BEFORE THE HEARING EXAMINER
OF THURSTON COUNTY

IN RE TAYLOR SHELLFISH APPLICATION
FOR SHORELINE SUBSTANTIAL
DEVELOPMENT PERMIT FOR NORTH
TOTTEN INLET MUSSEL FARM

Sequence No. 96-961372 XC
TAYLOR SHELLFISH’S POST-
HEARING BRIEF

I. INTRODUCTION

The proposed Taylor Shellfish (“Taylor”) North Totten Inlet Mussel Farm will
provide valuable ecosystem services, economic growth, and educational opportunities in
Thurston County. The mussel farm is a preferred use under the Shoreline Management
Act (chapter 90.58 RCW) (“SMA”), Department of Ecology’s Shorelines Guidelines
(chapter 173-26 WAC) (“Guidelines”), and the Shoreline Master Program for the
Thurston Region (“SMPTR”). Not only is the farm consistent with regulations governing
shoreline development in Thurston County, it implements several key goals and policies
of the SMA and SMPTR. Taylor’s proposal epitomizes why the Department of Ecology
(“Ecology”) and Governor Gregoire have strongly declared that shellfish aquaculture is of
long-term benefit and statewide interest.¹

The mussel farm is perhaps one of the most studied projects ever presented to the
Thurston County Hearing Examiner. Consultants for Taylor Shellfish conducted
biological, biochemical, and water circulation studies to analyze five environmental
issues: impacts to bottom-dwelling organisms; impacts to the surrounding water column;
impacts to phytoplankton resources; escapement and propagation of mussels; and impacts

¹ See WAC 173-26-241(3)(b); Ex. 20, Attachment A (Washington Shellfish Initiative).

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to marine navigation. Additionally, Thurston County retained five independent experts with doctorate degrees in their fields to review and comment on all documents prepared by Taylor's consultants. After more than ten years of study and review, the consultants, independent scientific experts, and the County all concluded the mussel farm would not result in any significant adverse environmental impacts to any natural resources.

The sole purpose of this proceeding is to determine whether the proposed mussel farm is consistent with the SMA, the Guidelines and the SMPTR; the adequacy of the environmental impact statement ("EIS") prepared for the mussel farm is not subject to review. The displeasure of a few individuals living near the proposed farm site cannot serve as a basis for denying or conditioning a substantial development permit ("SDP") for the proposal. Likewise, a few individuals’ speculation about hypothetical impacts cannot serve as a basis for denying or conditioning an SDP for the farm over conclusions reached by scientific experts following years of study and review. After an objective review of the mussel farm in the context of applicable criteria, the Hearing Examiner should issue an SDP for the farm with the conditions of approval recommended by County staff.

II. FACTS

Taylor submitted an application for an SDP, together with a checklist prepared under the State Environmental Policy Act ("SEPA"), to the County in November 1996. Taylor’s original proposal was to expand its existing mussel farm in Gallagher Cove from 21 to 42 rafts, and to establish a new farm in North Totten Inlet consisting of 108 rafts. The County held public meetings in 1997 to explain the proposal and invite comments. The County requested that Taylor provide additional analysis of the proposal to address

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3 Ex. 6 (DEIS), p. 1-1.
specific potential environmental impacts. In response to this analysis, to eliminate or minimize concerns raised by the County, Taylor proposed an alternative project description eliminating 50 rafts at the North Totten Inlet site and reconfiguring the remaining 58 proposed rafts.

The County issued a Determination of Significance ("DS") in 1998 requiring an EIS for the alternative proposal. The limited-scope EIS was to address project impacts to bottom-dwelling organisms, the surrounding water column, phytoplankton resources and marine navigation, and impacts that could be caused by the escapement and propagation of mussels. Under SEPA, an EIS may be required only when a proposal is likely to result in probable significant adverse environmental impacts. Taylor appealed the County's DS, arguing this standard was not met. The Hearing Examiner upheld the DS requiring the limited-scope EIS.

Taylor retained a team of technical consultants in 1999 to conduct the investigations and analyses required to prepare the EIS. To eliminate concerns regarding potential impacts to polychaete worm tube colonies, Taylor subsequently proposed yet another reduced project alternative, eliminating the proposed expansion of the Gallagher Cove mussel farm. Under this new project alternative, only the proposed 58 rafts at the North Totten Inlet site remained part of Taylor’s proposal.

The County selected a team of scientists to serve on an Independent Technical Review Committee ("ITRC") to review and comment on all documents prepared by Taylor consultants, including the original scope of work, study protocols and

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4 Ex. 6 (DEIS), p. 1-1.
5 Ex. 6 (DEIS), p. 1-2.
6 WAC 197-11-330.
7 Ex. 6 (DEIS), p. 1-2.
methodology, and findings and conclusions described in technical reports. These scientists, recognized experts in their fields, include:

- **Jack Rensel, Ph.D.** (Rensel Associates Aquatic Science Consultants) – phytoplankton, algal blooms, and effects on benthic organisms and finfish;
- **Mitsuhiro Kawase, Ph.D.** (University of Washington School of Oceanography) – flushing characteristics (circulation) and water quality (eutrophication);
- **Jan Newton, Ph.D.** (University of Washington, Applied Physics Lab) – water quality (nutrients and dissolved oxygen) and phytoplankton productivity;
- **Ralph Elston, Ph.D.** (AquaTechnics, Inc.) – mussel genetics, including potential escapement and competition issues; and
- **Roger Newell, Ph.D.** (University of Maryland, Horn Point Laboratory) – water column and benthic community effects.

The ITRC operated between 2001 and 2009 as technical studies were prepared.

The County released a Draft EIS ("DEIS") on May 26, 2010. The DEIS was accompanied by a series of technical reports, all of which were reviewed by the ITRC. The DEIS concluded, based on these technical reports and analyses prepared during the 10-year review, that the project would not result in any significant unavoidable adverse impacts to the following specific resources and uses:

- Water circulation;
- Dissolved oxygen;
- Silicate, phosphorous or dissolved inorganic nitrogen;
- Phytoplankton;
- Macroalgae;
- Zooplankton;

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8 Ex. 6 (DEIS), p. 1-3; Testimony of Robert Smith and Mark Pedersen.
9 The curricula vitae for the County’s experts are located at Exhibit 17. The curriculum vitae for County consultant Mark Pedersen is also located at Exhibit 17. Mr. Pedersen holds a Master of Science degree in Fisheries from the University of Washington.
10 Ex. 6 (DEIS), p. 3-1 and 3-2.
- Benthic organisms;
- Genetic make-up of native mussel populations;
- Fish or fish habitat;
- Marine mammals;
- Bald eagles, marbled murrelets, bulltrout, Puget Sound Chinook salmon, steelhead trout or Southern Resident killer whale; and
- Vessel Traffic.\textsuperscript{11}

The County received written and oral comments on the DEIS during a 45-day public comment period.\textsuperscript{12} The County and its consultants meticulously and comprehensively responded to these comments in the Final EIS ("FEIS").\textsuperscript{13} In response to some comments, additional research was conducted and analysis performed.\textsuperscript{14} The County and its consultants responded to each individual comment in sections 2.2, 2.3 and 2.4 of the FEIS. In addition, the County and its consultants summarized concerns raised by the public and provided comprehensive responses to those concerns in section 2.1 of the FEIS.

