q --and measuring any distribution of the granular size of
18 the sand--

19 A No.

20 Q --or the beach composition?

21 A No.

22 Q And you didn't retain a sample of that and look at it
23 microscopically or with any magnification at any time?

24 A No.

25 Q So it was just middle of the night, you dig a hole a foot

1 deep and look at it, find the fish, keep the fish?

2 A Exactly. That's what it was.

3 Q Okay. The opinion you expressed about dredging is an
4 opinion you formed before you were retained to work on this
5 matter, correct?

6 A Actually, no, it was not, because I actually wasn't
7 familiar with intertidal geoduck farming until this case
8 occurred.

9 Q You were not familiar that that was going on?

10 A No, I was not.

11 Q I thought you said that you teach, in your shorelines
12 class, and have expressed there, the opinion that this
13 geoduck harvesting method constitutes dredging.

14 A No. No.

15 Q Okay. I misunderstood then?

16 A No.

17 MR. KIMBALL: I don't have any further questions.

18

19 REDIRECT EXAMINATION

20 BY MR. BRICKLIN:

21 Q Just a couple, real quick. You were asked questions about
22 burrowing shrimp, and you said you encountered some. Did
23 you encounter any in the area of this particularly soft
24 sand?

25 A No.

1 Q what did that area look like? could it support burrowing
2 shrimp?

3 A The word that I used when I saw it -- and I think it's an
4 accurate description -- is that it sort of looked bombed
5 out, like there wasn't really anything there other than
6 this mixed -- mixed sand.

7 Q And Counsel asked you a question whether the liquified area
8 was directly adjacent to Mr. McCormick's property. But on
9 direct, I thought you said that the liquified area extended
10 onto the McCormick property.

11 A It did extend onto the McCormick property very slightly. A
12 few tens of feet.

13 Q Okay. And lastly, a question about these holes that you
14 dug. why did you do that, and did it serve any purpose in
15 forming your opinions here?

16 A Yes. I was attempting to identify -- to see if the
17 sediment plumes that I saw in photographs had some
18 manifestation in the geologic record on the beach. And
19 what I discovered was no. The beach is most likely much
20 too active, in terms of sedimentologically speaking, to
21 record that sort of information. That does not mean that
22 it was not there in the past and had been since eroded
23 away.

24 Q So you referred to sediment plumes. Do you have the
25 package of photographs up there on the lectern?

1 A Yes.

2 Q Could you turn to Exhibit 47?

3 A Okay.

4 Q Not Exhibit 47, but Number 47 in the supplied package.

5 A Yeah.

6 Q Is that an example of the sediment plume you're talking
7 about?

8 A Yeah.

9 Q And so how do you relate that sediment plume to the
10 harvesting operation that is apparently occurring in that
11 picture?

12 A Well, in this particular picture, it was very obvious that
13 -- and I've actually done a lot of work with river plumes,
14 and river plumes -- you can often see the edge of the
15 plume, even in satellite photographs. And this was very
16 similar to that, where you see anything that's
17 sediment-laden, it goes off a few feet offshore.

18 I know, based upon the oceanography of this particular
19 area, that the tidal currents, when the tide is coming in,
20 which it was at this time, moves the sediment northwards.

21 Q I'm sorry. Was your answer prior to that one any
22 indication of the extent to which this sediment is being
23 deposited on adjacent beaches? Were you able to determine
24 that at all?

25 A Yeah. Well, the only evidence that I have -- the sediment

1 is going to deposit somewhere north of the site. It has
2 to. But there was one particular photograph in the slide
3 show that actually shows what I would expect to see further
4 north, and I'm trying to find it here.

5 But there was a photograph that indicated that there
6 was some very thin layer of fine sediments, probably
7 organic grit sediments, that deposited on the beach further
8 north. If you really want, I can find what that is.

9 Q I'm not sure that this is it (indicating). Is it 49? Is
10 that the one that you're thinking of, or not?

11 A Oh, yeah. This is it. 49.

12 Q Thank you.

13 THE HEARING EXAMINER: Would you pull 49 up for me?
14 I'd like to see it. Yeah, that's the one. Okay. That's
15 what I thought it was.

16 MR. BRICKLIN: Thank you. That's all I have for
17 this witness.

18 MR. PLAUCHE: Just one, just to get right onto this
19 one.

20 RE-CROSS-EXAMINATION

21 BY MR. PLAUCHE:

22 Q And is it your testimony that these fines, this deposit of
23 fines that you testified seeing in this photograph, is
24 related to the harvest on the Taylor site?

25 A Yeah.

1 Q The Taylor farm?

2 A Yeah, because the -- this -- so these are obviously fines,
3 because of where they're deposited. They're deposited in
4 the swash, and the waves here, as you can see, are minimal
5 to nonexistent.

6 But, you know, that small amount of energy will sort
7 the material. So where you find these fines is in these
8 sort of arced patterns along the beach, and I have to
9 imagine, particularly knowing that there was harvesting
10 going on, you know, sort of upstream of this.

