October 18, 2012

Board of County Commissioners
Thurston County Courthouse
2000 Lakeridge Drive, SW
Olympia, WA 98502

RE: APHETI’s Response in Opposition to Appeal of Hearing Examiner Decision
Project No. 961372-North Totten Inlet Mussel Farm

ORAL ARGUMENT REQUESTED

Dear Commissioners:

The law firm of Gendler & Mann, LLP represents the Association to Protect Hammersley, Eld and Totten Inlets (“APHETI”), a citizens group that is opposed to the proposed North Totten Inlet Mussel Farm. APHETI has actively participated in the public process surrounding Taylor’s application for a shoreline development permit and submits this letter in support of the Hearing Examiner’s Decision (“Decision”) denying the permit. While we do not agree with each aspect of the Decision, the county commission, now acting as an appellate body, must give the Decision due deference. For the reasons articulated below, the Decision should be affirmed.

I. Standard of Review

Under the Thurston County Code, the final decision of a hearing examiner is subject to a closed record appeal to the County Commissioners. TCC 2.06.070(F). The Code expressly limits the review of facts to “evidence presented to the examiner.” TCC 2.06.080(C). The Code allows the board to “adopt, amend and adopt, reject, reverse, and amend conclusions of law and the decision of the examiner, or remand the matter for further consideration.” TCC 2.06.080(D). If “the board renders a decision different from the decision of the examiner, the board shall adopt amended conclusions accordingly.” Id.

Where appellate review is based solely on the administrative record, the appellate body may not substitute its discretion for that of the original body. Maranatha Mining, Inc. v. Pierce County, 59 Wn. App. 795, 801, 801 P.2d 985 (1990) citing Messer v. Snohomish County Bd. of Adjustment, 19 Wn. App. 780, 787, 578 P.2d 50 (1978). The findings of fact made by the original tribunal will not be disturbed on appeal if they are sustained by substantial evidence. Id. Evidence is substantial when in “sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” Heinmiller v. Dep’t of Health, 127 Wn.2d 595, 607, 903 P.2d 433 (1996). Where the Hearing Examiner’s findings support the Examiner’s legal conclusions, the decision should be affirmed unless it is arbitrary and capricious. Maranatha, 59 Wn. App. at
804-05 (reviewing county council’s application of findings to law under arbitrary and capricious standard); see also, Landmark Development, Inc. v. City of Roy, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999) (reviewing application of facts to law under arbitrary and capricious standard). Arbitrary action is conduct taken without consideration and in disregard of the facts. 59 Wn. App. at 805.

Under Maranatha, the county must defer to the Hearing Examiner’s factual findings unless they are shown to be unsupported by substantial evidence. The Hearing Examiner’s 101-page decision includes 189 findings of fact based on clear citations to a lengthy record of expert studies, reports, and testimony. These findings are amply supported and his 84 conclusions of law are replete with citations to the record and his factual findings. The decision is thoroughly supported and it should be affirmed.

II. Hearing Examiner’s Pertinent Findings of Fact

Taylor has proposed a 58-raft Gallo mussel facility and covering 63,100 square feet of Totten Inlet. Findings 3, 6. The rafts would be anchored to the sea floor and aligned in eight rows of seven or eight rafts over aquatic lands leased from the Department of Natural Resources, extending 700 feet into Totten Inlet. Findings 3, 5. The rafts would rise one to two feet above the water surface. Id.

Adjacent uses upland of the shoreline consist of single-family residences. Finding 27. Public comments and photographs demonstrated that mussel rafts are often piled high with equipment and cleaned only when complaints are made. Finding 36. Storage is often messy and unsightly. Id. The Hearing Examiner reviewed two visual impact assessments which evaluated the proposal’s impacts on the adjacent property owners. The two analyses, one funded by Taylor and the other, by APHETI, reached different conclusions about the impacts on adjacent property owners. Taylor’s view assessment concluded that the proposal would have a moderate to high visual impact on 10-15 residences. Finding 37. APHETI’s assessment, however, concluded that project would have a high impact on 25-30 residences. Findings 37, 41, 42.

Totten Inlet is classified by the state Department of Ecology as Extraordinary, Class AA waters. Finding 18. Evidence indicated that while there are no pending applications for aquaculture facilities in Thurston, Mason, or Pierce counties, approximately 85% of Totten shorelines are under commercial aquaculture lease and 2,150 acres are shellfish farms. Finding 25. The property directly onshore from the proposed mussel facility was recently purchased by Capital Land Trust and contains a small pocket estuary with critical salmon habitat as well as a beach that is used for spawning by forage fish. Finding 27.

The Hearing Examiner found that the mussel farm would reduce some of the nitrogen deposited into Totten Inlet and help prevent eutrophication by consuming it. Findings 43-58.

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1 The Hearing Examiner found that a statement claiming 90% conversion was not supported by evidence and determined that the 85% estimate was accurate. Finding 25.
2 Eutrophication refers to algae blooms stimulated by excess nitrogen in marine waters and constitutes a
Experts identified Totten Inlet as an area that has experienced algae blooms and eutrophication. Findings 55-56. In analyzing the mussels’ ingestion of nitrogen, the Examiner drew largely from data contained in the DEIS and expert testimony. See Findings 43-58. While mussels are known to both consume and release nitrogen, evidence demonstrated that the rafts are expected to remove approximately 5,000 kg of the 47,000 kg of the nitrogen deposited into Totten Inlet per year, approximately 9.6%. Findings 46, 50-51; Finding 52 citing Expert Testimony of Dr. Jack Rensel. However, the DEIS estimated 5,817 kg of nitrogen per year would be released by the mussels, increasing levels of dissolved inorganic oxygen primarily in the form of ammonia. Findings 48-49. The Hearing Examiner acknowledged the existence of some uncertainty regarding the net amount of nitrogen removed by the mussels, Finding 49-50, but concluded that there would be no adverse cumulative impact of the project based on evidence showing the removal of “substantial amounts of excess nitrogen[.]” Finding 168.