The FEIS was issued November 7, 2011. In advance of the public hearing on Taylor’s SDP application, a staff report was prepared recommending approval of the permit application. The report proposed four conditions of approval: (1) Securing all necessary local, state and federal permits and approvals;\textsuperscript{15} (2) implementing all mitigation

\textsuperscript{11} Ex. 6 (DEIS), pp. 1-7 through 1-14 (Table 1.6-1).
\textsuperscript{12} A public meeting on the DEIS was held during the public comment period on June 22, 2010. Ex. 8 (FEIS), p. 1-6.
\textsuperscript{13} During the hearing on Taylor’s SDP application, the Hearing Examiner on several occasions referred to the applicant’s responses to public comments on the DEIS. To be clear, the responses to comments contained in the FEIS were not prepared by Taylor’s consultants; they were prepared by the County and its consultants.
\textsuperscript{14} For example, the FEIS addresses public comments regarding cumulative impacts with nine additional pages of analysis, supported by supplemental research. Ex. 8 (FEIS), pp. 1-23 through 1-31.
\textsuperscript{15} The permits and approvals listed under this condition of approval include a Washington State Department of Natural Resources Aquatic Lands Lease, a U.S. Army Corps of Engineers Section 10 Individual Permit, a

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measures noted on pages 1-15 through 1-22 of the FEIS; (3) disposing construction and
operational debris at an approved site; and (4) keeping the rafts in a neat and orderly
manner, including not storing materials on the rafts. At the public hearing, Taylor
representative Diane Cooper testified Taylor would comply with all conditions of
approval.

III. STATE LAW AND POLICY FAVORS SHELLFISH AQUACULTURE

The proposed mussel farm is entitled to preferential treatment under the SMA.
The law requires preference be given to those uses that are “unique to or dependent upon
use of the state’s shoreline.” RCW 90.58.020; see also WAC 173-26-241(2)(a)(i). This
means water dependent uses must be granted priority over many other types of shoreline
uses. RCW 90.58.020; Nisqually Delta Ass’n v. City of DuPont, 103 Wn.2d 720, 726, 696
P.2d 1222 (1985). Shellfish aquaculture is water dependent due simply to the intrinsic
nature of its operation. WAC 173-20-020(36). Therefore, shellfish aquaculture is a
preferred use of the shoreline environment.

Unlike other water dependent uses, however, shellfish aquaculture is specifically
called out in Ecology’s Guidelines as “an activity of statewide interest.” The Guidelines
state that shellfish aquaculture can “result in long-term over short-term benefit and can
protect the resources and ecology of the shoreline.” WAC 173-26-241(3)(b). This
regulation implicitly acknowledges the many ecosystem benefits provided by shellfish
aquaculture, including three-dimensional habitat and reduction of nutrient pollution
through filtration. Further, the Guidelines promote the utilization of shorelines for
economically productive uses that are particularly dependent on shoreline location or use.

Federal Endangered Species Act and Magnuson-Stevens Fishery Conservation Management Act compliance
letter; and a U.S. Coast Guard Aids to Navigation compliance letter. Ex. 14 (Staff Report), p. 11.

16 Ex. 14 (Staff Report), p. 11.

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WAC 173-26-176(3)(a). Shellfish aquaculture squarely fits into this category.

The proposed mussel farm epitomizes an appropriate use of the shorelines contemplated by the SMA. It is water dependent, an activity of statewide interest, results in long-term over short-term benefit, provides a net ecological benefit to the shoreline ecosystem, and promotes the utilization of shorelines for economically productive uses. It not only is consistent with the SMA and Ecology’s Guidelines, but implements several key goals and policies for shoreline use.

IV. THE PROPOSED MUSSEL FARM IS CONSISTENT WITH THE SMA, ECOLOGY’S GUIDELINES AND THE SMPTR

An SDP may be granted for a proposal that is consistent with the SMA, Ecology’s Guidelines, and the applicable local master program. Thurston County Code (“TCC”) § 19.04.010; WAC 173-27-150. The Hearing Examiner is assigned by code the authority to make this consistency determination. TCC § 2.06.010(C).17 In making that determination, the Examiner must remain cognizant of the overall purpose of the SMA.

In applying the law, we look first to its overall policy. The SMA does not prohibit development of the state’s shorelines, but calls instead for “coordinated planning ... recognizing and protecting private property rights consistent with the public interest.” RCW 90.58.020.

Nisqually Delta Ass’n v. City of DuPont, 103 Wn.2d at 726. See also Biggers v. City of Bainbridge Island, 162 Wn.2d 683, 697, 169 P.3d 14 (2007) (“The SMA embodies a legislatively-determined and voter-approved balance between protection of state shorelines and development.”). The SMPTR carries out this overall policy of the SMA by allowing certain types of development in certain environment designations. The SMPTR does not guarantee that allowed development will not cause any impact to the

17 Conversely, the Hearing Examiner does not have authority to hear appeals regarding the adequacy of an EIS. TCC § 2.06.010(E) and 17.09.160(A). Therefore, the Hearing Examiner does not have jurisdiction over SEPA issues related to this proposal.

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environment. Indeed, the Supreme Court found that to require a finding of “no adverse
effects” from development would preclude development from the shorelines entirely,
thereby defeating the purpose of the SMA. *Nisqually Delta Ass'n v. City of DuPont*, 103
Wn.2d at 731-32.

The SMPTR recognizes this balancing act. For example, the Goal of the SMPTR
is to preserve to the fullest possible extent the scenic, aesthetic and ecological qualities of
the shorelines in harmony with those uses deemed essential to the life and well-being of
its citizens (i.e., food, jobs and housing). SMPTR, p. 19. The Purpose of the SMPTR is
to coordinate planning of the shorelines while recognizing and protecting private property
rights consistent with the public interest. SMPTR, p. 19. And the Policy of the SMPTR is
to provide for the management of the shorelines by planning for and fostering all
reasonable and appropriate uses. Those uses include industrial and commercial
developments which are particularly dependent on their location on, or use of, the
shorelines. These uses are required to be designed and conducted in a manner to
minimize, to the extent feasible, any resultant damage to the resultant use of the shoreline
area. SMPTR, p. 20.

Thurston County determined that aquaculture is a reasonable and appropriate use
in the Conservancy Environment, the designation in which the proposed farm would be
located. The SMPTR contains policies and regulations specific to aquacultural activities.
SMPTR, Section Three, II. When determining whether aquacultural activities are
consistent with the SMPTR, the aquaculture policies and regulations must be harmonized
with other provisions in the SMPTR. *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d
at 732. Said another way, any general policy guidance provided in the SMPTR must be
read consistent with specific policies and regulations governing aquaculture. Specific
statutes supersede general ones when both apply. Kustura v. Dept. of Labor and
Industries, 169 Wn.2d 81, 88, 233 P.3d 853 (2010). Therefore, the Hearing Examiner’s
analysis must begin with the specific provisions provided by SMPTR’s aquaculture
policies and regulations. Id.

The analysis below addresses several issues implicated by applicable SMPTR
provisions and raised at the public hearing on the permit application. It begins with a
discussion of Thurston County’s express desire to increase aquaculture as a preferred use
of the shorelines.

A. The Mussel Farm Advances Thurston County’s Intent to Encourage
Aquacultural Uses and Utilize Shorelines with High Aquacultural Potential.

Any discussion of the proposed mussel farm’s consistency with the SMPTR must
begin with the County’s aquaculture policies. SMPTR, Section Three, II. Two of those
policies provide:

• The Region should strengthen and diversify the local economy by encouraging
  aquacultural uses; and

• Aquacultural use of areas with high aquacultural potential should be encouraged.

Through these policies, the County has identified aquaculture as a use it generally wishes
to promote and expand. The proposed mussel raft furthers these policies.

