



COUNTY COMMISSIONERS

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 District One
 Sandra Romero
 District Two
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 District Three

HEARING EXAMINER

Creating Solutions for Our Future

**BEFORE THE HEARING EXAMINER
 FOR THURSTON COUNTY**

In the Matter of the Application of)	Project No. 2011-102333
)	
Net@Ventures Inc.)	Xia/Wheeler SSDP
)	
)	
For Approval of a)	
Shoreline Substantial Development Permit)	FINDINGS, CONCLUSIONS, AND DECISION
_____)	

SUMMARY OF DECISION

The requested substantial shoreline development permit to allow phased development of a 0.92-acre intertidal geoduck bed along Eld Inlet on leased tidelands at 9330 Maple Beach Lane NW in Olympia is **GRANTED** with conditions.

SUMMARY OF RECORD

Request:

Henry Xia of Net@Ventures Inc. (Applicant) requested approval of a substantial shoreline development permit to develop a phased 0.92-acre geoduck bed on Eld Inlet tidelands leased from the Wheelers, owners of the residential parcel at 9330 Maple Beach Lane NW in Olympia, Washington. The proposed project area is designated as Conservancy Shoreline Environment by the Shoreline Master Program for the Thurston Region.

Hearing Date:

The Thurston County Hearing Examiner held an open record hearing on the request on December 17, 2012. At the conclusion of the hearing, the record was held open to allow the Applicant an opportunity to respond to the public comments submitted at hearing. The Applicant agreed to extend the time for issuance of the decisions until January 18, 2013.

Testimony:

At the hearing the following individuals presented testimony under oath:

Scott McCormick, Associate Planner, Resource Stewardship Department

Henry Xia, Applicant
Hui Xia, Applicant
Mary Troy
Preston Troy
Lee Ruddy
Laura Hendricks

Exhibits:

At the hearing the following exhibits were admitted in the record:

EXHIBIT 1 Resource Stewardship Department Report including the following exhibits:

- Attachment a Notice of Hearing
- Attachment b Master Application, July 6, 2011
- Attachment c JARPA Application dated July 6, 2011
- Attachment d Vicinity Map (Project Location)
- Attachment e Vicinity Map (Eld Inlet)
- Attachment f Site Aerial showing proposed and existing Geoduck farms
- Attachment g Perspective View of a Typical Geoduck Farm
- Attachment h Cross-Section View of a Typical Geoduck Tube
- Attachment i Bird-Eye View of a Typical Geoduck Farm
- Attachment j Notice of Application with site plans dated December 16, 2011
- Attachment k Geoduck Aquaculture Lease agreement between the Wheeler's and Net@Venture, Inc.
- Attachment l Site photos by staff, taken during a June 5, 2012 site visit
- Attachment m Mitigated Determination of Non-Significance dated November 6, 2012, and attachments including:
 - 1. SEPA Checklist, dated July 11, 2011
 - 2. Biological Evaluation, prepared November 2011 by ACERA LLC
 - 3. Addendum Biological Evaluation, dated February 7, 2012
 - 4. Correspondence from US Army Corps of Engineers, dated August 16, 2012, indicating authorization pursuant to Nationwide Permit 48

- Attachment n Joint Public Notice from the US Army Corps and WA Department of Ecology, dated October 3, 2011
- Attachment o US Army Corps approval letter, dated August 16, 2012
- Attachment p Geoduck Aquaculture Research Program Interim Progress Report, dated February 2012
- Attachment q Comment letter from the WA Department of Ecology, dated July 27, 2011
- Attachment r Memo from Thurston County Public Works recommending approval, dated July 18, 2011
- Attachment s SEPA recommendation from Thurston County Public Works recommending approval, dated July 18, 2011
- Attachment t Approval memo from Thurston County Public Health and Social Services, dated June 12, 2012
- Attachment u Comments and photos from the WA Department of Ecology staff (Alex Callender) regarding the June 5, 2012 site visit
- Attachment v Email from Mao (Henry) Xia to Thurston County Resource Stewardship staff (Scott McCormick) dated December 5, 2012
- Attachment w Letter from the Sierra Club dated November 19, 2012
- Attachment x Sierra Club Produced Document: Protecting America's Water Campaign: Industrial Shellfish Aquaculture Adverse Impacts, dated November 17, 2011 (Revised).
- Attachment y RCW 90.58.143
- Exhibit 2 Photographs of Public Hearing Notice posted on-site
- Exhibit 3 Public comment email from Kris Mansfield, dated December 14, 2012
- Exhibit 4 Public comment letter from Jules Michel, dated December 13, 2012
- Exhibit 5 Public comment email from Susan Macomson, dated December 8, 2012
- Exhibit 6 Public comment letter from Gail Sheikhezadeh, dated December 7, 2012
- Exhibit 7 Public comment letter from Darlene Ruddy, dated December 15, 2012

- Exhibit 8 Comments of Hui Xia, Applicant, dated December 17, 2012
- Exhibit 9 Correspondence from Washington State Department of Ecology re: Nationwide Permit 48 authorization, dated September 26, 2012
- Exhibit 10 Color copies of photographs submitted by Mary Troy of shellfish operations on Totten Inlet
- Exhibit 11 Color photo submitted by Mary Troy of an Eld Inlet beach allegedly groomed by backhoe (2009)
- Exhibit 12 Email exchange between Scott Sissons and Chris Waldbillig, Department of Fish and Wildlife, last date April 3, 2012
- Exhibit 13 Mary Troy comments, dated December 17, 2012
- Exhibit 14 Preston Troy comments, dated December 17, 2012
- Exhibit 15 Lee Ruddy comments, dated December 15, 2012
- Exhibit 16 Laura Hendricks comments (17 pages), dated December 16, 2012, with attachments:
- a. Maps showing locations and types of shellfish operations on Eld Inlet (8 pages)
 - b. Print out from Washington Department of Fish and Wildlife website
 - c. DRAFT Washington Shellfish Culture Areas Database (undated)
 - d. "Typical Intensive Intertidal Geoduck Operation" leaflet (two pages, no author, no date)
 - e. Email exchange between Scott Sissons and Chris Waldbillig, Department of Fish and Wildlife, last date April 3, 2012
 - f. "Nitrogen Removal from Shellfish Aquaculture" leaflet (five pages on Sierra Club letterhead, no author, no date)
 - g. "This Isn't Your Grandfather's Oyster Farm" leaflet (ten pages, no author, no date)
- Exhibit 17¹ Post-Hearing submittal by the Applicant, dated December 19, 2012

Based on the record developed at hearing, the following findings and conclusions are entered:

¹ At the conclusion of the hearing, the record was held through December 19th open to allow the Applicant an opportunity to respond to the information submitted during public comment. Ms. Xia's response was timely submitted and is admitted at Exhibit 17.

FINDINGS

Procedural Background and Site Information

1. The Applicant requested approval of a substantial shoreline development permit to develop a 0.92-acre geoduck bed on tidelands leased from the owners (Wheelers) of the residential parcel at 9330 Maple Beach Lane NW in Olympia.² *Exhibit 1, pages 2, 4; Exhibit 1, Attachment B, Joint Aquatic Resources Permit Application (JARPA); Exhibit 1, Attachment K.*
2. The undeveloped subject property is located on Eld Inlet, one of five narrow inlets that make up southern Puget Sound. There are no major river systems or estuaries in the action area. *Exhibits 1, Attachment D; Exhibit 1, Attachment M.2.* The undeveloped shoreline on the subject property has a low gradient slope. The upper beach is densely vegetated with overhanging trees and shrubs and contains a bulkhead, riprap, and some drift logs. There is no public access to the shoreline from the uplands on-site or on adjacent properties. The intertidal area is gently sloped. The record contains color photos of the proposed geoduck bed, the upland bluff, and views from the beach. *Exhibit 1, Attachments L and M.2.*
3. The intertidal area proposed for development consists predominantly of sand and sandy gravel giving way to soft sand at lower tidal elevations. There are no intertidal wetlands or eelgrass found on-site or in the vicinity. Species commonly witnessed there include various macroalgae, red rock crab, leather star, sunflower star, and existing native geoducks among other species in the intertidal area and horse clams in the upper beach. *Exhibit 1, Attachments B and M.2.*
4. The subject parcel is zoned Rural Residential Resource One Dwelling Unit Per Five Acres (RRR 1/5). *Exhibit 1, page 2.* The Thurston County Code includes aquaculture in its definition of agriculture³, and agriculture is a permitted use in the RRR 1/5 zone. The geoduck bed proposed is allowed as an agricultural use without a land use permit. *Thurston County Code (TCC) 20.09A.020.* Resource Stewardship Staff noted, however, that certain potential impacts to adjacent properties must still be mitigated to comply with shoreline regulations, including lighting, glare, noise, and safety for beach users. *Exhibit 1, page 4; McCormick Testimony.*
5. Surrounding parcels range from one to two acres in area; many of them have been developed with residences for at least twenty years. The parcel to the north (Parcel 12903210300) contains a partially completed, uninhabited single-family residence.

