



# PLAUCHÉ & STOCK

LLP



**Samuel W. Plauché**

811 First Avenue, Suite 630, Seattle, WA 98104  
TEL: (206) 588-4188 FAX: (206) 588-4255  
www.plauchestock.com

**Amanda M. Stock**

October 25, 2012

Permit Assistance Center  
Thurston County Courthouse  
2000 Lakeridge Drive SW  
Building 1, Second Floor  
Olympia, WA 98502

Board of County Commissioners  
Thurston County Courthouse  
2000 Lakeridge Drive SW  
Building 1, Room 269  
Olympia, WA 98502

Re: Reply to Opposition Memorandum by APHETI Regarding  
Project No. 961372—North Totten Inlet Mussel Farm

Dear Commissioners:

Taylor Shellfish Farms (“Taylor”), has asked the Thurston County Board of County Commissioners (the “Board”) to review and modify a decision of the Hearing Examiner to deny a Shoreline Substantial Development Permit (“SDP”) for a mussel farm in Totten Inlet. More specifically, Taylor asks that the Board reject and reverse the Examiner’s legal conclusions that the project did not comply with Thurston Region Shoreline Master Program (“SMP”) Regional Criterion B. The Examiner’s decision (at pp. 89 to 91), asserts that the project failed to comply with Regional Criterion B with regard to cumulative impacts in three areas, dissolved oxygen, benthic impacts and mussel genetic impacts. Cumulative impacts aside, the Examiner also concluded that additional information was required regarding three areas related to benthic impacts (sulfide levels, organic deposition and generation of beggiatoa), and regarding hybridization of Gallo Mussels to determine compliance with Regional Criterion B.

The Association to Protect Hammersley, Eld and Totten Inlets (“APHETI”) opposes Taylor’s Appeal. However, the opposition memorandum fails to cite any legal authority in support of the Examiner’s erroneous legal conclusion that “cumulative impacts” that may be discretionarily considered for purposes of a SDP are as broad as the statutorily mandated

cumulative impacts reviewed in an Environmental Impact Statement (“EIS”) prepared pursuant to the National Environmental Policy Act (“NEPA”). The reason APHETI cannot cite legal support for this proposition is simple—there is none.

APHETI does not challenge the findings of the Examiner that the project is one of the most thoroughly studied projects ever presented to Thurston County, with the unprecedented participation of an independent panel of experts who studied the effects of the project over a nine year period. Decision at Findings 32 to 34. Instead, APHETI’s opposition argued (at p.6), that “thorough review of impacts in some areas does not justify ignoring glaring gaps in other areas.” This argument is disingenuous because the EIS and the independent technical experts focused upon the very same issues cited by the Examiner as justifying denial under Regional Criterion B—“impacts to bottom-dwelling (benthic) organisms, impacts to the surrounding water column and impacts that could result from Gallo Mussel genetic escapement.” Decision at Finding 30. Instead, APHETI cites authority and facts it finds favorable, but that are largely irrelevant to the issues raised in Taylor’s appeal. Taylor will address these issues and the authority cited by APHETI below.

## **I. Standard of Review**

APHETI argues that the Board must give deference to the decision of the Hearing Examiner under the well-known substantial evidence test. According to APHETI (opposition at p.2), the Board should affirm the Hearing Examiner simply because the decision is lengthy with many findings.<sup>1</sup> However, APHETI fails to acknowledge that the substantial evidence test applies only to factual determinations, and does not apply where, as here; a dispute turns upon legal interpretations or the application of fact to law. *Citizens to Preserve Pioneer Park v. Mercer Island*, 106 Wn. App. 461, 472-473 (2001). In *Citizens to Preserve Pioneer Park*, the citizens argued before the City Council that the Council must give deference to a planning commission finding that a telecommunications monopole would be “materially detrimental” within the meaning of the City’s code criteria. *Id.* The Court of Appeals disagreed, holding that:

It is true that when an appellate administrative body is governed by provisions directing it not to substitute its discretion for that of the original tribunal, findings of fact made by the original tribunal are not to be disturbed if they are sustained by substantial evidence. But the critical determinations by the planning commission that the residents want to have reinstated cannot properly be characterized as findings of fact. The major areas in which the city council differed from the planning commission revolved around the meaning and application of the variance criteria. Such disputes, as contrasted to disagreement about “raw facts,” present either questions of law, or mixed questions of fact and law.