Taylor is the leading producer of farmed shellfish on the West Coast and employs
hundreds of permanent and seasonal employees. The addition of the 58-raft mussel farm
will allow Taylor to realize operational efficiencies between its existing shellfish farms in
the form of labor, boat trips, truck trips, and maintenance work. Taylor hopes to produce

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18Local ordinances are subject to the same rules of construction as state statutes. Kitsap County v. Mattress
19Ex. 20 (Taylor Consistency Analysis), p. 6; Testimony of Diane Cooper.
upwards of 850,000 pounds of mussels for sale each growing season from the new farm.\textsuperscript{20} This increase in production will create eight full-time jobs (four on-farm positions and four off-farm positions).\textsuperscript{21}

As indicated by both the National and Washington State Shellfish Initiatives, demand for shellfish far exceeds supply.\textsuperscript{22} Washington State enjoys a world-wide reputation for the quality of the shellfish it produces.\textsuperscript{23} Increasing the production of mussels through the proposed farm would increase that supply, further enhancing that reputation and subsequently the local economy where such shellfish is produced.

Further, Totten Inlet, the location of the proposed farm, is a proven area of high aquacultural potential. At present Totten Inlet annually produces approximately 900,000 pounds of oysters, 1.2 million pounds of mussels, 500,000 pounds of Manila clams, and 500,000 pounds of geoduck. The area possesses the specific biophysical requirements of water quality, temperature, dissolved oxygen, and salinity necessary to support aquaculture.\textsuperscript{24} The County conducted a carrying capacity analysis to ensure the area would support expansion of aquaculture. The DEIS and FEIS prepared for the project concluded there would be no significant unavoidable adverse impacts to the carrying capacity of Totten Inlet from the project.\textsuperscript{25} Indeed, a modeling analysis prepared specifically for this project shows that when the proposed mussel farm is at full production, shellfish farms in Totten Inlet will consume only 10% of the Inlet’s predicted carrying capacity for suspension feeders.\textsuperscript{26} No specific evidence was presented at the

\textsuperscript{20} Ex. 20 (Taylor Consistency Analysis), p. 6; Ex. 6 (DEIS), p. 1-4.
\textsuperscript{21} Ex. 20 (Taylor Consistency Analysis), p. 8.
\textsuperscript{22} Ex. 20 (Taylor Consistency Analysis), Attachments A & B.
\textsuperscript{23} Ex. 20 (Taylor Consistency Analysis), Attachment A.
\textsuperscript{24} Ex. 20 (Taylor Consistency Analysis), p. 9; Cooper Testimony.
\textsuperscript{25} Ex. 6 (DEIS), pp. 3-2 through 3-24 (results of water column effect investigations); Ex. 8a (NewFields Report); Ex. 8 (FEIS), pp. 1-24 through 1-30.
\textsuperscript{26} Ex. 8 (FEIS), p. 1-29.
public hearing to refute this analysis or the conclusions drawn from it.

The proposed mussel farm furthers the County's policies to encourage aquaculture and utilize shorelines with high aquacultural potential.

**B. Environmental Impacts of the Proposed Farm Were Thoroughly Analyzed and Appropriately Addressed.**

Several SMPTR provisions require evaluation of a proposed project's environmental impacts. Specific to aquacultural activities, the SMPTR (Aquaculture Policy 8) states: "Proposed aquacultural activities should be reviewed for impacts on the existing plants, animals and physical characteristics of the shorelines." This policy requires that environmental impacts be evaluated, but does not require an aquaculture project be denied if it results in any adverse environmental impacts. Indeed, the policy does not indicate an aquaculture project *should* or *could* be denied on the basis it will result in any adverse environmental impacts.

Here, the proposed mussel farm was reviewed extensively for its potential environmental impacts. As described above, preparation of an EIS for the farm took place over the course of over 10 years. Leading experts in the fields of phytoplankton, algal blooms, benthic ecology, finfish, water circulation, water quality, mussel genetics and non-native species escapement and competition issues reviewed the EIS analysis and conclusions, as well as all of the technical reports supporting those conclusions. The FEIS addresses every environmental issue raised during the public comment period on the DEIS, either by explaining where the issue was addressed in the DEIS or by supplementing the analysis in the DEIS with new information. The EIS concludes the proposed mussel farm will not result in *any* significant adverse environmental impacts. No new evidence was presented at the public hearing that would change that conclusion.
Pursuant to SMPTR Aquaculture Policy 8, the mussel farm was “reviewed for impacts on the existing plants, animals and physical characteristics of the shorelines.” In addition to this specific policy regulating aquaculture, Regional Criterion B also addresses environmental impacts.\(^{27}\) Regional Criterion B provides:

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.

This criterion requires applications “be closely analyzed for their effect on the aquatic environment.” The criterion emphasis the preservation of the “larger ecological system” when a change is proposed “to a lesser part of the system.” Further, the criterion emphasizes water quality and aquatic habitat as a whole. As evidenced by the EIS and testimony presented at the hearing, the mussel farm will have some less-than-significant temporary impacts on water quality. However, the farm is also self-mitigating to the extent it will have beneficial environmental impacts on both water quality and aquatic habitat. Three specific issues discussed at the hearing warrant further explanation here: the proposed farm’s potential impacts on dissolved oxygen, on nitrogen loading and on forage fish.

1. **Dissolved Oxygen.**

The EIS and technical reports methodically analyzed the potential for the mussel farm to effect concentrations of dissolved oxygen (“DO”) in Totten Inlet. The EIS

\(^{27}\) Regional Criterion G provides: “Shorelines of this Region which are notable for their aesthetic, scenic, historic or ecological qualities shall be preserved.” This particular shoreline, while undoubtedly important to those who live on it, is not particularly notable for its aesthetic, scenic, historic or ecological qualities. See Ex. 14 (Staff Report), p. 9. Totten Inlet currently and historically is home to commercial shellfish aquaculture. To that end, the proposed project protects and enhances the historical and cultural significance of shellfish aquaculture in Totten Inlet.
concluded the farm would not have significant unavoidable adverse impacts to DO or fish as a result of changed DO levels. These conclusions are based on data analyzed in the NewFields Report.\textsuperscript{28} Substantial testimony regarding interpretation of the NewFields Report was provided at the hearing by Bill Gardiner (principal author of the report), Mark Pedersen (County consultant), and Dr. Jack Rensel (ITRC member).

To provide some basis for predicting the impact of the mussel farm on DO, measurements of DO were taken at the Deepwater Point mussel farm. This farm is located in the inner part of Totten Inlet, where ambient levels of DO are generally lower than those found at the proposed mussel farm location. Over 20,000 measurements of DO were taken at a North Buoy location (70 meters north of the farm), a North Boom location (3 meters north of the farm just before water enters the farm), in the center of the farm, at a South Boom location (3 meters south of the farm just after water exists the farm), and at a South Buoy location (70 meters south of the farm).\textsuperscript{29} The data revealed that although DO levels within the center of the farm were reduced, DO levels recovered to background levels by the time they reached the South Buoy location.\textsuperscript{30} The EIS concludes that the reduction in DO levels within the raft array does not constitute a significant adverse environmental impact because the reduction is temporary, extremely localized, reversible, and of small magnitude, and because juvenile salmonids generally are not present during the month of August when ambient levels of DO are naturally lower.\textsuperscript{31}

The Hearing Examiner had questions regarding a particular measurement in the month of August. Table 2 on page 22 of the NewFields report indicated the minimum DO level measured in August was 4.5 mg/L and that the negative change in DO concentration

\textsuperscript{28} Ex. 8a (NewFields Report) (the final NewFields report is dated November 2009).

\textsuperscript{29} Ex. 8a (NewFields Report), pp. 4-5; Testimony of Bill Gardiner.

\textsuperscript{30} Ex. 8a (NewFields Report), Figure 16 and pp. 24-25; Ex. 6 (DEIS), p. 3-15.