² The legal description of the subject property is a portion of Section 03 Township 19 Range 2W Govt Lt COM ON ML 215F S OF SE COR LT 22 GRIFFIN MAPLE BEACH DIV 1 VOL 8 PG 101; also known as Parcel No. 12903210200. *Exhibit 1, page 1.*

³ Pursuant to TCC 20.03.040(3), "Agriculture" means the use of a tract of land for (a) the tilling of the soil; (b) the raising, harvesting and processing of crops or plant growth of any kind, including forest practices; (c) pasturage; (d) horticulture including wholesale greenhouses; (e) dairying; (f) raising of poultry and livestock; (g) shellfish or fish farming, including finfish in upland hatcheries; or (h) raising, harvesting and processing of clams, oysters and mussels. (emphasis added)

Abutting the subject property to the south is Parcel 12903240100, an undeveloped 0.4-acre parcel. South of that is a larger undeveloped parcel with a 1.75-acre geoduck farm in the intertidal zone. This aquaculture operation appears to have been planted in 2008 or 2009 without permits. *Exhibit 1, Attachments B and E; Exhibit 1, pages 2, 6.*

6. Puget Sound beaches with the appropriate shallow slope and soft sediment, including the subject beach, are highly productive for commercial shellfish growing. The Washington State Department of Ecology (DOE) indicates that Puget Sound harbors the highest concentration of geoducks in the contiguous United States, with the most abundant concentrations in southern Puget Sound. Eld Inlet is an historic shellfish growing area. *Exhibit 1, page 5; Exhibit 1, Attachment M.2.*
7. As intertidal lands in Eld Inlet, the project site is subject to the jurisdiction of the Shoreline Master Program for the Thurston Region (SMPTR). *SMPTR, Section 4, Definitions.* The SMPTR designates the site as Conservancy Shoreline Environment. Aquaculture is allowed in this environment. The proposed geoduck operation requires the installation of equipment on the tidelands that constitutes a “structure” and is considered “development” for the purposes of the SMPTR. Non-exempt development in the shoreline jurisdiction that exceeds \$6,412.00 in fair market value requires a shoreline substantial development permit (SSDP). *SMPTR, Section 1.II.A.* The value of the proposed project is greater than that amount. *Exhibit 1, pages 3-4; Exhibit 1, Attachment B.*

The Applicant’s Proposal

8. The requested SSDP would occupy approximately 0.92 acres of cultivable land.⁴ Prior to planting, the intertidal area would be surveyed; boundary corners would be assigned GPS coordinates during the survey. The geoduck bed would be installed within the mid-intertidal zone (+3’ to - 4’ mean lower low water [MLLW]) and no work would be conducted above +3’ MLLW. No heavy equipment would be used on the intertidal zone at any time. Corner markers would be put in place during site preparation and planting. The site would be cleared of garbage or natural debris. Sand dollars and macroalgae would be picked up by hand and relocated to areas just waterward of the planting area when they cannot be left in place. Ten-inch long by six-inch diameter PVC pipes would be placed on end in straight rows and pressed down into the substrate leaving two to three inches exposed. Approximately 40,048 tubes would be placed at an average density of one per square foot. Three geoduck seeds would be planted by hand per tube to maximize productivity. Rather than capping the tubes with individual mesh caps, area netting would be placed over the entire tube field to protect the geoduck from predators, to secure the tubes from wave action, and reduce visual impacts. Tubes would be removed after 18 months. Depending on the level of predator presence, the area net may be re-staked to the substrate for an additional six months. *Exhibit 1, page 2; Exhibit 1, Attachment B; Hui Xia Testimony; Henry Xia Testimony; Exhibit 1, Attachments G H, M.2, and M.3.*

⁴ The total lease area is 1.1 acres, but only the area below +3’ MLLW is plantable (see Attachment v).

9. A total of sixteen area nets would be used to cover the tubes. Measuring 50 by 50 feet, the nets would be staked every ten feet around the perimeter with rebar to ensure they remain in place. Nets placed below the line of the mean higher high water would be marked with identifying information attached to the rebar every 50 feet. Keeping the nets taut and securely fastened to the substrate would reduce bird entrapment. Netting and encrusting organisms would be removed by hand within one working day. Native organisms would be relocated below the line of the extremely low tide. Any garbage would be removed from the site. *Exhibit 1, Attachments M.2 and M.3; Henry Xia Testimony.*
10. Two to four workers would be present on the beach during site preparation and planting, which is anticipated to take eight four-hour low tide periods. Workers would take care to ensure tubes and nets remain secured in place, both for the protection of the crop and also to preserve the surrounding environment. Two to four workers would be involved in gear removal after the first 18 months. Removal is expected to take eight four-hour low tide periods. The three to five year period of bed maintenance is a period of observation during which growth and mortality rates are monitored. Before and after gear removal, site visits would be made at least every other month and after each storm event to check for debris and garbage. A record of site visits would be kept, noting where debris tends to accumulate and how much debris was found on each date. *Exhibit 1, Attachment B; Exhibit 1, Attachment M.2; Henry Xia Testimony.*
11. The majority of the cultivated area would be underwater and invisible for 80% of the eighteen month period tubes and nets are in place. The Applicant custom orders gray PVC tubes to minimize their visual impact, increasing the cost for tubes by 30%. After the equipment is removed, the geoduck bed would be invisible for the three to five years until harvest with the exception of occasional worker site maintenance. *Exhibit 1, Attachment B; Exhibit 1, page 6; Exhibit 8.*
12. Access to the farm would be by water using two types of boats. For planting activities, the Applicant would use a 21-foot boat with a 250 horsepower outboard motor. The larger vessel is required during planting to handle the tubes and nets. For harvest, the Applicant uses a 15-foot boat with a 25 horsepower motor. All vessels are maintained, fueled, and kept in a marina off-site when not in use. *Exhibit 1, Attachment B; Henry Xia Testimony; Exhibit 1, Attachment M.2.*
13. Harvest would be accomplished by hand using a pressurized hose and nozzle system with low pressure water jets. The majority of harvest would be accomplished "in the dry" during low tides when the bed is exposed. On rare occasions when the tide levels are not low enough to accommodate harvest in the dry, a small percentage of the harvest may be conducted by daytime diving from below the water line. In either case, pumps for harvest would be run by a small combustion engine and mounted on an eight- by eight-foot barge stationed just waterward of the geoduck bed. The engine and pump would be fitted with a muffler and kept inside an insulated box to minimize sound. *Exhibit 1, Attachment B; Exhibit 1, Attachments M.2 and M.3.*