The Examiner also relied heavily on studies and reports in the DEIS and expert testimony regarding dissolved oxygen in the water column below and around the rafts (“DO”). The mussels reduce the level of DO as water moves beneath the mussel rafts and remains deficient for up to 656 feet from the raft. Finding 61 citing NewFields Study and Testimony of Mark Pedersen. The level of 5 mg/L DO is the biological stress concentration benchmark. Id. As levels drop below 5 mg/L, an organism becomes increasingly more stressed, more susceptible to disease, or potentially at low values, even dies from suffocation if it cannot move away to better conditions. Finding 62. Evidence in the record and testimony at the hearing acknowledged that while the DO would remain above the stress benchmark for most of the year, incoming water at flood tide – during August or October – could result in DO levels well below 5 mg/L, to 1.35 mg/L or 2.52 mg/L. Findings 62-68. Experts debated the amount of time DO could be expected to remain below 5 mg/L, Mark Pedersen, an independent consultant hired by Taylor, testified that depressed DO “would stress the fish.” Finding 70 (emphasis added). APHETI’s expert Wayne Daley testified that DO below 5 mg/L can have a “chronic adverse impact on fish.” Finding 71. The Hearing Examiner found that neither the information in the DEIS nor FEIS adequately discussed how the seasonal areas of deficient DO impacted sea life – especially forage fish – and also did not adequately show how the low DO from the proposed project would impact sea life in light of possible depressed DO at other aquaculture facilities in Totten Inlet. Findings 171-172. He properly concluded additional study was required.

Additionally, the Examiner considered impacts to the benthos community, which refers to creatures dwelling on the sea bottom. Finding 91. The Examiner found that “[n]either the DEIS nor the FEIS” adequately describes the effects of the mussel farm on the benthic community or “states whether [the impacts] are adverse or beneficial.” Finding 92. However, a dive in 2006 under Taylor’s mussel raft in nearby Gallagher Cove demonstrated that the mussel rafts could cause harm to the benthic community by creating a dead zone beneath the raft. Findings 94-95. The dive described a white bacteria of Beggiatoa thriving under the rafts on hydrogen sulfide. Id. The dive also showed a three-inch layer of sludge covering the sea bed along with mussel shell debris. Id. The benthic area around the rafts created a “dead zone.” Finding 95. The FEIS claimed that the project site has superior circulation than Gallagher Cover
and suggested that any impact to the benthos under the rafts is localized and temporary. Finding 97. However, the FEIS gave very limited treatment to Beggiatoa, its effect on benthic life, or whether the high sulfide could be expected at the proposed North Totten site. Findings 104-105. The Examiner thus properly concluded the cumulative effects on benthic life were not adequately covered. See Conclusion 30.

The Examiner also devoted significant time to the issue of genetic pollution. Taylor’s proposed mussel farm features the nonnative Gallo or Mediterranean mussel and the native mussel in Puget Sound is M. e. trossulus. Finding 133 citing DEIS. The Examiner relied on several studies in the record to consider whether the cultivated Gallo was adversely impacting the M. e. trossulus by genetic pollution. Findings 133-147. According to a 2002 survey of mussels in Puget Sound, only 3% of the mussels were Gallos, but between 3% and 10% were hybrids of Gallos and M. e. trossulus. Finding 136 citing Brooks study.

Other surveys of Puget Sound mussels disclosed an even higher percentage of hybrids, including one study that demonstrated 67% were hybrids and another demonstrated that 100% were hybrids. Finding 137. A study by the University of Puget Sound – and not considered in the DEIS – estimated hybrids consisted of 10-19% of the total mussel population. Finding 144. A 2008 article from the Ecological Society Review described Gallos as an “invasive specie with the highest ecological impact” stating it disrupts “entire ecosystem processes.” Id. A letter cited in the FEIS from the U.S. Fish and Wildlife Service expressed opposition to the use of Gallo mussels due to risk of impacts to native mussels. Finding 140. The letter expressed concerns about Gallos because if Taylor’s claims of benign impact are wrong, “it is doubtful that any corrective measure would be effective in the eradication or control of the spread of this non-native mussel to other areas of Puget Sound.” Id. Based on the record, the Examiner found that the DEIS failed to adequately consider the body of available evidence on genetic pollution, and also, did not adequately consider how the Gallos cultured at the proposed mussel farm would impact the mussel composition of Gallos, hybrids, and M. E. trossulus in all of Totten Inlet. See Conclusion 33-34.

Finally the Examiner looked reviewed the proposal’s impact to phytoplankton and zooplankton, which form the foundation of the food web. Findings 73, 81. Evidence demonstrated that the mussels would remove between 0.3 percent and 1.4 percent of the primary phytoplankton production over 50% of the area of Totten Inlet. Finding 79 citing DEIS. The Examiner also found that the mussels will ingest an undefined percentage of zooplankton. Finding 82 citing Testimony of Daley and Rensel. While expert testimony from Dan Pentilla indicated that mussels may also ingest forage fish larvae, the Examiner did not find sufficient evidence to support the theory. Id. While the Examiner also acknowledged that the mussels consume phytoplankton, he concluded the effect was “minimal” and the cumulative effects were properly considered. See Conclusion 26.

