

February 12, 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 copods, which are critical food sources for juvenile salmonids. *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. *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. *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; *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. *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." *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. *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,

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