14. All project phases (bed preparation, planting, and harvest other than dive harvest) are proposed to be conducted when the beach is dry in order to minimize turbidity impacts resulting from disturbance of the substrate. The displacement of sediments during planting is expected to be minimal resulting in negligible water quality impacts. Harvest activities create more disruption of the substrate, which can result in turbidity when the harvested area is next inundated. However, the resulting turbidity is expected to be temporary and localized, typically limited to the mixing zone, which the Department of Ecology typically measures at 150 feet. Less than 10% of the harvest would be accomplished by diving in order to minimize turbidity impacts. *Exhibit 1, Attachments M.2 and M.3.*
15. The instant proposal would utilize aquacultural techniques including the PVC pipes and area netting, water access, and water pumps during harvest that have been proven effective for years. No experimental techniques would be used. *Exhibit 1, Attachment B; Hui Xia Testimony.*
16. With no structures taller than three inches, the project would not obstruct shoreline views from upland properties. At the time of proposal, there is no residential development upland of the proposed geoduck bed except for the unfinished house to the north. The nearest inhabited residence is 250 feet northwest of the proposal site. *Exhibit 1, page 6.*
17. Staff noted that there are no parks or public boat docks in the vicinity to draw boaters to the subject beach and no established historic public use of the beach on-site or in the vicinity. Aquacultural activities would occur a significant distance waterward from the bulkhead. The project would not place buoys, concrete markers, or other objects on the beach that would interfere with access. The Applicant contended that geoduck aquaculture is compatible with public recreational activities as it only occurs on privately owned intertidal areas. The neighborhood tidelands are all privately owned. *Exhibit 1, pages 5-6; Hui Xia Testimony; Exhibit 17.*
18. There are no established commercial navigation channels over or in the vicinity of the site. The ACOE has issued authorization for the project, certifying, in part, lack of conflict with navigation. *Exhibit 1, pages 5, 10; Exhibit 1, Attachment O.*
19. No aquaculture processing plant, hatchery, or nursery operation is proposed. No residential development, land clearing, beach fill, or excavation is proposed. *Exhibit 1, pages 2, 7-8; Exhibit 1, Attachment B.*
20. All employees would have the use of sanitation facilities not located on the subject property; the beach and uplands would not be accessed for use by employees. *Exhibit 1, Attachment B.*
21. The project would support six full time employees for two years during planting and harvest, which are very labor intensive. In addition, leases provide income to landowners which can cover their property taxes, allowing those on fixed incomes to remain in waterfront properties. The proposal would produce products for export, which the Applicant argued helps to narrow the trade deficit. All goods and gear used in the

operation are purchased from other Washington businesses, most of them local *Exhibit 8; Hui Xia Testimony*.

22. The Applicant noted that the site is among a relatively limited number of sites with high potential for geoduck aquaculture due to the species' specific habitat requirements. Geoduck cultivation requires a substrate with the right mixture of sand and silt, a large enough area to plant, the correct water salinity, and abundant nutrition for the growing animals. Geoduck beds can be converted to other shellfish uses, including oyster beds, but oyster beds cannot be converted to geoduck beds. Oyster shells left in the substrate destroy geoduck habitat by changing the sand content and by leaving shards that injure and kill juvenile geoducks. The Applicant argued that the site's high geoduck potential is a factor in favor of SSDP approval, as the SMPTR Section III stipulates that "aquacultural use of areas with high aquacultural potential should be encouraged." *Hui Xia Testimony; Exhibit 8*.
23. The proposal requires authorization from the US Army Corps of Engineers. Federal agencies are required to confirm that actions they authorize comply with the Endangered Species Act (ESA), which prohibits actions that jeopardize the continued existence of endangered or threatened species or destroy/adversely modify critical habitat of listed species. The Applicant commissioned a professionally prepared biological evaluation (BE, November 2011) to support its request for ACOE authorization. The BE identified the following listed species: Puget Sound Chinook salmon (threatened), coastal Puget Sound bull trout (threatened), Puget Sound steelhead (threatened), Southern resident Killer Whale (endangered), Marbled Murrelet (threatened), and Bald Eagle (no longer listed under ESA, but still protected under the federal Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Plan). *Exhibit 1, Attachment M.2*. An Addendum BE was issued to address specific questions from the federal agencies for whose review the BE was prepared. *Exhibit 1, Attachment M.3*.
24. The BE evaluated anticipated project effects in terms of short-term impacts (those localized pulse impacts associated with planting or harvesting) and long-term impacts (associated with the full seven year grow out phase). It noted that Marbled Murrelets have only been documented in South Puget Sound near the Nisqually River Delta and Henderson Inlet, that the nearest documented Bald Eagle nest is a mile away, and that Killer Whales are unlikely to enter the project area due to shallow water depths. The report concluded as follows:

Chinook salmon, Bull trout, and Steelhead: Overall there may be minimal temporary effects on salmonids but no lasting effects. The project "may affect but is not likely to adversely affect" Chinook salmon, Steelhead, or Bull trout.

Killer Whale: It is unlikely that the killer whale will be present during project activities. Impacts from noise are not anticipated because noise levels would not be significantly greater than background levels. The project "may affect but is not likely to adversely affect" Killer Whales.

Bald Eagle: Though the nearest nest is a mile away, eagles have been observed

feeding in the vicinity. Compliance with BE mitigation measures would ensure that area netting is managed to prevent it from becoming loose in order to minimize bird entrapment. The project is "not likely to adversely affect" the Bald Eagle.

Marbled Murrelet: The murrelet is unlikely to regularly forage in Eld Inlet. The project "may affect but is not likely to adversely affect" the Marbled Murrelet.

Critical Habitat for Chinook salmon and Killer Whales: Temporary localized effects are anticipated. The project "may affect but is not likely to adversely affect" critical habitat for the listed species.

Exhibit 1, Attachment M.2.

25. The BE and Addendum BE contained proposed conservation measures, compliance with which would satisfy applicable Federal requirements. The measures are listed on pages 21 through 24 of the Biological Evaluation and on pages 4 and 5 of the Addendum BE. The Applicant based the proposal on and intends to comply with recommended conservation measures in the two documents. *Exhibit 1, Attachments M.2 and M.3; Hui Xia Testimony.*
26. According to Washington Department of Fish and Wildlife (WDFW) priority habitats and species (PHS) database, there is no documented herring or surf smelt spawning habitat in the project vicinity; however, Pacific sand lance are documented to spawn on intertidal beaches adjacent to the proposed project at +7MLLW. The sand lance is an important prey species for salmon and birds. According to the BE, the geoduck bed would be placed from +3 MLLW to -4MLLW and would not spatially overlap the sand lance spawning areas. No adverse affects to sand lance are anticipated. *Exhibit 1, Attachment M.2.*
27. One conservation measure recommended by the Addendum BE was a Pacific herring spawn survey to be conducted prior to any site activities occurring between January 15 and March 31 of a given year. If the survey reveals Pacific herring spawn to be present, all site activities would be prohibited where spawning has occurred until the eggs have hatched and spawn is no longer present. The measure further suggests that the Applicant maintain a record of Pacific herring site surveys to include the date, time, and area of the survey, materials, equipment surveyed, and results of survey. *Exhibit 1, Attachment M.3.*

County Review

28. Pursuant to RCW 15.85.010,

The legislature finds that many areas of the state of Washington are scientifically and biologically suitable for aquaculture development, and therefore the legislature encourages promotion of aquacultural activities, programs, and development with the same status as other agricultural activities, programs, and development within the state.

Resource Stewardship Staff contended that this declaration by the state legislature is a clear directive to local governments that aquaculture has a preferred status similar to agriculture and is a desirable land use. *Exhibit 1, page 5.*

29. Pursuant to the State Environmental Policy Act (SEPA), Thurston County acted as lead agency for review of Taylor/Lockhart project's impacts on the environment. Review included 21 documents (detailed at Exhibit 1, Attachment M, page 3) and several site visits. Documents reviewed included the three Washington Sea Grant Interim Reports (detailed in findings 42, 43, and 44 below), the BE and Addendum BE, the Pacific Shellfish Growers Association Environmental Codes of Practice, Washington Department of Natural Resources (DNR)'s Geoduck Aquaculture best management practices (June 2006), comments from County reviewing departments, numerous studies and articles on shellfish farming submitted by the Applicant and by the Sierra Club, and agency comments from County, State, and Federal agencies. The SEPA Responsible Official determined that while the project may result in some impacts, with mitigation, such impacts would be of short duration and limited intensity and would not rise to the level of probable, significant, adverse impacts to any element of the environment, including: erosion, water quality, habitat for plants and animals, unique species, migration routes, noise, toxic releases, light and glare, aesthetics, recreation, and cultural preservation. The County issued a mitigated determination of non-significance (MDNS) on November 6, 2012. No appeal of the MDNS was filed and compliance with SEPA is not at issue in the instant proceedings. *Exhibit 1, pages 3, 6; Exhibit 1, Attachments M, M.1, M.2, M.3, and M.4.*
30. The MDNS imposed 14 mitigation measures requiring:
- 1) Compliance with the most current version of the Pacific Coast Shellfish Growers Association Environmental Codes of Practice (ECOP) for Pacific Coast Shellfish Aquaculture;
 - 2) Installation of a sign listing the name and contact information for a person designated to immediately address problems associated with the operation detected by government agents or citizens;
 - 3) Recording of a document granting access to the operation for researchers affiliated with state or federal government agencies gathering information related to geoduck aquaculture;
 - 4) Twice monthly patrol of the planting gear while in place, maintenance of a record of animals observed in the nets, , and release of living entangled animals;
 - 5) Restriction to the use of washed gravel for bed preparation and prohibition of any "unsuitable" material;
 - 6) Restriction of grounding the shellfish barge (raft) within ten horizontal feet of eelgrass or kelp beds;
 - 7) Prohibition of planting geoducks above the tidal elevation of +7 feet MLLW if area is documented as a surf smelt spawning area;
 - 8) Prohibition of planting geoducks above the tidal elevation of +5 feet MLLW

- if area is documented as a Pacific sand lance spawning area;
- 9) Compliance with all requirements of the ACOE approval dated August 16, 2012;
 - 10) Prohibition of permanent lighting and control of temporary lighting to prevent off-site glare;
 - 11) The use of UV-resistant fasteners to attach individual tube screens, if used;
 - 12) The cessation of work and contacting DAHP and appropriate authorities in the event that artifacts of archeological or historic significance are discovered during operations;
 - 13) Approval of all required State and Federal permits prior to commencement of operations; and
 - 14) Labeling of all gear placed below the ordinary high water mark with identifying information.