*Id.* at 473. Here, the key issues are questions of interpretation of law—the permissible scope of review of cumulative impacts when a SPD application is under review, and whether the Hearing Examiner properly applied the facts to the law—in making his determination that the project

---

<sup>1</sup> While Taylor does not agree with all of the Examiner’s purely factual findings, it is not necessary to reverse any of those factual findings to resolve this appeal in Taylor’s favor for the reasons stated in this section.

required denial under SMP regional Criterion B. In *Citizens to Preserve Pioneer Park*, the Court explained that the City Council was not required to defer to the way the planning commission decided to apply the facts to the code standard:

The city council could properly conclude, based on its own review of the pictures, maps and testimony in the record, as summarized by the planning commission's findings as to underlying facts, that in view of the entire record, there was insufficient evidence that the visibility of the pole constituted a detriment to public welfare. In so deciding, the city council did not step outside the appellate role prescribed for it by the Mercer Island City Code.

*Id.* at 473. Here, just like in *Citizens*, the Board may, upon review of the decision, “adopt, reject, reverse and amend conclusions of law and the decision of the Examiner.” TCC 2.06.080(D). Just as the Mercer Island City Council could substitute its judgment for that of the Planning Commission and determine that the project as proposed complied with the variance criteria, the Board is free to determine that the Mussel Raft project complies with Regional Criterion B.

## **II. Raw Facts are largely undisputed and Ancillary to the Issues on Appeal.**

APHETI cites, out of context, some findings of the Examiner to suggest that the project itself could have adverse impacts justifying denial without regard to the Examiner’s self-described cumulative impact standard. For example, the opposition memorandum (at p. 2), cites conflicting testimony regarding alleged visual impacts to nearby residences and notes that the impact analysis funded by APHETI concluded that the project would have a “high impact” on a greater number of residences. However, facts pertaining to visual impacts are not pertinent to this appeal. The Examiner concluded that the project complied with applicable policies concerning views and aesthetics. Decision at Conclusion 52. APHETI did not appeal any part of the Examiner’s decision and cannot now, through an opposition memorandum, challenge the findings and conclusions of the decision adverse to APHETI.

APHETI also cites (at P. 3) findings to suggest that the amount of nitrogen potentially released (as feces) from growing mussels on an annual basis (5,817kg) would negate the benefit of the 5,000 kg of nitrogen the mussels are expected to annually remove from the waters of Totten Inlet. APHETI’s recitation of these facts are misleading as Dr. Rensel testified at the hearing that the 5,000kg reduction in nitrogen was a net amount, representing 9.6% of the 47,000 kilograms of annual nitrogen deposited in Totten Inlet from area streams and surface runoff. This was not an ambiguous reduction as suggested by APHETI. As the Examiner stated, “This reduction, Dr. Rensel testified, is of measurable and significant benefit.” Decision at Finding 52.

APHETI’s opposition memorandum goes on (at pages 3 to 5) to discuss numerous of the Examiner’s findings regarding dissolved oxygen impacts, benthic impacts and mussel genetic impacts to support a concluding statement that “each finding was based on voluminous information contained in the record and clearly meets the standard requiring substantial report.” Opposition Memorandum at p.5. However, as stated above, the substantial evidence test is not applicable here, where the issues are questions of legal interpretations or the application of law to

fact. The Board can conclude, based upon the expertise of the independent Technical Review Committee, the results of the EIS and consistent with the staff recommendation that the project complies with Regional Criterion B.

As discussed below, APHETI offers no new or additional legal authority to support the Examiner's legal conclusion that the scope of cumulative impacts to be evaluated in a SDP application is identical to the cumulative impacts to be reviewed in a NEPA EIS.

### **III. APHETI Cites No Legal Authority in Support of the Examiner's Overbroad Interpretation of Cumulative Impact review for a SDP Application**

Taylor's appeal challenged the Examiner's conclusion that cumulative impacts in three areas (dissolved oxygen, benthic impacts and mussel genetics) justify denial of the project pursuant to SMP regional criterion B. In its appeal, Taylor explained that the Examiner made a fundamental legal error in proclaiming that he would analyze cumulative impacts for the Taylor Mussel Raft SDP in a manner that was "indistinguishable from that followed by NEPA." Decision at Conclusion 18. As stated in the Taylor Appeal, no Washington Court or Shoreline Board has ever made such a pronouncement, and APHETI can apparently find no authority for this proposition either.

