

**Cami Petersen - Taylor Shellfish Co. Substantial Development Application (No. 961372)
legal Argument**

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Date: 02/22/2012 8:25 PM
Subject: Taylor Shellfish Co. Substantial Development Application (No. 961372 SSDP) - legal Argument
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Dear Counsel:

Set out below are a number of legal issues on which briefing would be helpful. The parties are not restricted to these issues and may discuss any relevant matter. As discussed at the hearing, post-hearing briefing may be submitted by any party and is due 45 days after the effective date of this e-mail, which is February 23, 2012. Since the 45th day is a Sunday, post-hearing briefs are due from all parties by 5 p.m. Monday, April 9, 2012. Briefs are timely if sent by e-mail to me by that time or if delivered or mailed so they reach the Thurston County Resource Stewardship Department by that time.

At the open public hearing on February 17 in this matter I announced that all persons with party status would be allowed to submit post-hearing briefing within 45 days of this e-mail discussing legal issues. I also announced that any parties who wished to review this list of issues should contact Hearing Examiner Clerk Cami Petersen, who would supply them with this e-mail. This e-mail is sent to all attorneys who have participated in the current proceeding.

1. Some of the materials admitted into evidence characterized the view of cumulative effects under the State Environmental Policy Act (SEPA) as focusing on the interdependency of projects, while under the National Environmental Policy Act (NEPA) a broader view of cumulative effects is used. Which approach should be used in this proceeding under the Shoreline Management Act (SMA)?
2. Does the no net loss standard apply under the SMA and Shoreline Master Program (SMP) under which this project is vested?
3. The Final Environmental Impact Statement (FEIS) at pp. 1-15 and forward concludes that the project will have no significant unavoidable adverse impacts on various aspects of the environment. Is the use of "significant" in this context the same as that of the threshold determination: whether there are probable, significant, adverse environmental impacts? In other words, does "significant" in this context mean impacts that would require an EIS at the threshold determination stage?
4. WAC 173-11-440 (5) (a) states that the alternatives section of the EIS "describes and presents the proposal (or preferred alternative, if one or more exists) and alternative courses of action." Subsection (5) (b) states that "reasonable alternatives shall include actions that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation."

Does the plural "alternative courses of action" in (5) (a) mean that at least two alternatives must be presented?

Some of the evidence suggested that the alternative discussed in the FEIS would not have less environmental impact than the proposal. If so, would that violate the requirement of (5) (b) that the alternatives discussed have a lower environmental cost or decreased level of environmental degradation?

Can these issues be reached in this proceeding when the adequacy of the FEIS has not been challenged?

5. The following questions relate to the state Water Pollution Control Act, Chap. 90.48 RCW, and its implementing rules at WAC 173-201A.

Do the requirements of this Act and rules apply to this proposal through the SMA or SMP, especially the

Regional Criteria of the latter?

The Ninth Circuit's decision in Association to Protect Hammersley, Eld and Totten Inlets v. Taylor Resources, Inc., No. 00-35667 (2002), found at Ex. 27, holds that the mussel byproducts and shells that enter Puget Sound from Taylor's mussel rafts are not pollutants or point sources under the federal Clean Water Act and that a federal NPDES permit is therefore not required for the rafts. RCW 90.48.260 (1) (a) grants the Department of Ecology the authority "to establish and administer a comprehensive state point source waste discharge or pollution discharge elimination permit program which will enable the department to qualify for full participation in any national waste discharge or pollution discharge elimination permit system and will allow the department to be the sole agency issuing permits required by such national system . . ." If an NPDES permit is not required for this proposal, do any of the requirements of Chap. 90.48 RCW or WAC 173-201A apply to it?

Footnote 9 of the Ninth Circuit decision states that it does not decide whether the release of biological materials from mussel rafts in concentrations significantly greater than otherwise in Puget Sound counts as "pollution" under the Act. Does the evidence show this threshold is met, and, if so, does that make the opinion's holding on "pollution" inapplicable to these facts?

WAC 173-201A-010 states that all surface waters are protected by an anti-degradation policy, and WAC 173-201A-300 describes that policy in more detail. Table 612 at WAC 173-201A-612 shows this part of Totten Inlet as "extraordinary" for "aquatic life uses". WAC 173-201A-210 (1) (d) shows the lowest one-day minimum for dissolved oxygen (D.O.) in extraordinary waters to be 7 mg/l, which I believe is the same as parts per million. WAC 201A-210 (1) (d) (i) then states "[w]hen a water body's D.O. is lower than the criteria in Table 210 (1)(d) (or within 0.2 mg/L of the criteria) and that condition is due to natural conditions, then human actions considered cumulatively may not cause the D.O. of that water body to decrease more than 0.2 mg/L." Subsection (ii) states "[c]oncentrations of D.O. are not to fall below the criteria in the table at a probability frequency of more than once every ten years on average." Does the evidence showing D.O. levels of 4.3 in July and perhaps lower for small areas show a violation of these standards?

I'd like to impose a realistic maximum on the length of briefing and will propose 35 pages, double spaced, with customary legal type size and margins. Do any have any other proposals for length?

Tom Bjorgen
Thurston County Hearing Examiner