Exhibit 1, Attachment M.

31. The Pacific Coast Shellfish Growers Association Environmental Codes of Practice referenced in MDNS condition #1 were designed to protect harvest areas through sound environmental practices. While mandating compliance in the MDNS, Resource Stewardship Staff acknowledged that geoduck growers are dependent on clean water to produce economically viable products, giving them a strong motivation to maintain a clean environment. *Exhibit 1, pages 6-7.*
32. The site is not known for its historic qualities. County environmental review included consideration of potential archeological or cultural interest in the site. Mitigation measure 12 of the MDNS would require implementation of consultation with the Department of Archeology and Historic Preservation (DAHP) in the event of inadvertent discovery during site preparation or project installation. *Exhibit 1, Attachment O.*
33. Thurston County Environmental Health Division (EHD) submitted comments indicating that because the proposed project does not include processing facilities, retail sales, or use of the upland parcel, it is not subject to any water supply, septic system, or food requirements and does not require review pursuant to the Thurston County Sanitary Code. EHD recommended SSDP approval. *Exhibit 1, Attachment T.*
34. The project is exempt from the standards in the Thurston County Drainage and Erosion Control Manual (DDECM) because it is considered commercial agriculture. *DDECM Volume I, Section 2.2.2.* Public Works Staff recommended approval on condition that any permits for additional work related to the operation would need to comply with the County Road Standards and the DDECM. *Exhibit 1, Attachment R.*
35. Upon completing review of the application, Resource Stewardship Staff concluded that with conditions, the proposal would comply with SSDP criteria. Among other conditions of approval, Staff recommended condition number 7 (Exhibit 1, pages 11-12) requiring the project to be reviewed for impacts and potential additional mitigation through an open

record public hearing for a new SSDP before the County hearing Examiner after five years and/or before replanting, stating:

Even though existing biological analyses generally have found that no long-term significant impacts are associated with geoduck aquaculture, there are some areas of ongoing research related to water quality and the effect on ESA-listed species in particular. The Washington Sea Grant program is conducting that research at the direction of the Washington State Legislature. A more detailed discussion of that program follows below. Combined with the relative modernity of geoduck aquaculture in the form proposed, it is prudent to reassess the biological research and aquacultural practices at a specified time in the future as it relates to the subject bed. The Department will recommend that a re-review of the entire operation of the subject project be conducted by the Hearing Examiner in the future.

Exhibit 1, pages 7, 11-12.

36. Staff contended that its recommendation for re-review prior to replanting is supported by WAC 173-27-090(3), which states: "Authorization to conduct development activities shall terminate five years after the effective date of a substantial development permit." Because the Department interprets "development activity" to include placement of structures (tubes and netting) on the beach, that each planting cycle would essentially require new review and authorization to "develop" the shoreline. Staff argued that according to the WAC, permission to conduct development activity terminates after five years, with a potential one-year extension upon application. Staff characterized its recommendation as requiring a perpetual five year review and renewal. *Exhibit 1, pages 7, 11-12.*
37. The remaining conditions of approval recommended by Staff require: compliance with all County Code and SMPTR requirements and the MDNS conditions; obtaining all required state and federal permits and providing copies of approval documents to the County prior to site preparation; prohibiting fill on the beach and advance approval by the ACOE should any beach excavation become necessary; prohibition of release of sediments into Puget Sound; requiring site preparation to commence within two years and initial installation of "structures" (tubes and netting) must be completed within five years of final approval; compliance with the approved site plan and advance review of any deviation therefrom; control of lighting to prohibit off-site glare; compliance with County noise standards and control of noise within allowed standards such that it does not rise to a level found "persistently annoying" by receiving properties; and prohibition of hard structures or markers on the beach. *Exhibit 1, pages 11-12.*
38. After SSDP approval, geoduck aquaculture operations must obtain, at a minimum, the following State and Federal permits or exemptions therefrom: ACOE NWP 48 Certification or Individual Permit under Section 10; DOE Section 401 Water Quality Certification, DOE Coastal Zone Management Certification, State Department of Health Harvest Site Certification, State Department of Health Shellfish Operation License, and

Washington State Department of Fish and Wildlife Aquatic Farm Permit. The proposal may be required, by the ACOE, to obtain a Section 404 Clean Water Act Permit. Each of these permits would contain specific required mitigation to protect public health, safety, and general welfare. *Exhibit 1, Attachment M.*

Pertinent Information from Other Governmental Agencies

39. On May 7, 2012, the National Marine Fisheries Service (NMFS) issued a concurrence in the Applicant's Biological Evaluation's "may affect but not likely to adversely affect" findings (NMFS 2012/01091). On May 18, 2012, the US Fish and Wildlife Service issued a concurrence in the BE's "may affect but not likely to adversely affect" findings (USFWS 01EWF00-2012-I-0178). *Exhibit 1, Attachment O.*
40. Based on these concurrences, the ACOE issued authorization for the proposed geoduck operation under Nationwide Permit (NWP) 48, subject to the terms and conditions of NWP 48 and to project-specific conditions.⁵ Conditions of the ACOE authorization include, among other items:
- Twice monthly inspection of nets for the duration of their presence on the substrate, maintenance of a record of what was caught in the nets, if anything, and release of any living organisms stuck in the net;
 - A Pacific herring spawn survey prior to harvesting, net removal, and/or tube placement and removal, and if spawn are observed, delay of all activities until the herring have hatched and spawn are no longer present; and
 - Patrol of the beaches at least every three months to pick up aquaculture debris.

Provided the Applicant complies with all the general and specific permit conditions, ACOE determined that the project would comply with all requirements of the ESA, the Magnuson-Stevens Fishery Conservation and Management Act, and National Historic Preservation Act. *Exhibit 1, Attachment O.*

41. Nationwide Permit 48 certification requires review and approval by DOE of a Section 401 Water Quality Certification. The Washington State Department of Ecology submitted comments indicating that water quality concerns for the proposed aquaculture

⁵ The Examiner takes judicial notice of the following: In 2007, the U.S. Army Corps of Engineers (ACOE) issued Nationwide Permit 48 (NWP 48), which authorized existing aquaculture activities under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act. In 2012, the ACOE reviewed and revised NWP 48, establishing conditions governing all commercial shellfish aquaculture activities in waters under their control. In the reissued permit, the ACOE stated: "Properly sited, operated, and maintained commercial shellfish aquaculture activities support populations of shellfish that provide important ecological functions and services for coastal waters and should be authorized by a single NWP. ... The shellfish populations... authorized by this NWP help support the objective of the Clean Water Act because they improve water quality through conversion of nutrients into biomass (i.e., shellfish growth) and the removal of suspended materials through filter feeding. Commercially grown shellfish also provide some habitat functions for the aquatic environment. ... Commercial shellfish aquaculture activities have minimal adverse effects to aesthetics and are likely to result in little change in local baseline levels of noise, odor, or views when compared to other waterfront uses in coastal residential areas... ." See the ACOE website at <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/NationwidePermits.aspx>.

operation have been sufficiently addressed in the federal agency reviews and that no Individual 401 Water Quality Certification would be required for this project. *Exhibit 1, Attachment O; Exhibit 9.*

42. In 2007, the Washington state legislature passed a law directing Washington Sea Grant to study key uncertainties as to the impacts of geoduck cultivation on the Puget Sound ecosystem and on wild geoduck populations. One of the research efforts granted access to the site by MDNS measure #3 is the Washington Sea Grant program. Sea Grant established six priority objectives to assess:
- 1) The effects of structures commonly used in the aquaculture industry to protect juvenile geoducks from predation;
 - 2) The effects of commercial harvesting of geoducks from intertidal geoduck beds, focusing on current prevalent harvesting techniques, including a review of the recovery rates for benthic communities after harvest;
 - 3) The extent to which geoducks in standard aquaculture tracts alter the ecological characteristics of overlying waters while the tracts are submerged, including impacts on species diversity and the abundance of other organisms;
 - 4) Baseline information regarding naturally existing parasites and diseases in wild and cultured geoducks, including whether and to what extent commercial intertidal geoduck aquaculture practices impact the baseline;
 - 5) Genetic interactions between cultured and wild geoducks, including measurement of differences between cultured and wild geoduck in term of genetics and reproductive status; and
 - 6) The impact of the use of sterile triploid geoducks and whether triploid animals diminish the genetic interactions between wild and cultured geoducks.