Looking at all of the evidence in the record, the Hearing Examiner found that the proposal was compliant with the SMA and SMP in all respects with the exception of three specific issues that the record did not adequately address. He found the applicant’s analysis of
the cumulative impact of the project to be deficient in three areas: dissolved oxygen, the benthic community, and spread of Gallo mussels. See Findings 169-173; 174-176; 179-181. Each finding was based on voluminous information contained in the record and clearly meets the standard requiring substantial support. Taylor was given opportunity to provide additional evidence to assuage the record’s deficiencies. See Finding 189. Taylor chose not to do so. Id. This appeal followed.

III. Hearing Examiner Properly Applied Thurston County’s SMP to Require Compliance with Each Applicable Provision of the SMP

Under the Shoreline Management Act ("SMA"), a substantial development permit ("SDP") may not be issued unless the development is consistent with both the SMA and Thurston County’s shoreline master program ("SMP"). See RCW 90.58.140(2). The proposed project is subject to several components of Thurston County’s SMP, including the SMP’s general regulations, Regional Criteria and aquaculture policies. The project also must be consistent with the Conservancy Environment. A SDP may be granted “only” when it is consistent with all provisions of the applicable master program adopted or approved for the area. SMP at Sec. 7(I)(A) citing WAC 173-14-100(2)(c).

Taylor claims that the Hearing Examiner erred in elevating SMP Regional Criterion B as “paramount” to all other shoreline codes and polices, Statement of Appeal at 3, but the Hearing Examiner cited and considered all of the pertinent provisions in the SMP, including the SMP’s general regulations, provisions related to aquaculture, Regional Criteria, and the Conservancy Environment. Decision at 62-66 (Conclusions 1-8). Taylor can cite to no evidence in the record showing that the Examiner elevated any one standard in the SMP to a level that is different from any other. See Statement of Appeal. To the contrary, the decision reflects the Examiner’s careful and measured application of factual findings to each provision of the SMP, consistent with the requirements of the SMA. See RCW 90.58.140(2).

The Hearing Examiner cited SMP Regional Criterion B based on the plain language of the provision that requires the county to perform a close analysis of a proposal for the express purpose of determining the extent of impact on an aquatic environment. Regional Criterion B states that:

Protection of water quality and aquatic habitat is recognized as a primary goal. All applications for development of shorelines and use of public waters shall be closely analyzed for their effect on the aquatic environment. Of particular concern will be the preservation of the larger ecological system when a change is proposed to a lesser part of the system, like a marshland or tideland.

SMP Regional Criterion B.

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3 The SMP’s Regional Criteria are contained in Sec. 2(V)(B). The SMP’s aquaculture policies are included in Sec. 3(II)(B).

4 The Conservancy Environment is discussed at Sec. 2(VII)(B).
Guided by the SMP’s requirement that use of public waters “shall be closely analyzed for their effect on the aquatic environment[,]” the Hearing Examiner found Taylor’s project did not adequately address questions about dissolved oxygen, the benthos community, and genetic pollution. See Findings 169-173; 174-176; 179-181; 185-189 and Conclusions 63-66; 69-71; 77-80. Taylor now claims that the Examiner’s application of Regional Criterion B constitutes error because the impacts were merely hypothetical, but Taylor misreads the plain language of the SMP and the Examiner’s responsibilities under the SMA.

Regional Criterion B does not, as Taylor surmises, require a showing of adverse impact. But it does require a “close analysis” to determine a proposal’s impact on the aquatic environment. SMP Regional Criterion B. The SMA also requires the Examiner to review the proposal in light of each applicable component of the SMP. RCW 90.58.140(2). Given the questions that remain surrounding the project’s impact, the Examiner properly applied Regional Criterion B to require adequate study to at least determine whether adverse impacts would occur in areas where the record was deficient. Taylor describes environmental review of the project as one of the most thorough in Thurston County, Statement of Appeal at 5, but thorough review of impacts in some areas does not justify ignoring glaring gaps in other areas. Thurston’s SMP requires careful review for impacts on the aquatic environment. SMP Regional Criterion B. So does the SMA.

Taylor next relies on Overlake Fund v. Shoreline Hearings Bd., 90 Wn. App. 746, 954 P.2d 304 (1998) as authority to support the claim that a balance of competing interests and policies under the SMP was not properly achieved. Statement of Appeal at 4. But Overlake Fund does not adopt or even discuss a methodology for weighing the policies of a SMP. Overlake Fund reversed a Shorelines Hearing Board decision because it included legal conclusions that were reliant upon nonexistent provisions of the SMP. 90 Wn. App. at 759-60. The Hearing Examiner here – by contrast – was guided by specific provisions in Thurston’s SMP that require a close analysis of potential impacts. He properly concluded that Taylor had not provided adequate analysis in precise areas that risked harm to the pristine habitat and shoreline of North Totten Inlet.