As Taylor explained in its appeal, the concept of cumulative impacts is reflected in various regulatory programs. However, it has a specific and distinct meaning and application in each regulatory program. The Examiner himself acknowledged that cumulative impacts are viewed much more broadly under NEPA than under our State Environmental Policy Act ("SEPA"). Decision at Conclusion 13 and 14 (noting that cumulative impacts review under SEPA is not required for independent projects and is not required unless it is shown that approval of the project will facilitate future actions that will result in additional impacts).

APHETI now claims (opposition at p.8) that Taylor's argument "relies upon a faulty interpretation of the SMA and cases interpreting it." In support of this contention, APHETI states (opposition at p. 8), "the Hearing Examiner properly found that that the policies adopted in *Hayes and Skagit County, supra*, were indistinguishable from that followed by NEPA." *Hayes v. Yount*, 87 Wn.2d 280 (1976), and *Skagit County v. Department of Ecology*, 93 Wn.2d 742 (1980), were both fully discussed and analyzed in Taylor's notice of appeal and the full discussion will not be repeated here. However, even a cursory view of those cases makes perfectly clear that neither stands for the proposition that cumulative impact review for a SDP application is the same as that for an EIS prepared pursuant to NEPA. *Hayes* merely states that the "concept of cumulative environmental harm has received legislative and judicial recognition." *Id.* at 287-288 (citing, among other authorities, cases decided under NEPA). *Skagit County* does not mention NEPA or even cases decided under NEPA.

As additional authority, APHETI cites two federal cases that stand for the undisputed contention that cumulative impacts can be considered under NEPA. *Neighbors of Cuddy Mountain v. U. S. Forest Service*, 137 F.3d 1372 (9<sup>th</sup> Cir. 1998) and *Mountaineers v. U.S. Forest Service*, 445 F. Supp.2d 1235(W.D. Wash 2006). In *Neighbors of Cuddy Mountain*, the Forest Service violated NEPA by failing to consider the cumulative impacts of four nearly simultaneous

proposals for timber sales and logging in the Cuddy Mountain Roadless area. *Id.* at 1378. Similarly, in *Mountaineers*, the Forest Service impermissibly segmented different projects that were in fact related to avoid discussion of cumulative impacts. *Id.* at 1243. Thus, neither case has any bearing in deciding whether to review cumulative impacts for a SDP application where there is undisputed evidence that no other similar projects are pending or proposed in a three county area, and where the purported impacts have been thoroughly reviewed in a SEPA EIS. Decision at Conclusion 24.

APHETI argues (Opposition at p.9) that it does not matter that no similar projects are pending or proposed within the three county area because, in its view, cumulative impact analysis for SDP applications are not limited to consideration of “additional requests for like actions in the area.” While future similar proposals may not be the sole factor considered, it is a significant factor considered in nearly every appellate and Shoreline Board decision discussing cumulative impact review for SPD applications. Thus, it was error for the Examiner to disregard existing case law describing when it is appropriate to consider cumulative impacts for a SPD application and instead supplying his own one-part test—that cumulative impacts will be analyzed “where there is proof of impacts that risk harm to habitat.” Decision at Conclusion 23.

As Taylor stated previously, appellate and Shoreline Board cases all indicate that important factors to consider in deciding whether to exercise the discretionary authority to evaluate cumulative impacts for a SDP application include, among other things, whether approval of the project would result in similar requests for like actions in the area, whether applications for similar projects in the area are pending or contemplated and whether such projects would be approved under applicable criteria. In addition to the authorities previously cited in Taylor’s Appeal, additional authorities include the following:

*Franzen v. Snohomish County*, SHB Nos. 87-5 & 87-6, Findings of Fact, Conclusions of Law and Order, June 29, 1988, at Conclusion of Law 16.

“Because there is no other urban shoreline in the vicinity, the possibilities for a multiplicity of applications for like activities in the area are almost nil. The instant approvals are not likely to lead to additional authorizations for similar developments such that the totality would be inconsistent with the SMA and [Snohomish County SMP].”