Exhibit 1, Attachment P.

43. Through a competitive bidding process, Sea Grant selected from among proposed studies to address the objectives, choosing three:
- Geochemical and Ecological Consequences of Disturbances Association with Geoduck Aquaculture Operations in Washington (G. VanBlaricom, UW, J. Cornwell, UM): assessing all phases of geoduck aquaculture in terms of effects on plant and animal communities (fish, shellfish, and plant) and physical/chemical effects to beaches
 - Cultured-Wild Interactions: Disease Prevalence in Wild Geoduck Populations (C. Friedman, UW): Developing baseline information on pathogens to improve understanding of geoduck health and management of both wild and cultured stocks.
 - Resilience of Soft Sediment Communities after Geoduck Harvest in Samish Bay (J. Ruesink, UW): examining the effect of geoduck aquaculture on soft-sediment tide flat and eelgrass meadow habitats.

Interim reports summarizing research to date have been submitted to the Legislature in 2009, 2011, and 2012. The final results of the three funded studies will be reported to the Legislature in December 2013. *Exhibit 1, Attachment P.*

44. The 2012 interim report contains the following summary of preliminary research observations from study inception to date:

- Benthic infaunal communities are not significantly altered;
- Current practices have minimal impacts on benthic communities of infaunal invertebrates, with no spillover into adjacent habitats, suggesting that the disturbance occurring on the scale of current harvest practices is within the range of natural variation;
- Significant differences in the structure of mobile macrofauna communities between planted and nonplanted areas do not persist once tubes and nets are removed during the grow out phase;
- Nutrients released from geoduck operations are low with localized effects likely to be negligible, and the overall rate of nutrient release is not changed from the natural rate;
- No distinct patterns have been observed in the distribution of disease organisms as a function of geographic location or water depth; and
- In Fisk Bar, where eelgrass recruited after geoducks were planted, harvest activities significantly impacted the eelgrass, with limited spillover effects to adjacent, non-farmed sites; however, within one year, eelgrass recovery had begun on the harvested site, suggesting that current practices do not render sites unsuitable for later eelgrass colonization.

Again, final results would be reported to the Legislature in December 2013. *Exhibit 1, Attachment P.*

Public Comment and Response

45. Notice of the public hearing was sent to all property owners within 500 feet of the site and published in The Olympian on December 7, 2012. The site was posted with hearing notice on December 6, 2012. *Exhibit 1, page 3; Exhibit 2; Exhibit 1, Attachment A.*

46. Public comment was offered at the hearing in opposition to the requested SSDP. Issues of concern alleged in public comment included: environmental concerns for south Puget Sound, citing Totten Inlet as an example of what shellfishing can do; alleged uselessness of the Pacific Shellfish Growers Code of Conduct as a document that requires self-regulation and is not enforceable; assertions that the Washington Sea Grant study gives cursory treatment to salmonid impacts; concerns that the County has neither the will nor the resources to monitor the project for compliance with conditions of approval; concerns that the conditions in the MDNS and SSDP are not adequate to mitigate beach impacts; about impacts from chemicals applied and impacts to wildlife from area nets; argument that aquaculture is only one preferred shoreline use and that public use and environmental protection are also preferred; personal observations of a significant decline in natural species since “factory approach” aquaculture began; concerns about lobbying pressure to allow commercial use of public waters; concerns that the instant permit process would be a precedent of entitlement for future such uses; toxins from PVC entering the water; scraping the beach or use of heavy equipment to prepare it; impacts from high pressure water jet harvest; lack of monitoring and fines for geoduck operators who don't comply

with regulations; lack of information about the combined impacts of geoduck operations throughout the Sound; impacts to spawning sites for forage fish, which require similar conditions to geoducks; impacts to birds, which comments alleged are experiencing significant declines in population; flat fish displacement; export of Puget Sound resources out of state; allegation that the six jobs claimed to be created by the Applicant is an overestimate, that the proposal can't support the number of jobs claimed; concern that the proposal should be included in a cumulative impact analysis with all shellfish operations in Eld Inlet; and a request for County by County master conservation plan that identifies shorelines to be reserved for natural habitat purposes. *Exhibits 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, and 16; Testimony of Mary Troy, Preston Troy, Lee Ruddy, and Laura Hendricks.*

47. One comment letter, dated December 13, 2012, requested that an EIS be performed. It cited testimony and evidence offered at a shellfish project hearing conducted in November 2012 in separate proceedings. This letter voiced concerns about the unconsidered impacts of the adjacent, unpermitted geoduck farm and cited studies not offered in evidence and information related to oyster growing on CO2 and pH levels. No author credentials were provided in the letter. *Exhibit 4.*
48. Another comment letter argued: that geoduck farming is inconsistent with the SMA and the SMPTR on its face; that a cumulative impacts analysis is required under the Shoreline Management Act; that the record did not demonstrate the proposal would result in no net loss of functions or values of the shoreline area; that the soundness and impartiality of the Washington Sea Grant study is questionable; and that the US Fish and Wildlife Biological Opinion, the National Marine Fisheries Biological Opinion, and the ACOE consultation relied on in the staff report and MDNS are unpublished, non-peer reviewed reports and should not be relied on. This letter cited studies not in evidence relating to shellfish growing operations in Case Inlet in Canada. *Exhibit 16.*
49. Members of the public offered photographs of various shellfish operations. Exhibit 10 includes images from Totten Inlet shellfish farms. Photos 2, 3, and 5 are pictures of an oyster farm. Photo 6 is a geoduck farm using individual mesh caps to cover tubes. Photos 1 and 4 are uncovered white four-inch tubes. Also offered were photographs of a geoduck operation claimed to be the unpermitted bed adjacent to the subject property with its tidal lands obviously groomed by heavy equipment. Also offered was an email from a WDFW habitat biologist who was not present for cross examination stating that clam predator nets alter habitat and wash up all over, and that WDFW no longer uses them. *Exhibits 10, 11, and 12.*
50. The Applicant noted that prior to 2007, geoduck aquaculture was not properly regulated and many operators conducted their businesses without government permits and oversight. As a waterfront property owner, the Applicant noted they have to pick up PVC pipes and other aquacultural debris from their beach too. As stated in the Applicant's written hearing comments:

After the new rules regarding geoduck aquaculture coming out, the industry has been strictly regulated and properly managed. I knew quite a few geoduck farmers who are now out of business because they do not have knowledgeable professionals in their crew to go through all the legal process required by the law. The survivors like us have realized the importance of regulations in the industry. We believe that the intent of the geoduck aquaculture regulations is to promote properly managed aquaculture. It's not intended to kill the industry or prohibit aquacultural uses in the State.

Hui Xia Testimony; Exhibit 8.