Significantly, Taylor does not acknowledge other areas where the Examiner resolved competing interests in favor of Taylor. For instance, the Examiner discussed the Regional Criteria’s provision discouraging the degradation of Totten Inlet’s aesthetic and scenic qualities and suggested an isolated reading of the provision might counsel in favor of denial. See Conclusions 47-49 citing SMP Sec.2(V)(G). However, the Examiner interpreted the provision in light of a separate provision in the SMP which plainly allows aquaculture and determined that it would be improper to deny an SDP based on the “ineluctable, inherent appearance of such rafts.” Conclusion 51. Thus, he concluded that the SDP complied with the SMP concerning views and aesthetics. Conclusion 52.

Evidence also demonstrated that the mussel farm can create a “strong, unpleasant odor,” and the Examiner reviewed these findings in light of SMP Section 2(III), which requires
permitted uses to be conducted in a manner that minimizes damage and interference with the public's use of water. *See Conclusions 71-72.* Again he concluded that the SMP could not prohibit aquaculture due to odors and required Taylor to merely minimize odors to the extent practicable. Conclusion 73. The Decision as a whole reflects the Examiner's careful balancing of competing interests that Taylor now claims – by relying in isolation on a single component of the SMP – did not occur.

It should not be surprising that Taylor now asks the county commissioners to accept an alternative “consistency analysis” that is attached to Taylor’s Statement of Appeal at Exhibit C: the analysis was prepared by Taylor. *APHETI too attaches a consistency analysis that contrarily concludes that the project does not meet any of the applicable shoreline policies. See Exhibit A (Letter to Hearing Examiner dated February 12, 2002).* While Taylor also asks the county commissioners to consider the import of the Washington Shellfish Initiative, Statement of Appeal at 5-6, that document is neither incorporated into the SMA nor the SMP. The Hearing Examiner had no obligation to consider the Washington Shellfish Initiative in rendering a permit decision.

Finally, Taylor criticizes the Hearing Examiner’s failure to ‘overlook and ignore’ the environmental benefits of the project. Statement of Appeal at 7. But the Examiner accepted that the project could reduce 9.6 percent of the nitrogen deposited in Totten Inlet each year from stream and watershed runoff. Finding 52. Findings 43-58 all focused on the extent to which mussels would reduce nitrogen in Totten Inlet and help to prevent eutrophication. He also cited evidence in the record showing that the mussels would release approximately 5,000 kg of nitrogen per year – an amount greater than Dr. Rensel estimated the mussels would remove. Fencing 48. Although the Examiner further acknowledged some dispute over the net amount released, the Examiner nonetheless concluded that the project would “remove substantial amounts of excess nitrogen from Totten Inlet, thus helping to prevent eutrophication and the depletion of oxygen[.].” Conclusion 27. Taylor’s argument is incorrect not simply because the precise extent of the net benefit remains unclear, but also, because Taylor wrongly presumes that a benefit in one area justifies ignoring potential harm in all others. The SMA and SMP demand more, requiring a clear analysis of all potential adverse impacts to the marine ecosystem. RCW 90.58.140(2).

The Hearing Examiner’s Decision properly reviews the project in light of all applicable provisions of the SMA and SMP and is supported by ample evidence. It should be affirmed.

IV. *Cumulative Impacts Under the SMA Includes Considering Relevant Actions in the Area*

The Hearing Examiner found that Taylor did not properly consider the cumulative impacts of the project on dissolved oxygen, benthic life, and potential Gallo dissemination. The Examiner’s view of cumulative impacts was derived principally from the Washington Supreme Court’s application of the Shoreline Management Act, RCW 90.58.020, in *Skagit County v. State* and *Hayes v. Yount.* Taylor now challenges the Examiner’s interpretation of cumulative impacts
but relies upon a faulty reading of the SMA and the decisions interpreting it.

In enacting the SMA, the legislature recognized the necessity for “increased coordination in the management and development of the shorelines of the state.” RCW 90.58.020. Accordingly, the SMA demands a “planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state’s shorelines.” Id.

Interpreting the SMA, the Washington Supreme Court stated that the SMA “recognizes the necessity for controlling the cumulative detrimental impact of piecemeal development through coordinated planning of all development.” Skagit County v. State, Dep’t of Ecology, 93 Wn.2d 742, 750, 613 P.2d 115 (1980) citing RCW 90.58.020; Hayes v. Yount, 87 Wn.2d 280, 288, 552 P.2d 1038 (1976) citing RCW 90.58.020. Both Skagit County and Hayes concluded that it is proper to account for the cumulative impacts of all development because “numerous projects, each having no significant effect individually, may well have very significant effects when taken together.” Id. Both courts condemned the threat of piecemeal development and stated that while the permit at issue may not itself cause significant harm, the proposed project should be considered in light of other related uses and potential impacts, even if the potential impact consisted only of hypothetical “future developments[.]” 87 Wn.2d at 287; see also, 93 Wn.2d at 750 citing Hayes.

To support the adoption of its cumulative impact analysis Hayes relied upon the authority of federal courts interpreting cumulative impacts under the National Environmental Policy Act (“NEPA”). See 87 Wn.2d at 287-88. Cumulative impacts under NEPA requires quantification and detailed information, including a cataloguing of relevant past actions in the area. Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1379-80 (9th Cir. 1998). While the affected area may not be defined as broad a multistate area, it is proper to consider an area in smaller scope, such as Puget Sound. The Hearing Examiner properly found that the policies adopted in Hayes and Skagit County, supra, were “indistinguishable from that followed by NEPA.” Decision at 69. He also looked to the SHB decision in Fladseth v. Mason County, SHB No. 05-026 Findings of Fact, Conclusions of Law, and Order, (2010), which applied a cumulative impacts analysis for a pier, ramp, and float project that included considering impacts to the shoreline based on both existing uses and potential future uses.