*Citizens for Sensible Growth v. City of Leavenworth*, SHB No. 98-24, Findings of Fact Conclusions of Law and Order, October 15, 1998, at Conclusion of Law 14.

Holding that it was not necessary to consider the cumulative impacts of potential development on the remainder of the subject site or upon adjacent parcels because there were no current development proposals for these sites so, “both remain in the category of supposition and conjecture.”

*Roller v. Pierce County*, SHB Case No. 06-016, Findings of Fact, Conclusions of Law and Order, October 4, 2006, at Conclusion of Law 9.

Noting that while cumulative impact review is required for Conditional Use Permits and Shoreline Variances, it is not so mandated for SDP applications. The Board further explained that cumulative impact review would only be appropriate for a SDP application where there was evidence that the project would be a “first of its kind” in the area and encourage similar proposals for like projects in the area.

*Rosellini v. City of Bellingham*, SHB No. 08-003, Findings of Fact, Conclusions of Law and Order July 15, 2008, at Conclusion of Law 6.

“Neither SEPA nor the SMA requires consideration of unformulated plans and unknown impacts from possible future development which are separate and distinct from the present shoreline SDP proposal.”

*Walker/Seidl v. San Juan County*, SHB No. 09-012, Findings of Fact, Conclusions of Law and Order August 27, 2010, at Conclusion of Law 29.

Holding that a cumulative impacts analysis was not needed where there was little risk of additional future dock approvals since future docks would “have to meet the very stringent criteria in the [San Juan County Shoreline Master Program.]”

In light of the authority previously cited, along with the additional authority cited in this reply, it is clear that the Hearing Examiner committed reversible error in declaring cumulative impact review for SDP permits to be as broad as under NEPA. It was also legal error for the Examiner to refuse to consider the absence of applications for similar projects in the area. As previously discussed in Taylor’s appeal, it was also error for the Examiner to rely upon dock cases, as docks are clearly a disfavored use under almost all Shoreline Master Programs, whereas aquaculture facilities are a preferred and water-dependent use. The Examiner concluded that the project was consistent with all applicable shoreline codes and policies with only one exception, Regional Criterion B. However, the Examiner used the wrong legal standard in doing so. The analyses in the EIS, and other work of the Independent Technical Review Committee provides an appropriate basis for the Board to reach a different legal conclusion than the Examiner—that the project is consistent with all applicable criteria, including Regional Criterion B.

#### **IV. APHETI Failed to Appeal and Cannot Now Seek Reversal or Modifications of Findings and Conclusions Adverse to APHETI.**


APHETI’s opposition memorandum (at p. 10) states that, if the Board does decide to modify the decision, APHETI requests that the Board reverse findings and conclusions unrelated to Taylor’s Appeal and adverse to APHETI. As APHETI correctly notes in the “standard of review” section of its opposition memorandum, the Board is acting in an appellate capacity in this appeal. Issues may only be raised on appeal through the filing of a notice of appeal and upon payment of the applicable appeal fee. As APHETI failed to timely appeal the Hearing Examiner’s decision, it may not now ask the Board to consider new or additional issues on appeal.

**V. Conclusion**

As has been shown in Taylor's notice of appeal and reply memorandum, the Examiner committed clear legal error in proclaiming cumulative impacts be reviewed for this SPD application in a matter as broad as that under review of an EIS for purposes of NEPA. The Examiner also disregarded well-established case law factors indicating that a cumulative impacts analysis would not be appropriate for the Taylor SDP application. APHETI claims that the Examiner found "gaps" in the analysis that justified denial of the project under Regional Criterion B. However, as shown by the Examiner's own findings, the EIS and work of the Independent Technical Review Committee focused upon the very same areas the Examiner found lacking for purposes of Regional Criterion B (benthic impacts, dissolved oxygen/water column impacts and mussel genetic impacts). Decision at Finding 30. Accordingly, the Board should modify and approve the SDP application consistent with the staff recommendation and the recommendations of the Independent Technical Review Committee.

Thank you for your thoughtful consideration of Taylor's reply memorandum.

Respectfully Submitted,

  
for Michael P. Witek  
Samuel W. Plauché #28255

MPW:tat