11 Q And do you know there was harvesting going on upstream of
12 that on --

13 A Yes.

14 Q -- what's that? On February 8th, 2007?

15 A Yeah. I believe there's another photograph in there that
16 was taken on February 8th, where there's a barge parked.
17 Again, it's February. The harvesting would have gone on at
18 night, in the middle of the night.

19 And then, also, there was -- I was also told that by
20 the person that took the photograph.

21 MR. PLAUCHE: Nothing further.

22 THE HEARING EXAMINER: May this witness be excused?

23 MR. KIMBALL: I had one.

24 THE HEARING EXAMINER: I did my best.

25 MR. BRICKLIN: You tried.

1

RE CROSS-EXAMINATION

2 BY MR. KIMBALL:

3 Q Relating to that, the area south of -- the south portion of
4 the beaches is high bank, and the --

5 A Yes.

6 Q what do you call those banks? They're feeder banks?

7 A Yeah, feeder bluffs, feeder banks. You can --

8 Q They constantly shed sand?

9 A Yes.

10 Q That happens by the way of storms?

11 A Yes.

12 Q Rain? Possibly a geologic event, like an earthquake?

13 A Sure.

14 Q And the shore sweep of the current brings it north,
15 correct?

16 A Yes.

17 Q That sediment then settles out into different places,
18 depending on its size, which relates to its weight and
19 ability to be suspended?

20 A Yes.

21 Q So, if you look at the photograph, the aerial photograph,
22 to your right, that effect is really shown there, isn't it?

23 A Yes.

24 Q You can see the sweep of the beach?

25 A Yep.

1 Q Are you aware of whether or not that was existent prior to
2 any farm aquaculture being in existence?

3 A Yes, of course.

4 Q It's been there for a long, long time?

5 A Thousands of years.

6 Q Okay. In 49, it says "brown scum." It's not scum. It's
7 just earth, correct?

8 A It's -- it's a picture. I know that the fines that are
9 resuspended by the harvesting operations are generally a
10 dark grey in color. That's because of their depth. And
11 all I can tell in this photograph is exactly what you can
12 tell. It's something between brown to gray scum, which is
13 most likely those materials.

14 Q "Scum" is not a term that you use in geomorphology, is it?

15 A I did not write this caption, no.

16 Q And so it's a line of fines, not a line of scum, according
17 to your opinion?

18 A Yes.

19 Q The other thing was: To the extent you've relied on the
20 information from whoever took the photographs or from Mr.
21 McCormick as to when events occurred, your opinions are, in
22 fact, dependent on that information being accurate?

23 A What is that? Can you repeat the question?

24 Q To the extent you have relied on what you have been told
25 about when the photographs were taken, what had preceded

1 that occurring--

2 A Yes.

3 Q --that is a factor you relied on.

4 A Yes.

5 Q And if that was untrue, your opinion may change?

6 A That's true.

7 Q And you relied, in fact, on information provided to you by
8 Mr. McCormick, and certainly harvest dates, correct?

9 A well, although -- although there were -- there was a lot of
10 photographic evidence that was dated. Now, I don't know
11 who put those dates on those photographs. Some of those
12 were dated from the camera; not all of them were, and -- in
13 which case, I have no idea who said what date it was.
14 Presumably, Mr. McCormick.

15 Q So you're relying on the accuracy of that information in
16 forming your opinion. If that information is not accurate,
17 your opinion may change?

18 A with regards to the liquefaction, my determination is
19 somewhat more dependent on the conditions that I observed
20 on site. And those related to the fact that the sediments
21 in that particular area were distinctly different than any
22 part of the beach -- any other part of the beach.

23 Q Okay. And I don't want to quibble, but you said there may
24 have been natural causes, there may have been other causes,
25 and the causation that you found more probable than not was

1 based on the information that there had been a harvest
2 adjacent to that area, or as part of that area?

3 A I would say that -- I would say that there was -- that
4 there was corroborating evidence telling me that the areas
5 identified as harvest areas were -- for one thing, you can
6 tell where they are, because it's the Foss property and
7 there's not five geoducks per square foot on the beach.
8 And it's -- well, there's other places where they are, but
9 that one was one where that was true. I mean, it's
10 obvious, just from walking.

11 Q There were physical observations you made, in addition to
12 what you were told, that you relied on?

13 A Yes.

14 Q Okay. So it wasn't just what Mr. McCormick told you?

15 A It wasn't strictly what Mr. McCormick said.

16 Q If, in fact, that information was not accurate, it may
17 affect your opinion?

18 A No. I would say that it wouldn't affect my opinion. I
19 mean, I'm pretty certain of my opinion. I have a fair
20 degree of certainty that that is what it related to.

21 MR. KIMBALL: Thank you.

22 MR. BRICKLIN: I have nothing further, Your Honor.

23 THE HEARING EXAMINER: This hearing will be
24 adjourned.

25

1 (The hearing adjourned at 3:17 p.m.)
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