Trying to explain away the weight of authority, Taylor claims that a cumulative impacts

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5 Hayes specifically acknowledged that the SHB did not rely “solely on potential future harm” as a ground for vacating the permit, but provided no indication that cumulative impacts from potential future threats may not itself constitute a sufficient basis to deny a SDP. Skagit County, four years after Hayes, made clear that a SDP may be denied under the SMA based only on the project setting a “detrimental precedent.” 93 Wn.2d at 750.


7 The Hearing Examiner also found that the facility was proposed on a shoreline of statewide significance under RCW 90.58.030 and concluded that the more comprehensive view of cumulative impacts was more consistent with Fladseth’s conclusion that it is less likely cumulative effects will need to be considered on a shoreline that is not a shoreline of statewide significance. Conclusion 25.
analysis should include only “additional requests for like actions in the area.” Appeal at 8-10 (emphasis in original). Taylor misconstrues the governing law. No plain reading of the SMA, Hayes or Skagit County supports a view of cumulative impacts that would result in the exclusion of impacts due to existing use.

Taylor also omits critical statements from the SHB decisions it incorrectly claims provide support. Fladseth considered impacts both from existing uses and from potential uses: the county properly “compared the differences and effects of development on the north and south shores” including the “relative lack of development on the north shore” and the “potential” impacts of incremental development. Fladseth at p. 26. In Overaa v. Bauer, SHB No. 10-015, Findings of Fact, Conclusions of Law, and Order at p. 21 (2010), the SHB considered cumulative impacts from both existing uses of the shoreline and from potential uses of it: the approved a permit because “there is no evidence that a level of development has been reached on the west shore of Hood Canal that would cumulative harm fish habitat or migration.”

Overaa expressly contrasted the project at issue with the “existing natural qualities and of the shoreline” described in Fladseth with the “existing bulkhead” and dense residential development in Overaa. Overaa at Conclusion 11. Overaa also contrasted the project at issue with yet another SHB decision that denied a SDP based on “the cumulative impact of the many existing docks on the south shore of Hood Canal.” Conclusion 12 citing McCauley v. Mason County, SHB No. 06-033 (2007). Taylor’s claim that Fladseth or Overaa are irrelevant or distinguishable is simply not supported by a plain reading of those decisions.

Taylor next relies on Coalition to Protect Puget Sound Habitat v. Pierce County, SHB 11-019 Findings of Fact, Conclusions of Law and Order (2012) (“CPPSH”), but again, the decision does not support Taylor’s position. CPPSH does not, as Taylor suggests, dispense with Fladseth and conclude that cumulative impacts under the SMA is not appropriate for aquaculture projects. Statement of Appeal at 10. To the contrary, CPPSH relied on Fladseth when it stated that “cumulative impacts for SDP applications is warranted if ‘there is proof of impacts that risk harm to habitat, loss of community use, or a significant degradation of views and aesthetic values.’ CPPSH at Conclusion 15 citing Fladseth. CPPSH also relied on Fladseth’s statement that a cumulative impacts analysis is more appropriate for a project located on a shoreline of statewide significance. Id. Both provisions support and reinforce the Examiner’s conclusions here: the Examiner found specific instances where the record inadequately addressed risk of harm to habitat and also found that the shoreline at issue is one of statewide significance. See Decision, Conclusion 25. Taylor’s further attempt to distinguish the holding in Fladseth from aquaculture activities as a general matter is also unsupported: neither Fladseth nor CPPSH held that cumulative impacts should be limited to piers, ramps and floats or that a mussel farm is otherwise somehow exempt from cumulative impacts review under the SMA. 8

8 A plain reading of the language in CPPSH disproves Taylor’s claim: “cumulative impacts for SPD applications is warranted if there is proof of impacts that risk harm to habitat...” Conclusion 15. The decision then concluded that geoduck—not mussel—aquaculture proposals need to be reviewed on its own site characteristics and if a particular site had currents that made it likely to transport sediments over known spawning areas of forage fish, “considerable scrutiny” would be given. Id. Unlike CPPSH, forage fish are believed to spawn on the beach
V. If Commissioners Amend, Modify, or Reject Any Aspect of the Decision, Conclusions Regarding the Project's Consistency with the SMP's Conservancy Environment and Aquaculture Policies Should be Reversed

APHETI argued to the Hearing Examiner that the project is inconsistent with the SMP’s “Conservancy Environment.” See Attachment A. As a Conservancy Environment, the SMP restricts uses that threaten “existing” natural resources: the “intent of a Conservancy Environment designation is to protect, conserve and manage existing resources and valuable historic and cultural areas in order to ensure a continuous flow of recreational benefits to the public and to achieve sustained resource utilization.” SMP Sec. 2(VII)(B). Uses are permitted which are demonstrated to be “nonconsumptive of the physical and biological resources of the area and activities and uses of a nonpermanent nature which do not substantially degrade the existing character of the area. SMP Sec. 2(VII)(B).

The proposal does not fit either the purpose or the definition of the Conservancy Environment. The Hearing Examiner found that the project will reduce oxygen to levels below where they are known to stress fish. Finding 68. He also found that the mussels would remove food sources for forage fish, such as plankton and zooplankton, which are critical for salmonids. Findings 79, 82. Evidence also indicated that mussels could ingest larval fish. See Findings 114. While shorelines in a Conservancy Environment must be managed to ensure no long-term irreversible impacts and only allows uses which are “nonconsumptive,” Taylor’s project was found to consume resources in the water column beneath and around the mussel farm. Given the evidence in the record, including the applicant’s own admissions and the Examiner’s findings, Taylor’s proposal is improper in a designated Conservancy Environment.