\textsuperscript{31} Testimony of Mark Pedersen.
in the center of the raft array in the month of August was as high as 45%. The Hearing
Examiner asked whether this event would be a significant adverse environmental impact
pursuant to guidance from Ecology and the U.S. Environmental Protection Agency
establishing 5 mg/L as the level below which sensitive fish such as salmonids may begin
to feel stress. Testimony in response to the Examiner’s question demonstrates it is not.
First, the low measurement of 4.5 mg/L was a one-time occurrence in over 20,000
measured occurrences. The vast majority of the time, the ambient DO level at the
Deepwater Point farm was above 5.0 mg/L.
Second, the measurement was taken at the Deepwater Point farm located in a
different part of Totten Inlet than where the proposed farm would be located. While
ambient or background DO levels at the Deepwater Point farm fell to below 5.0 mg/L, DO
measurements taken at Windy Point (near the proposed farm location) never fell below
6.0 mg/L.32 The level to which the mussel raft reduces DO is a function of the ambient
levels of DO in the water. Because the ambient DO levels at the proposed farm site are
below those at Deepwater Point, any reduction in DO caused by the farm is not
anticipated to drop below 5.0 mg/L.
Third, it is not possible, based on Table 2, to determine at what point in time DO
levels were reduced by 45% in the raft array. It is extremely unlikely the 4.5 mg/L
measurement occurred at the same time as the 45% reduction. Indeed, Dr. Rensel testified
one “cannot legitimately apply” the 45% reduction to the 4.5 mg/L measurement. Dr.
Rensel also testified based on his significant experience in the Puget Sound that DO levels
less than 3.0 mg/L simply do not occur in Totten Inlet.

Fourth, the 4.5 mg/L measurement represents a very brief snapshot in time. The
water measured moves swiftly through the raft array with the current, and ambient
concentrations of DO in that water will resume “in a matter of minutes” as the water
passes through the raft array and approaches the South Buoy.33 At most, it will take 20-40
minutes for water moving through the raft array to be restored to ambient concentrations
at a slack tide.34

Fifth, the short duration of low DO is not enough to cause significant impacts to
fish.35 Most fish will simply swim away from areas of low DO.36 The proposed farm will
occupy a very small portion of an extremely large water body, allowing fish to quite easily
avoid the farm.37

Finally, sensitive species such as juvenile salmonids will not be in the area
occupied by the raft in the month of August when the low measurement was taken.38
Based on all of these factors, the mussel farm’s impact on DO will not be significantly
adverse.


The mussel farm’s impact on nitrogen will be significantly beneficial. Dr. Rensel
tested that eutrophication is unequivocally the greatest threat to South Puget Sound. He
opined that anything reducing nutrient inputs such as nitrogen is a benefit to the
environment. In particular, South Puget Sound is “nutrient sensitive” to anthropogenic
inputs, such as on-site sewage systems. Shellfish counteract eutrophication by removing

33 Gardiner Testimony.
34 Testimony of Dr. Jack Rensel.
35 Some sensitive fish species may begin to feel stressed at 5.0 mg/L. Fish will not actually become stressed
until 3.0 mg/L. However, given the short duration of low DO, any fish exhibiting signs of stress would
recover. Pedersen Testimony.
36 Rensel Testimony; Pedersen Testimony.
37 Pedersen Testimony; Ex. 36 (enlarged aerial of Totten Inlet).
38 Rensel Testimony.
organic and inorganic nutrients in the water column through filtration and tissue storage.\textsuperscript{39} Dr. Rensel testified that a 5\% removal of nitrogen from Totten Inlet by the mussel farm would be a statistically significant beneficial impact to water quality. Dr. Rensel further testified the proposed farm would reduce the total annual input of nitrogen to Totten Inlet by 6.8\%.\textsuperscript{40} The farm will reduce nitrogen inputs to Totten Inlet from septic tanks, including those belonging to individuals living near the farm, by 25\%.

Additionally, video footage taken by the Pacific Shellfish Institute at the Deepwater Point farm and presented at the hearing demonstrates the range of wildlife that takes advantage of the habitat created by the mussel farm.\textsuperscript{41} Combined with the significant beneficial impact the removal of nitrogen from Totten Inlet will have on water quality, the mussel farm may have a net beneficial impact on water quality and aquatic habitat.

3. Forage Fish.

An issue raised for the first time at the public hearing on the SDP was whether the mussel farm would have a significant adverse impact on forage fish by ingesting them. Dan Penttila hypothesized a Gallo mussel could ingest newly hatched forage fish. He provided no evidence to support this hypothesis. Nor did he provide any evidence that there are forage fish spawning areas near the rafts or that conceivable ingestion of a forage fish larvae by Gallo mussels would be more than a rare occurrence. In essence, Mr. Penttila presented no evidence of any environmental impact that would be caused by the mussel farm.

Moreover, Mr. Penttila’s speculative testimony was squarely refuted by Dr. Roger

\textsuperscript{39} Ex. 6 (DEIS), p. 3-19; Testimony of Bill Dewey; Ex. 44 (diagram of shellfish off-sets to eutrophication).
\textsuperscript{40} See Ex. 49 (Rensel calculations).
\textsuperscript{41} Ex. 21 (mussel farm habitat video); see also Testimony of Mark Schaffel (his mussel farm is like a reef “loaded with life”).
Newell, a member of the ITRC. Dr. Newell stated:42 “Gallo mussels will not be able to capture or ingest larval herring because the fish larvae are 7.5 mm in length which is too big. As you say, mussels food resource is predominately suspended phytoplankton < 25 um (=0.025 mm) in diameter.” Dr. Newell continued:

Mussels have been shown to sometimes capture some copepods but even adults copepods are a lot smaller (about 1.5 mm) than newly hatched larval fish. However, this maximum capture size of mussels is in the range of herring eggs (1 to 2 mm) but seeing that herring eggs are attached in aggregated jelly to surfaces they will not be free floating and hence able to be available to be ingested. Interestingly, captured copepods are not digested but tend to become entangled in mucus and voided in pseudofeces. Larval Fish and copepods most of the time can swim so powerfully they can escape the quite modest inhalant current speed of even actively feeding mussels. So I would say that their expert needs to provide adequate documentation to support this assertion but based on all the literature that I am familiar with the claim is plain wrong.

There is no evidence supporting the claim the mussel farm will cause any adverse environmental impact for forage fish larvae, let alone a significant impact.

C. The Proposed Farm Furthers the Intent of the Conservancy Environment to Achieve Sustained Resource Utilization.

The proposed mussel farm will be located in the Conservancy Environment, in which aquaculture is an allowed use.43 The farm is consistent with the purpose of the Conservancy Environment:

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. The preferred uses

42 Dr. Newell’s response was provided through the testimony of Mark Pedersen. Mr. Pedersen read into the record an email exchange between himself and Dr. Newell.
43 All types of aquaculture are allowed in the Urban, Suburban, Rural, Conservancy and Natural-Aquatic Environments. SMPTR Section Three, II.D.
are 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. Nonconsumptive uses are those uses which utilize resources on a sustained yield basis while minimally reducing opportunities for other future uses of the resources of the area.

Similarly, the sixth Goal Statement of the Conservancy Environment is:

The goal of this element is to protect, conserve and manage existing natural resources and valuable historical and cultural areas in order to ensure a continuous flow of recreational benefits to the public, and to achieve sustained resource utilization.

As expressed by the purpose of the environment, the County intended for the resources in the Conservancy Environment to be utilized. The conscious use of the terms “conserve” and “preserve” is a key distinction between the Conservancy and Natural Environments, indicating the resources in the Conservancy Environment are intended to be used wisely, while resources in the Natural Environment are intended not to be used at all.

The intent of the Conservancy Environment is to “achieve sustained resource utilization.” Preferred uses in this environment are nonconsumptive, which means “those uses which utilize resources on a sustained yield basis.” This issue was examined in great detail in the EIS prepared for the mussel farm in the form of a carrying capacity analysis. Carrying capacity in the context of the proposed farm refers to the ability of Totten Inlet to supply the mussel farm phytoplankton as a food resource without sacrificing the sustenance of higher trophic levels. 44 In other words, is there enough phytoplankton to go around? Based on data collected specific to Totten Inlet, a reasonable person can only conclude there is.