51. In response to public comment, the Applicant argued the following:
- A. The photos offered in Exhibits 10 and 11 were taken from other farms/operators and are not related to the Applicant's proposal. All intertidal activities would be conducted by hand and avoiding any heavy machinery on the beach. The proposed uses would not use individual mesh caps and would employ six-inch grey PVC rather than the four-inch white PVC pictured. The Applicant asserted that according to the PVC manufacturer, the darker color would be less susceptible to heat and sun and harder to damage. The Applicant noted that grey tubes would blend into the surrounding environment and have much less aesthetic impact than white tubes.
 - B. The Applicant contended that Jules Michel's letter at Exhibit 13a is "just a 'copy and paste' from other projects" and does not address the details of the Applicant's BE.
 - C. The proposal would provide six full time positions for two years. Geoduck cultivation is not simply "putting in a few tubes and leaving" as some public comment testimony claimed. Cutting six-inch pipes into pieces is intensive labor work, which the Applicant pays employees to do rather than purchasing pre-cut tube. Delivering and transferring tubes is time-consuming. The Applicant's estimates on job creation are based on their business record data from similar projects.
 - D. The Applicant asserted that Laura Hendricks's public comment testimony and her written comments at Exhibit 16 failed to undermine the evidence in the record demonstrating that geoduck aquaculture is a beneficial use of shorelines that supports and diversifies the local economy.
 - E. The Applicant alleged that several members of the public who oppose the instant application are owners of waterfront properties that have been legally separated from their tidelands, the tidelands of which are owned and farmed by Taylor Shellfish. The Applicant alleged that these property oppose the shellfish industry through legal means in order to halt aquaculture activities in the State to prevent future shellfish

growing on the tidelands in front of their properties.⁶

Exhibit 17.

52. At the conclusion of the hearing, Resource Stewardship Staff recommended approval with conditions in the staff report as modified during testimony. *McCormick Testimony; Exhibit 1, pages 11-12.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has jurisdiction to decide substantial shoreline development applications pursuant to TCC 2.06.010(C), RCW Chapter 36.70, WAC 173-27, and Section One, Part V of the Thurston County Shoreline Master Program.

Criteria for Review

Shoreline Substantial Development Permit

Pursuant to WAC 173-27-150, in order to be approved by the Hearing Examiner, an SSDP application must demonstrate compliance with the following:

1. The policies and procedures of the Shoreline Management Act;
2. The provisions of applicable regulations; and
3. The Shoreline Master Program for the Thurston Region.

(a) Shoreline Management Act

Chapter 90.58 RCW, the Washington State Shoreline Management Act (SMA) of 1971, establishes a cooperative program of shoreline management between the local and state governments with local government having the primary responsibility for initiating the planning required by the chapter and administering the regulatory program consistent with the Act. The Thurston County Shoreline Master Program (SMPTR) provides goals, policies and regulatory standards for ensuring that development within the shorelines of the state is consistent the policies and provisions of Chapter 90.58 RCW.

The intent of the policies of RCW 90.58.020 is to foster “all reasonable and appropriate uses” and to protect against adverse effects to the public health, the land, and its vegetation and wildlife. The SMA mandates that local governments adopt shoreline management programs that give preference to uses that (in the following 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; protect the resources and ecology of the shoreline; increase public access to publicly owned areas of the shorelines; and increase recreational opportunities for the public in the shoreline. The public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state is to be preserved to the greatest extent feasible consistent with the

⁶ The Examiner notes that this assertion was made after adjournment of the hearing and the named property owners did not have a chance to respond to this assertion, which affects the weight given to the assertion.

overall best interest of the state and the people generally. To this end uses that are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline, are to be given preference.

(b) Applicable regulations from the Washington Administrative Code

WAC 173-27-140 Review criteria for all development.

- (1) No authorization to undertake use or development on shorelines of the state shall be granted by the local government unless upon review the use or development is determined to be consistent with the policy and provisions of the Shoreline Management Act and the master program.
- (2) No permit shall be issued for any new or expanded building or structure of more than thirty-five feet above average grade level on shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served.

WAC 173-27-150

- (2) Local government may attach conditions to the approval of permits as necessary to assure consistency of the project with the act and the local master program.

WAC 173-27-190 Permits for substantial development, conditional use, or variance.

- (1) Each permit for a substantial development, conditional use or variance, issued by local government shall contain a provision that construction pursuant to the permit shall not begin and is not authorized until twenty-one days from the date of filing as defined in RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within twenty-one days from the date of such filing have been terminated; except as provided in RCW 90.58.140 (5)(a) and (b).

(c) Shoreline Master Program for the Thurston Region

SMPTR Section Two, V, Regional Criteria

- A. Public access to the shorelines shall be permitted only in a manner which preserves or enhances the characteristics of the shoreline which existing prior to establishment of public access.
- B. 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.
- C. Future water-dependent or water-related industrial uses shall be
- D. Residential development shall be undertaken in a manner that will maintain existing public access....
- E. Governmental units shall be bound by the same requirements as private interests.
- F. Applicants for permits shall have the burden of proving a proposed substantial development is consistent with the criteria which must be met before a permit is granted. In any review of the granting or denial of an application for a permit as provided in RCW

90.58.18.180(1), the person requesting the review shall have the burden of proof.

- G. 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. Inappropriate shoreline uses and poor quality shoreline conditions shall be eliminated when a new shoreline development or activity is authorized.
- H. Protection of public health is recognized as a primary goal. All applications for development of use of shorelines shall be closely analyzed for their effect on the public health.

SMPTR Section Three, II, Aquacultural Activities

A. Scope and Definition

Aquaculture involves the culture and farming of food fish, shellfish, and other aquatic plants and animals in lakes, streams, inlets, bays and estuaries. Aquacultural practices include the hatching, cultivating, planting, feeding, raising, harvesting and processing of aquatic plants and animals, and the maintenance and construction of necessary equipment, buildings and growing areas. Methods of aquaculture include but are not limited to fish hatcheries, fish pens, shellfish rafts, racks and longlines, seaweed floats and the culture of clams and oysters on tidelands and subtidal areas.

B. Policies

1. The Region should strengthen and diversify the local economy by encouraging aquacultural uses.
2. Aquacultural use of areas with high aquacultural potential should be encouraged.
3. Flexibility to experiment with new aquaculture techniques should be allowed.
4. Aquacultural enterprises should be operated in a manner that allows navigational access of shoreline owners and commercial traffic.
5. Aquacultural development should consider and minimize the detrimental impact it might have on views from upland property.
6. Proposed surface installations should be reviewed for conflicts with other uses in areas that are utilized for moorage, recreational boating, sport fishing, commercial fishing or commercial navigation. Such surface installations should incorporate features to reduce use conflicts. Unlimited recreational boating should not be construed as normal public use.
7. Areas with high potential for aquacultural activities should be protected from degradation by other types of uses which may locate on the adjacent upland.
8. Proposed aquacultural activities should be reviewed for impacts on the existing plants, animals and physical characteristics of the shorelines.
9. Proposed uses located adjacent to existing aquaculture areas which are found to be incompatible should not be allowed.

C. General Regulations

1. Aquaculture development shall not cause extensive erosion or accretion along adjacent shorelines.
2. Aquacultural structures and activities that are not shoreline dependent (e.g., warehouses for storage of products, parking lots) shall be located to minimize the detrimental impact to the shoreline.
3. Proposed aquaculture processing plants shall provide adequate buffers to screen operations from adjacent residential uses.
4. Proposed residential and other developments in the vicinity of aquaculture operations shall install drainage and waste water treatment facilities to prevent any adverse water quality impacts to aquaculture operations.
5. Land clearing in the vicinity of aquaculture operations shall not result in offsite erosion, siltation or other reductions in water quality.