The proposal also does not meet the SMP’s demand that an aquaculture use “consider and minimize the detrimental impact it might have on views from upland property.” SMP Sec. 3(II)(B)(5), (8). Although Taylor’s study concluded the project would have only a moderate impact, the report improperly characterized the number of viewers as very low, approximately 10-15 residences. See Finding 37. APHETI’s visual impact assessment resulted in a finding of a much higher impact and concluded at least 25-30 residences would be impacted by the rafts. Id. Contrary to Taylor’s implication that the upland property consists of ‘low’ viewership, the residential communities adjacent to the proposed raft are built to the near maximum of Thurston County’s zoning code. See Decision, Exhibit 11 at 9. Evidence also demonstrated that the mussel rafts are often piled high with “unsightly collections of largely unidentifiable equipment” and that some of the “objects appears three to four times as high above the water line as the raft itself.” Finding 36. Evidence indicated that the rafts are cleaned only when complaints are made. Id. Taylor has not demonstrated that the detrimental impact on views from upland properties will be minimized under SMP Sec. 3(II)(B)(5). The project does not meet the SMP’s aquaculture policy.

adjacent to Taylor’s proposed site and known to spawn in the raft assembly area. Findings 106-111.
Sincerely,

GENDLER & MANN LLP

David S. Mann
Brendan W. Donckers

cc: Parties of Record
Cami Petersen, Thurston County Land Use Clerk
ATTACHMENT A
February 12th, 2012

Hearing Examiner of Thurston County
Thurston County Courthouse Complex
Building # 1, Room 152
2000 Lakeridge Drive SW
Olympia, WA 98502

RE: Comments in Response to Shoreline Substantial Development Permit for North Totten Inlet Mussel Farm (Project #: 91372 SSDP)

Dear Hearing Examiner:

These comments are submitted on behalf of the Association to Protect Hammersly, Eld and Totten Inlets ("APHETI"). Our focus is on the project’s inconsistency with the Shoreline Management Act and Thurston County’s Shoreline Master Program. These comments supplement and incorporate the comments you will receive from the individual members of APHETI, as well as the organization’s expert consultants, Mr. Wayne Daley and Mr. Dan Penttila.

A. Application of state SMA and Thurston County SMP

Taylor Shellfish submitted an application for a Shoreline Substantial Development Permit proposing to develop a 58-raft Gallo mussel farm along the eastern shore of Totten Inlet in Thurston County in 1996. As you know, Thurston County’s code does not allow an administrative appeal of an EIS. Thus, while the County and Taylor will assert that the EIS is presumed to be adequate, that presumption is limited in duration. Adequacy of the EIS will be subject to review before the Shoreline Hearings Board.

But while SEPA review is pending, the applicant must still establish that the shoreline substantial development permit complies with other environmental schemes, including the Shoreline Management Act ("SMA"), the Washington Administrative Code, and Thurston County’s Shoreline Master Program ("SMP"). Completion of an EIS alone does not justify substantive permit compliance. Bellevue Farm Owners Ass’n v. State of Washington, 100 Wn. App. 341, 997 P.2d 380 (2000); see also, DNR v. Kitsap County, SHB No. 03-018, *7 (2003). If the proposed project is not consistent with the SMA or Thurston County’s SMP, the permit should not be issued.

For the reasons articulated below, as well as comments received from APHETI’s members and consultants, Thurston County should delay issuance of the development permit until adequate environmental review can be conducted.
B. The SMA and SMP require the protection and preservation of shoreline habitat

The SMA very clearly mandates shoreline protection and preservation. In enacting the SMA, the legislature recognized that the shorelines are among “the most valuable and fragile of [the state’s] natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation.” RCW 90.58.020.

The SMA was drafted to respond to concerns about the “inherent harm in an uncoordinated and piecemeal development of the state’s shorelines.” RCW 90.58.020. The legislature declared that “the interest of all the people shall be paramount in the management of shorelines of statewide significance.” Id. The legislature also adopted specific policies to guide the management of shorelines which gives preference to uses in the following order:

1) Recognize and protect the statewide interest over local interest;
2) Preserve the natural character of the shoreline;
3) Result in long term over short term benefit; [and]
4) Protect the resources and ecology of the shoreline[.]

RCW 90.58.020. Uses “shall be preferred which are consistent with the control of pollution and prevention of damage to the natural environment[.]” Id. Permitted uses “shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area[.]” Id. The SMA shall be “liberally construed to give full effect to the objectives and purposes for which it was enacted.” RCW 90.58.900. That is, it must be construed broadly “in order to protect the state shorelines as fully as possible. English Bay Enterprises, Ltd. v. Island County, 89 Wn.2d 16, 568 P.2d 783 (1977). The SMA’s policies and use preferences are expressly adopted in Thurston County’s SMP. See, SMP at Sec.2 (IV).

The applicant’s project will occupy 16 acres of open water with 58 rafts of intensive aquaculture activity. It threatens to significantly alter the health and ecology of the shoreline environment in several ways. But the county’s Staff Report recommending Hearing Examiner approval of the development permit ignores or glosses over potential adverse environmental impacts and instead relies upon conclusory references to the applicant’s FEIS stating that “no significant impacts were identified.”