Dr. Jack Rensel testified regarding the results of the carrying capacity analysis.

44 Rensel Testimony.

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contained in the November 2009 Newfields Report.\textsuperscript{45} That report specifically analyzed
the effects of the mussel raft on the food web.\textsuperscript{46} Dr. Rensel explained the data shows
mussels cultivated at the proposed farm would consume only 1.1\% of the \textit{excess}
phytoplankton in Totten Inlet.\textsuperscript{47} Further, reviews and modeling conclude that the
proposed mussel farm in addition to all existing suspension feeders will only put Totten
Inlet at 10\% of its predicted carrying capacity.\textsuperscript{48} The data, therefore, in no way indicates
the mussel farm will adversely impact the carrying capacity of Totten Inlet.

Further evidencing consistency with the purpose and intent of the Conservancy
Environment, Taylor's existing mussel operations received independent third-party
certification from Food Alliance, an organization that identifies socially and
environmentally responsible management practices in shellfish farming operations. Food
Alliance Shellfish Sustainability Standards address soil and water conservation, fish and
wildlife conservation, healthy and humane care for shellstock, safe and fair working
conditions, and shared resource management.\textsuperscript{49} Taylor met the rigorous requirements
established by Food Alliance, and was the first of only two shellfish farms in the United
States to be certified as sustainable by Food Alliance.\textsuperscript{50}

This evidence is consistent with Ecology's Guidelines, which conclude shellfish
aquaculture can "result in long-term over short-term benefit and can protect the resources

\textsuperscript{45} Dr. Rensel, in response to a claim from Wayne Daley that no data was collected on this issue, explained
that it took months to obtain the data analyzed in the NewFields Report (Ex. 8a). Dr. Rensel characterized
this data as the "best available science."
\textsuperscript{46} \textit{See, e.g.,} Ex. 8a (NewFields Report), pp. 69-88.
\textsuperscript{47} Excess phytoplankton is that amount of phytoplankton in excess of what is necessary to support the
existing food web.
\textsuperscript{48} Ex. 8 (FEIS), p. 1-29.
\textsuperscript{49} Ex. 19 (letter from Brian Kingzett, Independent Auditor 2001 Food Alliance Certification). \textit{See also} Ex.
20 (Taylor Consistency Analysis), Attachment C (describing Food Alliance certification requirements for
farmed shellfish).
\textsuperscript{50} Ex. 19 (Brian Kingzett letter).
and ecology of the shoreline.” WAC 173-26-241(3)(b). The proposed mussel raft
further the intent and purpose of the Conservancy Environment.

D. Potential Impacts on Views from Upland Properties Were Considered and
Minimized.

The applicable policy regarding the potential visual impacts of aquaculture
projects, SMPTR Aquaculture Policy 5, requires aquacultural development “consider and
minimize the detrimental impact it might have on views from upland property.” Visual
impacts were considered in a Visual Impact Assessment prepared for the proposed farm.
The analysis utilized a Department of Ecology inventory and evaluation process. The
analysis concluded the proposed mussel farm would cause a moderate visual impact.

Potential visual impacts of the farm are minimized by a number of factors. Several
of those factors are:

- Taylor reduced the overall scope and size of the farm by over 55% (129
  rafts originally were proposed and only 58 remain);
- Taylor eliminated its proposal to expand the Gallagher Cove farm;
- Taylor aligned the remaining rafts in a single row extending waterward
  from a lower bank area of the shoreline (higher adjacent banks increase
  visibility from viewer’s perspective);
- Spacing between rafts will avoid visual impacts from continuous surface
  coverage;
- Rafts will have a low vertical profile of one to two feet above the surface of
  the water;

51 Ex. 12 (Visual Impact Analysis), p. 11.
52 Ex. 12 (Visual Impact Analysis), p. 27. The Hearing Examiner queried how the report concluded the farm
would result in a “moderate” visual impact, when Sheet No. 10 described a “moderate to high” visual
impact. The report indicates the overriding factor for this project is that the farm will remain subordinate to
the project setting as a whole. Id. Pursuant to the final page of Appendix A of the report describing the
possible four visual impact classifications, the project’s subordination to the project setting makes a
moderate visual impact determination appropriate.
53 For additional visual impacts analysis, see Ex. 20 (Taylor Consistency Analysis), pp. 9-10.
• The farm will use materials and colors that complement and blend into the marine environment;
• The farm is sited away from designated public spaces to minimize the number of potential viewers;
• Uplands were recently purchased by a land trust, limiting future viewers; and
• The farm is consistent with other aquaculture uses already located in Totten Inlet.

Further, staff proposed the following condition of approval: “The mussel rafts shall be kept in a neat and orderly manner. Materials that are not part of the raft shall not be stored on the rafts.” Compliance with this condition will ensure the visual profile of the rafts remains low and that conditions at the rafts will not offend reasonable notions of tidiness.

Specific to aquacultural development, the SMPTR states visual impacts of such development must be considered and minimized. The proposed farm is consistent with the applicable standard. This is a typical standard for local master programs based on the SMA, which states 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.” RCW 90.58.020. The Shorelines Hearings Board (“Board”) has frequently addressed, and rejected, claims that aquaculture development is inconsistent with this standard. In fact, the Board often overturns decisions by local governments denying permits for aquaculture development on the basis of aesthetic impacts.

54 Ex. 14 (Staff Report), p. 11.
55 This condition also eliminates the potential for aquaculture gear to be knocked into the water and to become marine debris.
56 See, e.g., Fisheries v. Mason County, SHB No. 91-33 (Final Findings of Fact, Conclusions of Law and Order, June 17, 1992) (reversing Mason County’s denial of a CUP for a facility to load frozen fish food on barges, as the facility would have a low profile and be angled to minimize impacts to residential views); Puget Sound Mussels, Inc. v. Kitsap County, SHB No. 90-59 (Final Findings of Fact, Conclusions of Law and Order, November 18, 1991) (reversing Kitsap County’s denial of an SDP for an aquaculture float, as it
According to the Board, aquaculture development that has a relatively low profile and is
designed to blend into the aquatic environment may not be denied on the basis of aesthetic
impacts. This is true even when the proposal will have aesthetic impacts to recreational
and residential uses.

Because Taylor’s proposed farm has a low vertical profile, uses colors that blend
into the marine environment, has been reduced in size and otherwise designed to minimize
aesthetic impacts, and is a preferred use of the shoreline, it may not be denied on the basis
of aesthetic impacts.

E. The Mussel Farm Will Provide Increased Opportunities for Public Access to
the Shorelines of the State.

A primary goal of the SMA is to increase public access to publicly owned areas of
the shorelines. The SMPTR identifies the same priority.57 Uses that foster increased
public access to the shorelines have preferred status. Additionally, the seventh Goal
Statement for the Conservancy Environment is to “promote, protect and preserve
historical, cultural, scientific or educational values on shorelines where these values are
acknowledged.” The proposed mussel farm advances these goals and priorities.

would have a low profile and use colors that blend into the marine environment); Jamestown Klallam Tribe
v. Clallam County, SHB Nos. 88-4, 88-5 (Final Findings of Fact, Conclusions of Law and Order, May 15,
1989) (reversing Clallam County’s denial of an SDP for a 2-acre salmon net pen facility that would protrude
up to five feet above the water surface, as it would use colors that blend with the marine environment); Penn
Cove Sea Farms, Inv. v. Island County, SHB No. 84-4 (Final Findings of Fact, Conclusions of Law and
Order, July 31, 1984) (reversing Island County’s denial of an SDP and CUP for a five-acre mussel farm,
holding aquaculture uses are not aesthetically displeasing to any particular percentage of the population and
result in long-term benefits to the state). See also Echo Bay Community Association v. Pierce County, SHB
No. 05-027 (Findings of Fact, Conclusions of Law and Order, April 14, 2006) (affirming SDP, CUP, and
DNS for a herring net pen facility, as it would occupy a small percentage of the overall water body and have
a low vertical profile); Risk v. Island County, SHB Nos. 86-49, 86-50 (Final Findings of Fact, Conclusions
of Law and Order, September 25, 1987) (affirming issuance of an SDP for a 2-acre mussel long-lines
facility given low profile of farm, use of blue floating barrels that would bend into the existing aquatic
environment, and given aquaculture promotes statewide over local interests).