Conclusions Based on Findings

1. The proposal was reviewed for compliance with the State Environmental Policy Act and an MDNS was issued on November 6, 2012. That threshold determination was not timely appealed. Comments calling for an environmental impact statement are not timely, and any comments that can be constructed as a call for cumulative impact analysis pursuant to SEPA are not timely. Findings 29, 30, 31, and 32.
2. Cumulative impact analysis is not required for shoreline substantial development permits pursuant to the Shoreline Management Act. The Shoreline Hearings Board has concluded that each geoduck aquaculture proposal must be reviewed on the merits of its own site, and only in projects proposed on shorelines of statewide significance or in cases where there is proof of impacts that risk harm to habitat, loss of community use, or a significant degradation of views or aesthetic impacts, a cumulative impacts analysis is warranted. While public comment includes allegations that the project by itself or in conjunction with existing and possible future aquaculture would harm wildlife and/or habitat, this non-expert opinion evidence does not outweigh the scientific evidence in the record that finds geoduck aquaculture generally (Sea Grant study) and as proposed at this site specifically (Biological Evaluation) is not a significant concern for long-term risk to the plants, animals, and physical characteristics of the shoreline. While public comments cite to and reference several studies and articles characterized as controverting the evidence considered by Staff, the studies and articles are not in the record. There is no indication that studies of the subject property have been conducted that undermine the site-specific evaluations in evidence. Because there are no parks, marinas, or other public recreation facilities in the vicinity and the project is proposed on private tidelands surrounded by private lands not included in any navigation channel, the project would not impact navigation, recreation, or public access to the shoreline. The offered photos of unsightly shellfish operations do not accurately depict the proposed use, and no other evidence was offered to show that the project as proposed and conditioned would result in any aesthetic impacts. The record contains no evidence that noteworthy views would be marred by the proposal. The unchallenged MDNS found no unmitigated impacts to

any element of the environment, aesthetics, or recreation. No cumulative impacts analysis is required under the SMA. *Findings 2, 9, 11, 16, 17, 18, 23, 24, 25, 26, 27, 42, 43, 44, 49, and 51; Coalition to Protect Puget Sound et al v. Pierce County and Longbranch Shellfish, SHB No.11-019 (2011).*

3. As the Shoreline Hearings Board has acknowledged, the Washington State Legislature has identified aquaculture as an activity of statewide interest that is a preferred, water-dependent use of the shoreline, which when properly managed can result in long-term over short-term benefits and protect the ecology of the shoreline. Aquaculture is allowed outright in the underlying zoning district and in the Conservancy Shoreline Environment upon review for compliance with applicable provisions in the Shoreline Master Program for the Thurston Region. (Review of SMPTR criteria is addressed in conclusion 4 below.) As conditioned, the project would be required to comply with the Nationwide Permit 48 terms and conditions, conditions imposed by the MDNS, and conditions of the instant permit approval. With these conditions, the proposal would be consistent with the policies of the SMA and would be a reasonable and appropriate use of the shoreline. *Findings 2, 3, 4, 5,6, 7, 22, 28, 29, 30, 31, 32, 39, 40, and 41; WAC 173-27-241(3)(b); Cruver v. San Juan County and Webb, SHB No. 202 (1976); Penn Cover Seafarms v. Island County, SHB No. 84-4(1984); Marnin and Cook v. Mason County and Ecology, SHB No. 07-021 (Modified Findings, Conclusions, and Order, February 6, 2008).*
4. No residence would have its view obstructed by the proposal and no structure taller than 35 feet would be built. As conditioned, the proposal complies with applicable regulations in the Washington Administrative Code. *Findings 8, 9, 10, 11, 12, 13, 14, 15, 16, and 51.*
5. As conditioned, the proposed aquaculture activities would comply with all applicable policies and regulations of the SMPTR.
 - A. With regard to regional criteria, the project would not hinder existing nor create new public access to shorelines, as the site is comprised of privately owned tidelands and all aquaculture access would be by water. A site-specific study reviewed the proposal in light of the specific characteristics of the subject property and proposed farming methods concluding that water quality impacts would be short-term and minimal and that species displacement due to project-related turbidity and noise would be temporary. Specifically, the BE and Addendum BE found that the project may affect but is not likely to adversely affect nearby sand lance spawning habitat because the project would not spatially overlap the sand lance spawning areas. The project may impact but is not likely to adversely impact ESA-listed species or critical habitat for ESA-listed species. As determined in the SEPA review process, the site is not notable for aesthetic, scenic, historic, or ecological qualities. No evidence in the record suggests the proposal would result in any adverse effects to public health. *Findings 2, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, and 34.*

- B. Approval of the requested permit would support the SMPTR's stated policy of encouraging aquacultural uses for the sake of strengthening the local economy. The record demonstrates that the site is an area with high aquaculture potential. The project would use tested and proven aquaculture methods. The record would not interfere with navigation of shoreline owners or commercial traffic. As proposed and conditioned, the project would minimize visual impacts to surrounding properties through the use of grey PVC tubes, area nets, regular monitoring of equipment to collect escaped gear or other debris, and because the use would only be above the waterline 20% of the time while gear is in place. There are no adjacent residences or uses other than a nearby geoduck bed, with which the proposal would not have conflict. The proposal was reviewed in a site-specific study that considered impacts to endangered and threatened species and critical habitats. The site specific study concluded that impacts to the existing natural environment would be localized and temporary. These conclusions are consistent with the findings to date of the Washington Sea Grant Study Interim reports (2009, 2011, and 2012). *Findings 2, 3, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 26, 27, 42, 43, 44, and 51.*
- C. The proposal constitutes a shoreline dependent aquacultural activity. No evidence in the record shows extensive erosion or accretion along the shoreline would occur. The site specific evaluation in the record finds that water quality impacts would be short-term and minimal. These findings are consistent with the data to date in the most recent Sea Grant interim report which found that current practices have minimal impacts on benthic communities of infaunal invertebrates, with no spillover into adjacent habitats, suggesting that the disturbance occurring on the scale of current harvest practices is within the range of natural variation. No processing plant, residential development, or land clearing is proposed. *Findings 2, 19, 23, 24, 25, 26, 27, 42, 43, and 44.*
6. The findings of the site-specific study offered by the Applicant (localized and temporary impacts only) are consistent with the interim findings of the Washington Sea Grant Study and the Nationwide Permit 48 issued by the ACOE. However, because the Sea Grant study is not completed, because commercial geoduck aquaculture is a relatively new enterprise, and because many citizens of Thurston County and Resource Stewardship Staff are concerned about any potential long term adverse effects to Puget Sound, it is appropriate to require review prior to future crop plantings. Recourse Stewardship's argument that the five-year limit established in WAC 173-27-090(3) should be applied is not persuasive in the case of a geoduck operation due to the cyclic nature of the proposed use. Geoducks take an average of seven years to reach marketable harvest weight. A condition requiring review prior to the first harvest would lead to an absurd result. Staff's alternative recommended condition that would require review of the SSDP in seven years or prior to replanting is adopted. Review at that future time will look at the final report of the Sea Grant study and will consider impacts shown to be occurring on-site. If facts at the time merit cumulative impact analysis pursuant to the SMA or other law in effect at the time, it shall be conducted during the review. *Findings 23, 24, 25, 26, 27, 35, 36, 37, 39, 40, 41, 42, 43, 44, and 51.*

7. Additional conditions of approval are necessary to ensure that the Applicant's stated intention to comply with the recommendations of the BE and the Addendum BE becomes a requirement of the permit. All on-site operations should be required to comply with the conservation measures identified at pages 21 through 24 of the Biological Evaluation and on pages 4 and 5 of the Addendum BE, as modified by the ACOE NWP 48 authorization, because the conservation measures were included in project review by the three federal agencies and by the County when each agency recommended or issued approval. *Findings 23, 24, 25, 26, and 27; WAC 173-27-150.*

DECISION

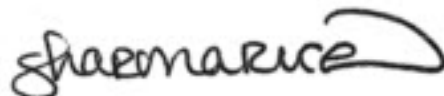
Based upon the preceding findings and conclusions, the requested shoreline substantial development permit allow development of a phased 0.92-acre geoduck bed in the intertidal lands associated with the residential parcel at 9330 Maple Beach Lane NW within the Conservancy Shoreline Environment associated with Eld Inlet is **GRANTED** subject to the following conditions:

1. Prior to or in conjunction with the commencement of bed preparation, all on-site operations shall comply with the regulations and requirements of the Thurston County Code and the November 6, 2012 mitigated determination of non-significance.
2. All on-site operations shall maintain compliance with all applicable policies and provisions of the Shoreline Management Act, its rules, and the Shoreline Master Program for the Thurston Region.
3. This approval does not relieve the applicant from compliance with all other local, state and/or federal approvals, permits, and/or laws necessary to conduct the development activity for which this permit is issued. Any additional permits and/or approvals shall be the responsibility of the applicant.
4. No fill shall be placed on the beach. A permit from the U.S. Army Corps of Engineers shall be obtained prior to any beach excavation if such permit is required. It is the responsibility of the applicant to investigate the need for this permit.
5. No discharge of sediments into Puget Sound shall be permitted at any time except as approved by the US Army Corps of Engineers and WA Department of Ecology.
6. Bed preparation must commence within two years, and all tubes and netting must be installed within five years, of the effective date of this permit. The effective date is the date of the last action required on the shoreline permit and all other government permits and approvals that authorize the development to proceed.
7. The aquaculture operation shall be reviewed by the Resource Stewardship Department through an open record review hearing in front of the Thurston County Hearing Examiner prior to subsequent replanting or within seven years, whichever occurs first. Review shall assess emerging environmental research and environmental issues arising from the

approved operation, if any. If facts at the time of the review warrant cumulative impact analysis under then-applicable law, it shall be conducted during the review. The hearing shall be held within 60 days following an application for review filed by the Applicant with the Thurston County Resource Stewardship Department.