In fact, significant adverse impacts have been identified by APHETI and its expert consultants, including food source removal due to bivalve ingestion and adverse impacts to habitat immediately adjacent to the site. The FEIS concedes that the mussel farm will remove food sources for forage fish, including phytoplankton and zooplankton, acknowledges adverse shading impacts to algae, and admits that benthic habitat will be displaced by concrete wedge anchors on the seafloor. See FEIS at Table 1.6. Taylor casually dismisses these impacts by stating that consumption of food sources will be “such a small percentage” and impacts to salmonids and other fish will only be “minor.” FEIS 1-29. However, as materials submitted by Mr. Daley and Mr. Penttila demonstrate, the applicant’s estimates are chronically understated and the project poses significant threats to the resources and ecology of the shoreline.
While the FEIS acknowledges the project will reduce food sources for salmonids, see FEIS 1-29, the extent of this impact is not adequately addressed. Taylor’s project will alter the water column and impact native wild fishes of Totten Inlet, including Endangered Species Act-listed Chinook salmon and Puget Sound Steelhead, due to bivalve ingestion of the marine plants and invertebrates their food sources depend on. See “Intensive Shellfish Culture Impact on Chinook Salmon,” Wayne Daley (“Daley Report”) at pp. 2-3. The applicant wrongly assumes that forage fish will not be impacted, in part, because the proposed activities are outside of their spawning area.\(^1\) But limiting the analysis to spawning activities is misleading. Taylor avoids its obligation to clearly analyze the impact of bivalve ingestion. Daley Report at p. 2; “Salish Sea Biological Memo,” Dan Penttila (“Penttila Report”) at p. 1.

The concomitant reduction of food sources for forage fish will affect the health and survival of Chinook salmon and steelhead, as well as various native flatfish species such as sole and flounder. Daley Report at p. 2. It is also likely that bivalve ingestion will reduce larval herring, crab larvae and harpacticoid copepods, which are critical food sources for juvenile salmonids. \textit{Id.} at p. 3. The FEIS does not even mention impacts to forage fish larvae of all species. Penttila Report at p. 3. Other impacts to the shoreline ecosystem which are not adequately addressed in the FEIS include the actual filtration rate of plankton adjacent to the aquaculture sites and impacts to the benthic community adjacent to the sites. \textit{Id.} Clearly analyzing the impact of bivalve ingestion is critical to understanding whether the project is consistent with the SMA’s command to protect and preserve shorelines. \textit{See RCW 90.58.020.}

The SMA’s provision for preservation and protection of the shorelines must be “liberally construed to give full effect to the objectives and purposes for which it was enacted.” RCW 90.58.900; \textit{Buechel v. State Dept. of Ecology}, 125 Wn.2d 196, 884 P.2d 910 (1994). Based on the applicant’s FEIS, it is impossible to know whether the proposed use prevents “damage to the natural environment” or, conversely, creates damage to the natural environment. \textit{Id.}

The applicant has also failed to provide any meaningful cumulative impacts analysis, which conflicts sharply with the legislature’s concerns about the “inherent harm in an uncoordinated and piecemeal development of the state’s shorelines.” \textit{See RCW 90.58.020.} Also, WAC 197-11-060(4) requires an EIS to address cumulative impacts. Existing mussel raft operations in Totten Inlet already include a 21-raft farm in Gallagher Cove and two farms in Deepwater Point. As aquaculture activities in Washington increase, so too does the need to understand their impact on the marine ecosystem. The cumulative effect of mussel rafts on Totten Inlet on the shoreline habitat remains unknown. \textit{See Penttila Report} at p. 4. No new farms should be permitted until the cumulative effects of shellfish farming on Totten Inlet are more clearly understood and compliance with the SMA can be accurately ascertained.

\(^1\) Mr. Penttila’s report raises several issues with respect to the applicant’s assumptions regarding spawning habitat of herring, surf smelt, and sand lance. Penttila Report at pp. 2-3. These must also be resolved to determine the project’s compliance with the SMA.
C. The intent of Thurston County’s “Conservancy Environment” is to protect, conserve, and manage existing resources

In addition to the SMA, the permit must comply with applicable provisions of Thurston County’s SMP. The shoreline along the North Totten Inlet is designated a “Conservancy Environment.”

The Staff Report fails to address this project’s consistency with the Conservancy Environment entirely. The “purpose” of the “Conservancy Environment” is to “protect, conserve and manage existing resources...” SMP at Sec. 2(VII)(B) (emphasis added). The preferred uses in a Conservancy Environment are expressly defined as “nonconsumptive of the physical and biological resources of the area and activities and uses of a nonpermanent nature which do not substantially degrade the existing character of the areas.” Id. (emphasis added).

Similarly, the “definition” of the “Conservancy Environment” includes the designation of shoreline areas for the “protection, conservation and management of existing valuable natural resources...” and which “do not result in long-term irreversible impacts on the natural character of the environment.” Id.

Taylor’s proposal fails to meet the purpose of Thurston County’s “Conservancy Environment.” Taylor’s proposal does not “protect, conserve, and manage existing resources.” As discussed above and in more detail by Mr. Daley and Mr. Penttila that the farm is a threat to existing resources. Contrary to the conservancy designation’s stated purpose of protecting, conserving, and managing existing resources, the applicant proposes to import and manage “new” nonnative resources in the form of its Gallo mussels.