57 SMPTR, Priorities, p. 21.
Testimony was provided by Dixie Reimer of the North Thurston School District describing Taylor’s valuable commitment to educating youth about the shoreline environment. Since 1992, Taylor has introduced between 600 and 800 students a year to shellfish aquaculture and the Puget Sound shorelines. This means tens of thousands of students have been provided access to the Puget Sound shorelines by Taylor. According to Ms. Reimer, over 50% of those children had never before walked on a shoreline.

Jennifer Hopper, Education and Outreach Coordinator for Taylor, testified how the mussel rafts provide a unique and important opportunity to provide this shoreline experience to students because the rafts are not tide-dependent. Thus, the mussel farm can be accessed for field trips and science experiments year-round.

Taylor has a demonstrated commitment to educating students and the community at-large about water quality and the importance of the shorelines of the state. Approval of the proposed mussel farm will provide even greater opportunities for those not fortunate enough to live on the shorelines to experience them and learn about the importance of Puget Sound habitat. Only rarely does a private project provide this prospect.

F. **A Cumulative Impacts Analysis Is Not Required under the SMA Although One Was Included in the EIS.**

Different standards apply to the consideration of cumulative impacts under SEPA, the National Environmental Policy Act (“NEPA”), and the SMA. SEPA and NEPA are

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58 See also Ex. 32 (letter from Susie Richards of Service, Education & Adventure regarding Taylor’s commitment to education and concern for the health of the Puget Sound) and (letter from the South Puget Sound Salmon Enhancement Group describing the significant technical and financial contributions Taylor has made to local and regional restoration, education and conservation projects including the Kennedy Creek Salmon Trail, a regional destination for the community to observe and learn about the chum salmon life cycle with over 5,000 visitors annually).
not at issue in this proceeding.\textsuperscript{59} Regardless, neither the SEPA nor NEPA standard regarding cumulative impacts is appropriate for considering cumulative impacts for an SDP application under the SMA. The SMA and its implementing regulations do not state cumulative impacts shall be considered for SDP applications.\textsuperscript{60} Rather, the general rule is that cumulative impacts are \textit{not} considered when reviewing SDP applications.

Cumulative impacts may be considered only when there is “proof of impacts that risk harm to habitat, loss of community use, or a significant degradation of views and aesthetic values.”\textsuperscript{61} Unless there is proof that additional, similar projects will be proposed and approved under applicable regulatory criteria near the subject proposal, claims regarding cumulative impacts are speculative and must be rejected.\textsuperscript{62} A cumulative impact analysis under the SMA is inappropriate here because the proposed farm does not have impacts that risk harm to habitat, loss of community use, or a significant degradation of views and aesthetic values. As discussed above, and as documented in the EIS, the proposal will have no significant adverse environmental impacts and several factors minimize potential view impacts of the proposed farm. Further, Robert Smith testified there are no pending applications for other floating aquaculture facilities in Thurston, Pierce or Mason Counties.

\textsuperscript{59} See Section V.C below for a discussion of SEPA applicability to this proceeding.
\textsuperscript{60} \textit{Roller v. Pierce County}, SHB Case No. 06-016 (Findings of Fact, Conclusions of Law and Order, October 4, 2006). In contrast, SMA regulations state “consideration shall be given to the cumulative impact of additional requests for like actions in the area” for conditional use and variance applications. WAC 173-27-160(2); WAC 173-27-170(4).
\textsuperscript{61} \textit{Fladseth v. Mason County}, SHB No. 05-026 (Findings of Fact, Conclusions of Law and Order, May 1, 2007), at Conclusion of Law 15.
\textsuperscript{62} \textit{Overaa v. Bauer}, SHB No. 10-015 (Findings of Fact, Conclusions of Law, and Order, Feb. 16, 2011), at Conclusion of Law 6; \textit{see also Citizens for Sensible Growth v. City of Leavenworth}, SHB No. 98-24 (Final Findings of Fact Conclusions of Law and Order, October 15, 1998), at Conclusion of Law 14 (cumulative impact concerns regarding nearby future development amounted to mere “supposition and conjecture” absent specific development proposal for other sites).
Even though a cumulative impact analysis is not warranted for the proposed farm under the SMA, the EIS contains an analysis of potential cumulative impacts of the farm.\(^6\)

As previously described in Section IV.C of this brief, the EIS analyzes the farm’s potential impacts on the carrying capacity of Totten Inlet.\(^6\) Data shows the mussels cultivated at the proposed rafts would consume only 1.1% of the excess phytoplankton in Totten Inlet. Further, reviews and modeling conclude that the proposed mussel farm, together with all existing suspension feeders, will constitute only 10% of Totten Inlet’s predicted carrying capacity.\(^6\) The data, therefore, in no way indicates the mussel farm will adversely impact the carrying capacity of Totten Inlet. This analysis takes into account all new geoduck aquaculture established between 2003 and 2010.\(^6\)

Finally, in those limited instances when it is appropriate to consider cumulative impacts for SDP applications, the reviewing body must balance the interests of the applicant, adjacent shoreline property owners, and the public.\(^6\) As discussed above, the mussel farm will not adversely impact adjacent shoreline owners and the public. More importantly, the farm will benefit the interests of both the applicant and the public at large.

The farm will provide jobs and healthful seafood. It will provide additional access to the

\(^6\) A cumulative impacts analysis also is not appropriate for the project under SEPA. Additional projects may not be reviewed under SEPA for cumulative impacts “if they are either substantially independent from the proposed action or are not necessary to meet the project’s purpose and need.” Gebbers v. Okanogan County Public Utility District No. 1, 144 Wn. App. 371, 380, 183 P.3d 324 (2008) (citing Cheney v. City of Mountlake Terrace, 87 Wn.2d 338, 345, 522 P.2d 184 (1976) and SEAPC v. Cammack II Orchards, 49 Wn. App. 609, 614, 744 P.2d 1101 (1987)). A cumulative impacts analysis can be required only if it is shown a proposed project “is dependent on subsequent proposed development.” Boehm v. City of Vancouver, 111 Wn. App. 711, 720, 47 P.3d 137 (2002); see also Rosellini v. City of Bellingham, SHB No. 08-003, Findings of fact, Conclusions of Law and Order (July 15, 2008), Conclusions of Law ¶¶ 6-7. However, because concerns were raised regarding the capability of Totten Inlet to support additional shellfish aquaculture, a carrying capacity analysis was conducted.

\(^6\) Ex. 8 (FEIS), pp. 1-23 through 1-31.

\(^6\) Ex. 8 (FEIS), p. 1-29.


\(^6\) Fladseth v. Mason County, SHB No. 05-026 at Conclusion of Law 15.
shorelines, as Taylor provides educational outreach and opportunities to school children
not usually exposed to the shoreline environment. As eloquently summarized in the
testimony of Mark Schaffel, there is more to the public use of Totten Inlet than the view
enjoyed by adjoining shoreline property owners.