8. All activities related to the proposed geoduck bed shall be in substantial compliance with the site plan submitted and made part of this staff report, including modifications as required by this approval. Any expansion or alteration of this use will require approval of a new or amended Shoreline Substantial Development Permit.
9. Any lighting associated with the operation shall be designed and placed to avoid direct or reflected glare onto nearby residences.
10. Noise from equipment or personnel engaged in the operation shall not rise to the level of persistently annoying as reported by any nearby property owner. Although this level of noise is subjective, the County will investigate and may require appropriate mitigations. Additionally, noise from machinery and equipment shall not exceed 60 decibels at the property line during daylight hours and 50 decibels from 10:00 PM to 7:00 AM as limited by WAC 173-60-040.
11. Hard markers or structures on the beach and in the water shall be avoided where possible. This includes but is not limited to property boundary markers and equipment to hold down netting.
12. All activities related to the proposed geoduck bed shall be in substantial compliance with the recommended conservation measures in the Biological Evaluation at Exhibit 1, Attachment M.2 and the Addendum Evaluation at Exhibit 1, Attachment M.3, except that in cases of conflict with required mitigation measures of the MDNS and/or the ACOE authorization of August 16, 2012, the measure most protective of the environment shall be required.
12. Physical activities on the beach pursuant to this permit shall not begin and are not authorized until 21 days from the date of filing of the Hearing Examiner's decision with the Department of Ecology as required in RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within 21 days from the date of filing have been terminated, except as provided in RCW 90.58.140(5)(a) and (b).

Decided January 18, 2013.



Sharon A. Rice
Thurston County Hearing Examiner

THURSTON COUNTY
PROCEDURE FOR RECONSIDERATION AND APPEAL
OF HEARING EXAMINER DECISION TO THE BOARD

NOTE: THERE MAY BE NO EX PARTE (ONE-SIDED) CONTACT OUTSIDE A PUBLIC HEARING WITH EITHER THE HEARING EXAMINER OR WITH THE BOARD OF THURSTON COUNTY COMMISSIONERS ON APPEALS (Thurston County Code, Section 2.06.030).

If you do not agree with the decision of the Hearing Examiner, there are two (2) ways to seek review of the decision. They are described in A and B below. Unless reconsidered or appealed, decisions of the Hearing Examiner become final on the 15th day after the date of the decision.* The Hearing Examiner renders decisions within five (5) working days following a Request for Reconsideration unless a longer period is mutually agreed to by the Hearing Examiner, applicant, and requester.

The decision of the Hearing Examiner on an appeal of a SEPA threshold determination for a project action is final. The Hearing Examiner shall not entertain motions for reconsideration for such decisions. The decision of the Hearing Examiner regarding a SEPA threshold determination may only be appealed to Superior Court in conjunction with an appeal of the underlying action in accordance with RCW 43.21C.075 and TCC 17.09.160. TCC 17.09.160(K).

A. RECONSIDERATION BY THE HEARING EXAMINER (Not permitted for a decision on a SEPA threshold determination)

1. Any aggrieved person or agency that disagrees with the decision of the Examiner may request Reconsideration. All Reconsideration requests must include a legal citation and reason for the request. The Examiner shall have the discretion to either deny the motion without comment or to provide additional Findings and Conclusions based on the record.
2. Written Request for Reconsideration and the appropriate fee must be filed with the Resource Stewardship Department **within ten (10) days of the written decision**. The form is provided for this purpose on the opposite side of this notification.

B. APPEAL TO THE BOARD OF THURSTON COUNTY COMMISSIONERS (Not permitted for a decision on a SEPA threshold determination for a project action)

1. Appeals may be filed by any aggrieved person or agency directly affected by the Examiner's decision. The form is provided for this purpose on the opposite side of this notification.
2. Written notice of Appeal and the appropriate fee must be filed with the Resource Stewardship Department **within fourteen (14) days of the date of the Examiner's written decision**. The form is provided for this purpose on the opposite side of this notification.
3. An Appeal filed within the specified time period will stay the effective date of the Examiner's decision until it is adjudicated by the Board of Thurston County Commissioners or is withdrawn.
4. The notice of Appeal shall concisely specify the error or issue which the Board is asked to consider on Appeal, and shall cite by reference to section, paragraph and page, the provisions of law which are alleged to have been violated. The Board need not consider issues, which are not so identified. A written memorandum that the appellant may wish considered by the Board may accompany the notice. The memorandum shall not include the presentation of new evidence and shall be based only upon facts presented to the Examiner.
5. Notices of the Appeal hearing will be mailed to all parties of record who legibly provided a mailing address. This would include all persons who (a) gave oral or written comments to the Examiner or (b) listed their name as a person wishing to receive a copy of the decision on a sign-up sheet made available during the Examiner's hearing.
6. Unless all parties of record are given notice of a trip by the Board of Thurston County Commissioners to view the subject site, no one other than County staff may accompany the Board members during the site visit.

C. STANDING All Reconsideration and Appeal requests must clearly state why the appellant is an "aggrieved" party and demonstrate that standing in the Reconsideration or Appeal should be granted.

D. FILING FEES AND DEADLINE If you wish to file a Request for Reconsideration or Appeal of this determination, please do so in writing on the back of this form, accompanied by a nonrefundable fee of **\$620.00** for a Request for Reconsideration or **\$820.00** an Appeal. Any Request for Reconsideration or Appeal must be **received** in the Permit Assistance Center on the second floor of Building #1 in the Thurston County Courthouse complex no later than 4:00 p.m. per the requirements specified in A2 and B2 above. **Postmarks are not acceptable.** If your application fee and completed application form is not timely filed, you will be unable to request Reconsideration or Appeal this determination. The deadline will not be extended.

* Shoreline Permit decisions are not final until a 21-day appeal period to the state has elapsed following the date the County decision becomes final.



Project No. _____ Appeal Sequence No.: _____

Check here for: RECONSIDERATION OF HEARING EXAMINER DECISION

THE APPELLANT, after review of the terms and conditions of the Hearing Examiner's decision hereby requests that the Hearing Examiner take the following information into consideration and further review under the provisions of Chapter 2.06.060 of the Thurston County Code:

(If more space is required, please attach additional sheet.)

Check here for: APPEAL OF HEARING EXAMINER DECISION

TO THE BOARD OF THURSTON COUNTY COMMISSIONERS COMES NOW _____
 on this _____ day of _____, 20___, as an APPELLANT in the matter of a Hearing Examiner's decision rendered on _____, 20___, by _____ relating to _____

THE APPELLANT, after review and consideration of the reasons given by the Hearing Examiner for his decision, does now, under the provisions of Chapter 2.06.070 of the Thurston County Code, give written notice of APPEAL to the Board of Thurston County Commissioners of said decision and alleges the following errors in said Hearing Examiner decision:

Specific section, paragraph and page of regulation allegedly interpreted erroneously by Hearing Examiner:

1. Zoning Ordinance _____
2. Platting and Subdivision Ordinance _____
3. Comprehensive Plan _____
4. Critical Areas Ordinance _____
5. Shoreline Master Program _____
6. Other: _____

(If more space is required, please attach additional sheet.)

AND FURTHERMORE, requests that the Board of Thurston County Commissioners, having responsibility for final review of such decisions will upon review of the record of the matters and the allegations contained in this appeal, find in favor of the appellant and reverse the Hearing Examiner decision.

STANDING

On a separate sheet, explain why the appellant should be considered an aggrieved party and why standing should be granted to the appellant. This is required for both Reconsiderations and Appeals.

Signature required for both Reconsideration and Appeal Requests

 APPELLANT NAME PRINTED

 SIGNATURE OF APPELLANT

Address _____

 Phone _____

Please do not write below - for Staff Use Only:

Fee of \$620.00 for Reconsideration or \$820.00 for Appeal. Received (check box): Initial _____ Receipt No. _____

Filed with the Resource Stewardship Department this _____ day of _____, 20___.