The project is also inconsistent with the definition of a “Conservancy Environment.” For one, the proposal cannot be characterized as “nonconsumptive.” The mussel farm will remove critical food sources for forage fish, juvenile salmonids, and other native fish. See Daley Report and Penttila Report. The applicant concedes benthic habitat will be displaced. Other effects to marine plants and animals that are adjacent to the mussel rafts are completely ignored.

Nor can the proposal be characterized as “nonpermanent.” Although the rafts can be moved, the history of aquaculture in Totten Inlet demonstrates that they are not moved. Once Taylor Shellfish sites a raft system, it remains there permanently. Taylor’s project has simply not been demonstrated to be a proper use for a “Conservancy Environment.”

D. While Thurston County’s SMP encourages aquaculture, where a proposal will result in significant impacts to adjacent properties and the environment, it must be denied.

While the SMP establishes a policy of encouraging aquaculture, it also requires aquaculture activities to consider and minimize detrimental impacts to adjacent properties and avoid impacts to existing plants, animals and the existing physical characteristics of the shorelines. SMP at Sec. 3 (II)(B) (5), (8). Moreover, aquaculture “shall not cause extensive erosion or accretion along
adjacent shorelines.” These policies are carried through and repeated in the “General Regulations” for aquacultural activities. SMP at Sec. 3 (II)(C).

As discussed in this letter and in the more detailed comments of Mr. Penttila and Mr. Daley, the FEIS does not fully address the scope and range of impacts to the aquatic ecosystem. Also, while the Staff Report states that the view impacts are “moderate,” Staff Report at p.6, evidence suggests otherwise. Members of the affected community will testify that Taylor’s proposal will have a significant view impact on adjacent properties. Their testimony is reinforced in APHETI’s May 22, 1998 Visual Impact Assessment. Taylor’s proposal does not meet policies 5 or 8.

E. Taylor’s proposal does not meet the “Regional Criteria” under the SMP

As with any development within the jurisdiction of the SMP, aquaculture activities must comply with Regional Criteria. Critical to the Hearing Examiner’s review is Regional Criteria B, which provides that:

Protection of water quality and aquatic habitat is recognized as a primary goal. All applications for development of shorelines and use of public waters shall be closely analyzed for their effect on the aquatic environment. Of particular concern will be the preservation of the larger ecological system when a change is proposed to a lesser part of the system, like a marshland or tideland.

SMP at Sec. 2 (V)(B). The Regional Criteria demand further that:

Shorelines of this region which are notable for their aesthetic, scenic, historic or ecological qualities shall be preserved. Any private or public development which would degrade such shoreline qualities shall be discouraged.

SMP at Sec. 2 (V)(G).

The Staff Report claims that Totten Inlet is only scenic and aesthetic to the residents of the area. Staff Report at 9. This claim is patently false. The legislature has already recognized that the Puget Sound is a “national treasure and unique resource” and that it “must be restored and protected in a more coherent and effective manner.” RCW 90.71.200(1)(a), (c). Further, as a defined “shoreline[] of statewide significance” the legislature has declared that the interests “of all people shall be paramount” and that uses must, in order of preference, “recognize and protect the statewide interest over local interest;” “preserve the natural character of the shoreline;” “result in long term over short term benefit;” and “protect the resources and ecology of the shoreline[.]” See RCW 90.58.020.

Shoreline property located nearby was recently acquired by the Capitol Land Trust to protect critical habitat used by area salmon and steelhead. Known locally as Adams Cove, and similar to the shoreline proposed for development by Taylor, the property contains enormous biological
value. The shoreline of Totten Inlet is important not only to surrounding residents, but to all citizens. A private company’s local interest in short term profit does not defeat the greater public interest in preserving and protecting the resources and ecology of the shoreline.

Protection of water quality and aquatic habitat is a “primary goal” under Regional Criteria and development applications must be “closely analyzed for their effect on the aquatic environment.” SMP at Sec. 2 (V)(B). There can be little question that the proposed project will have an impact on the ecology of the area. The FEIS simply demonstrates that more study is needed to determine the extent of the impact. As discussed above, a critical concern is the impact of food source removal for native fish due to bivalve ingestion. See Daley Report at p. 3.

Also as discussed above, the applicant has failed to assess the cumulative impact of aquaculture activities in the Totten Inlet. Regional Criteria (B) mandates a review of the impact on the larger ecosystem, not just the local ecosystem. This is particularly important where the FEIS wrongly assumes the proposed raft assembly site is not utilized by spawning forage fish. Due to the character of the beach, the upper intertidal zone is potential spawning habitat for surf smelt and sand lance. Penttila Report at pp. 2-3. The site should, at the very least, be sampled and analyzed before motor vehicles are allowed to operate on it. Id.

The SMA is designed to prevent “inherent harm in an uncoordinated and piecemeal development of the state’s shorelines.” RCW 90.58.020. Experts estimate that as much as 30 percent of the Puget Sound shoreline has been degraded by human activities but the actual impact of aquaculture activities, both to Totten Inlet and the greater Puget Sound, is utterly unknown. Penttila Report at p. 4. The applicant’s failure to identify and analyze the cumulative impacts of the proposal is fatal to the county’s claim that environmental impacts have been adequately assessed.

F. Conclusion

We appreciate your consideration of these comments and again request that the county delay issuance of the permit until complete environmental review of the project’s impacts is performed.

Sincerely,

GENDLER & MANN LLP

[Signature]

David S. Mann
Brendan W. Donckers