Shellfish aquaculture is a preferred, water-dependent use of the shoreline. RCW
90.58.020; WAC 173-26-241(3)(b). The Ecology Guidelines acknowledge shellfish
aquaculture provides priority habitat, promotes long-term over short-term benefits, and
protects the resources and ecology of the shoreline. WAC 173-26-241(3)(b), -
221(2)(c)(iii)(A), -020(24)). For these reasons, the Washington State Shellfish Initiative
recognizes shellfish aquaculture is important to the state’s environment, culture and
economy. Denying the proposed farm based on speculative concerns over potential
cumulative impacts would therefore not only violate the SMA and SMPTR, but it would
thwart the statewide interest in promoting this important activity.

V. THE HEARING EXAMINER’S QUESTIONS OF LAW

The Hearing Examiner presented several questions of law to be addressed by the
parties. The Examiner’s question regarding the consideration of cumulative impacts
under the SMA was addressed in Section IV.F above. Remaining questions are addressed
below in the order in which they were asked.

A. Does the “No Net Loss” Standard Apply to This Project?

Under Ecology’s Guidelines, local governments are required to identify, inventory
and ensure meaningful understanding of current and potential ecological functions
provided by affected shorelines. WAC 173-26-186(8)(a). Additionally, local
governments must include in their local master programs “policies and regulations
designed to achieve no net loss of those ecological functions.” WAC 173-26-186(8)(b).
The purpose of the Guidelines is to assist local governments in developing or amending master programs. WAC 173-26-171(2). The Guidelines, effective in 2003, do not regulate development in jurisdictions where approved master programs already are in effect, such as in Thurston County. WAC 173-26-173(3)(c). Thus, the “no net loss” standard does not yet apply in Thurston County and particularly does not apply to the proposed mussel farm. However, as Thurston County is in the process of a statutorily-mandated shoreline master program update, the “no net loss” standard will apply once the new shoreline master program is adopted by the County and approved by Ecology.

Although the “no net loss” standard does not apply here, evidence presented at the hearing demonstrates the proposed mussel raft meets that standard. The EIS prepared for the proposed farm concludes the farm will not result in any significant adverse environmental impacts. Although the farm may result in some less-than-significant impacts, there is no evidence those impacts will result in a net loss of shoreline ecological functions. Further, the focus under the “no net loss” standard is on net effects of a proposal; the proposed farm will likely result in a positive net effect on the overall water quality of Totten Inlet. As discussed above in Section IV.B.2 of this brief, eutrophication is the greatest threat to the health of Puget Sound. The farm will annually remove 6.8% of the total nitrogen input to Totten Inlet, significantly reducing the negative effects of eutrophication. The farm will also create habitat to be utilized by existing Totten Inlet wildlife. Therefore, the net effects of the farm are at worst benign and, more likely, positive.

B. What Does the Term “Significant” Mean as Used in the FEIS?

The FEIS concludes the mussel farm will have no significant unavoidable adverse impacts on the environment. The Examiner has requested briefing on what the term...
"significant" means in this context.

An EIS may be required for a project proposal only when it is determined the proposal is "likely to have a probable significant adverse environmental impact."

WAC 197-11-330. Under SEPA, "significant" means "a reasonable likelihood of more than a moderate adverse impact on environmental quality." WAC 197-11-794. The County determined the proposed project met this threshold, triggering the need to prepare an EIS to evaluate the probable significant adverse environmental impacts of the project.

In preparing the EIS, project consultants defined what "significant" meant under SEPA with regard to each potential impact. That is, consultants tailored the term "significant" under SEPA according to the resource being analyzed. For example, Mr. Pedersen testified how he evaluated the potential impacts of the farm on herring. He took into consideration the following facts: there is no documented herring spawning in the project area; there is a very small amount of macroalgae in the project area (herring favor macroalgae for spawning); the rafts naturally move with tidal currents and will not significantly impact existing macroalgae; and herring have adapted to spawning on surfaces other than macroalgae. Mr. Pedersen testified the EIS concluded the project would not have a significant adverse impact on herring because impacts were not irreversible, did not affect a large area, and were not a detriment to the recruitment of herring spawn in Totten Inlet.

 Each potential impact was analyzed in this specific manner in the EIS. The EIS ultimately concluded the farm would not result in any significant unavoidable adverse impacts. In essence, the extensive studies conducted as part of the EIS process

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68 A project may be denied under SEPA only when there is a finding "the proposal would be likely to result in significant adverse environmental impacts" identified in an FEIS and that reasonable mitigation measures would be insufficient. RCW 43.21C.060; WAC 197-11-660(1)(f).
ultimately found that the threshold determination was incorrect, and an EIS should not have been required for the farm. Positively viewed, however, the Examiner now has the benefit of ten years of scientific data collection and analysis specific to this project and the collective wisdom of five scientists with doctorates (the ITRC) who all conclude the farm will not result in significant adverse impacts to the environment.

C. Does the Examiner Have Jurisdiction over SEPA Issues?

The Examiner requested briefing on the following three issues relating to the section of the FEIS addressing project alternatives:

i. Does WAC 173-11-440(5)(a) require at least two alternatives to be considered in the FEIS?

ii. Would a violation of WAC 173-11-440(5)(b) occur if the alternative discussed in the FEIS does not have less environmental impact than the Project?

iii. Can issues (i) and (ii) be reached in this proceeding when the adequacy of the FEIS has not been challenged?

The last question is addressed first because it is dispositive.

This is a hearing solely on the SDP application for the proposed farm, and the Examiner’s scope of review is limited to whether the proposal satisfies the criteria for SDP approval in the SMPTR and the SMA. TCC 19.04.010; RCW 90.58.140(2)(b). Questions (i) and (ii) above relate solely to compliance with WAC 173-11-440, which is a SEPA rule. WAC 197-11-020. None of the criteria for SDP approval requires an alternatives analysis. Therefore, questions relating to the adequacy of the alternatives analysis in the FEIS are beyond the scope of review.

In fact, all questions relating to the adequacy of the FEIS or compliance with SEPA in general are beyond the scope of review here. The FEIS was issued on November 7, 2011, and was not appealed. No such appeal is permitted under the Thurston County
Code. See TCC 17.09.160(A) (“Only final threshold determinations . . . shall be appealable to the hearing examiner.”). Therefore, the adequacy of the FEIS, including compliance with SEPA rules addressing consideration of alternatives, is beyond the scope of the Examiner’s review in this proceeding.

Finally, even if the adequacy of the FEIS could be considered here, no evidence presented at hearing established a violation of WAC 197-11-440(5). As described in chapter 2 of the DEIS, several alternatives were evaluated or considered for the proposal. Taylor originally proposed expanding its existing mussel farm in Gallagher Cove from 21 to 42 rafts and installing 108 new rafts at the North Totten Inlet site. In 1997, an alternative proposal consisting solely of 58 new rafts at the North Totten Inlet site was considered and analyzed as the Preferred Alternative (or Alternative 1) in the DEIS.69 The DEIS also analyzed a two-row raft alternative (Alternative 2), a no-action alternative (Alternative 3), and considered two other alternative proposals (Gallagher Cove Expansion and North Totten Inlet More Northerly Site Location).70 Therefore, a total of five alternatives were considered. This was more than adequate. Under SEPA, “the EIS discussion of alternatives need not be exhaustive, but must present sufficient information for a reasoned choice among alternatives.”71 Here, the FEIS presented sufficient information for a reasoned choice among alternatives, all of which had a lower environmental cost in at least some resource areas than the original proposed action.72

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69 Ex. 6 (DEIS), § 2.4.
70 Ex. 6 (DEIS), § 2.5.
72 See Ex. 6 (DEIS), §§ 2.4-2.6; Ex. 8 (FEIS), §1.5 and pp. 2-43 through 2-45.
D. Does the Examiner Have Jurisdiction to Analyze Compliance with the Water Pollution Control Act and Implementing Regulations?

The Examiner requested briefing on whether the requirements of the Water Pollution Control Act (chapter 90.48 RCW) ("WPCA") and its implementing rules (chapter 173-201A WAC) apply to the proposal through the SMA or SMPTR, especially the Regional Criteria of the latter. They do not.

Like other administrative bodies, hearing examiners "are creatures of the legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication." This is a hearing solely on the SDP application. The Hearing Examiner’s authority is limited to determining compliance with the criteria for SDP approval as contained in the SMA and SMPTR, and the Examiner may not consider consistency with the requirements of the WPCA unless these requirements are contained in the SMA or SMPTR. Neither the WPCA nor chapter 173-201A WAC is mentioned once in the SMA or SMPTR. Thus, the requirements of the WPCA do not apply to this proposal through the SMA or SMPTR and cannot be considered by the Examiner in this proceeding. Similarly, the Shorelines Hearings Board, which has review authority over shoreline permitting decisions, does not have jurisdiction over Clean Water Act permitting. Such jurisdiction instead resides with the Pollution Control Hearings Board.

Project opponents may argue the requirements of the WPCA apply through the

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SMPTR because Regional Criterion B recognizes “[p]rotection of water quality and aquatic habitat” as a primary goal, and the WPCA is designed to secure high water quality for all waters of the state. This general reference to water quality, as a matter of law, is inadequate to incorporate the WPCA into the SMPTR. Incorporation of state statutes into local law is necessary before violations may be enforced, and “[t]he common characteristic of such adoption is the county’s desire and intent to exercise its own authority to enforce the law as local law.”

Therefore, unless local law specifically purports to adopt state law by reference, the state law is not part of local law and compliance with state law cannot be enforced by the local jurisdiction. Here, the SMPTR does not purport to specifically incorporate the WPCA or its implementing rules by reference; it merely recognizes protection of water quality and aquatic habitat as one goal of the SMPTR. Therefore, the consistency of the proposal with these state laws cannot be considered in this proceeding.

There is a very good reason that the SMA and SMPTR do not authorize local governments to determine a proposal’s consistency with the water quality regulations in the WPCA in the context of reviewing shoreline development permits: The WPCA designates Ecology as the state water pollution control agency and provides Ecology shall “be the sole agency issuing permits” under the State’s implementation of the National Pollutant Discharge Elimination System (“NPDES”). RCW 90.48.260(1)(a). Even

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77 Id. (Lincoln County resolution activating a county noxious weed control board did not adopt chapter 17.10 RCW by reference and make it local law). See also City of Auburn v. Gaunt, 160 Wn. App. 567, 569, 249 P.3d 657 (a city that had not expressly adopted state criminal statutes could not prosecute them in municipal court), review granted, 172 Wn.2d 1004, 258 P.3d 685 (2011); cf. City of Medina v. Primm, 160 Wash.2d 268, 281, 157 P.3d 379 (2007) (state law part of City of Medina Code when the latter explicitly states that the state laws “are hereby adopted by reference as and for a portion of the Medina Traffic Code”).

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though an NPDES permit is not required for this proposal, the broader requirements of
the WPCA and its implementing rules still apply and Ecology can take enforcement
actions if it determines a violation has occurred. For example, RCW 90.48.080 prohibits
any person from causing or allowing pollutants to enter state waters, and RCW
90.48.120(1) authorizes Ecology to take enforcement actions whenever it determines “any
person shall violate or creates a substantial potential to violate the provisions of this
chapter . . . .” Therefore, not only does the Examiner lack jurisdiction to adjudicate the
Project’s compliance with the WPCA, but the exercise of such authority would be
inefficient and potentially lead to inconsistent judgments with Ecology’s enforcement
authority.

Moreover, there is no evidence the proposed mussel farm will exceed water quality
standards set forth in WAC 173-201A-210, particularly the lowest 1-day minimum for DO
in marine water. As explained in Section IV.B.1 of this brief, the low DO measurement
of 4.5 mg/L was a one-time occurrence in over 20,000 measured occurrences. The water
measured moves swiftly through the raft array with the current, and ambient
concentrations of DO in that water will resume “in a matter of minutes” as the water

78 Ass’n to Protect Hammersley, Eld, and Totten Inlets (APHETI) v. Taylor Resources, Inc., 299 F.3d 1007 (9th Cir. 2002). The Hearing Examiner referred to footnote 9 of the APHETI decision, and asks whether there is any evidence here that the addition of biological materials are “pollutant[s]” under the federal Clean Water Act. First, the Examiner does not have jurisdiction to enforce the federal Clean Water Act. Second, in that case, APHETI argued the Deepwater Point and Gallagher Cove mussel farms, located in the same water body as the proposed farm and utilizing the same farming methods to be employed at the proposed farm, violated the Clean Water Act. Footnote 9 states: “In this case, feces and chemicals exuded from live mussels have not been shown in the record significantly to alter the character of Puget Sound waters, and the record suggests instead that the mussel-harvesting operations generally purify the waters.” The record in this proceeding demonstrates exactly the same circumstances. No evidence has been presented to the contrary.

79 A project can be found to exceed state water quality standards only when “direct evidence” is presented of an exceedence when the project is operational. See Marine Environmental Consortium v. Ecology, PCHB Nos. 96-257 – 96-266 and 97-110 (Final Findings of Fact, Conclusions of Law and Order, 1998), Finding of Fact XLVI.
passes through the raft array and approaches the South Buoy. At most, it will take 20-40 minutes for water moving through the raft array to be restored to ambient concentrations at a slack tide. Additionally, the measurement was taken at the Deepwater Point farm, located in a portion of Totten Inlet with generally lower levels of DO than those expected at the proposed farm location near Windy Point.

It also is not possible to determine which DO reading pairs with which percentage of reduction of DO caused by the mussel rafts. Dr. Rensel testified as to the extreme caution with which Table 2 of the NewFields report must be read, as Table 2 summarizes tens of thousands of data points. That is because the purpose of the NewFields report, and indeed the EIS generally, was not to determine whether the proposal would likely exceed a specific numeric criterion. Rather, the purpose was to determine whether the proposal would significantly impact DO levels and the wildlife dependent on healthy water quality. The experts that interpreted the collected data unequivocally determined there would be no significant adverse environmental impacts from the proposal.

This conclusion is consistent with the overall purpose of the WPCA’s anti-degradation policy, which is to protect against activities that “have the effect of degrading water or sediment quality to such a degree that other beneficial uses of an affected water body suffer adverse impacts, thereby calling into question the overall sustainability of those uses.” The evidence presented during this proceeding demonstrates the proposed farm will not adversely affect other beneficial uses of Totten Inlet. Indeed, the evidence presented during this proceeding demonstrates that, through the removal of a statistically

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80 Gardiner Testimony.
81 Rensel Testimony.
83 Marine Environmental Consortium v. Ecology, PCHB Nos. 96-257 – 96-266 and 97-110, Finding of Fact LV.
significant amount of nitrogen from Totten Inlet, the proposal will improve water quality in the water body. Therefore, even if the Hearing Examiner had jurisdiction to consider whether the proposal meets water quality standards under the WPCA or federal Clean Water Act, the only conclusive evidence before him is that the proposal will improve water quality in Totten Inlet.

VI. CONCLUSION

The proposed North Totten Inlet Mussel Farm is consistent with the SMA, Ecology’s Guidelines and the SMPTR. The farm is a water-dependent, preferred use of the shoreline that represents long-term over short-term benefits and is declared by Ecology and the Governor to be of statewide interest. It was rigorously and comprehensively evaluated by a team of independent experts considered the best in their fields, who determined the farm would not have any significant adverse environmental impacts. The farm will provide water quality benefits in terms of significant nitrogen removal, jobs and economic growth for the region, and significant opportunities for public access to the shorelines. An SDP for the proposal should be issued as recommended by County staff.

Dated this 9th day of April, 2012.

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