

OFFICE OF THE HEARING EXAMINER

THURSTON COUNTY

REPORT AND DECISION

PROJECT NO.: 2014101114 Shoreline Substantial Development Permit

PARCEL NO.: 12903230300

LOCATION: 9222 Hunter Point Road N.W.
Olympia, WA 98502

APPLICANT: Henderson Shellfish
Attn: Hui Xia
8822 Libby Road N.E.
Olympia, WA 98506

OWNER: Russell Duncan
9222 Hunter Point Road N.W.
Olympia, WA 98502

PLANNER: Scott McCormick, Associate Planner, M.E.S.

SUMMARY OF REQUEST:

Shoreline Substantial Development Permit to allow commercial, intertidal, geoduck operations on private tidelands. An application for the project was submitted to Thurston County on March 27, 2014 by Henderson Shellfish (applicant), Russell Duncan (owner). The proposed, Duncan geoduck farm is approximately 0.8 acres of tidelands. The site is located at 9222 Hunter Point Rd NW, Olympia.

SUMMARY OF DECISION: Request granted, subject to conditions.

DATE OF DECISION: June 2, 2016

PUBLIC HEARING:

After reviewing the Resource Stewardship Department Staff Report and examining available information on file with the application, the Examiner conducted a public hearing on the request as follows:

The hearing was opened on May 16, 2016, at 10:00 a.m.

Parties wishing to testify were sworn in by the Examiner.

The following exhibits were submitted and made a part of the record as follows:

- EXHIBIT "1" - Resource Stewardship Department Staff Report**
- Attachment a - Notice**
- Attachment b - Application**
- Attachment c - JARPA**
- Attachment d - SEPA**
- Attachment e - Zoning Map**
- Attachment f - Biological Evaluation**
- Attachment g - Notice**
- Attachment h - MDNS**
- Attachment i - Letter from DOE**
- Attachment j - Memo from Public Works dated August 13, 2015**
- Attachment k - Letter from Nisqually Indian Tribe dated December 29, 2015**
- Attachment l - Letter from DOE dated February 18, 2015**
- Attachment m - Letter from DOE dated December 18, 2014**
- Attachment n - Letter from DOE dated April 17, 2014**
- Attachment o - Memo from Thurston County Health Department**
- Attachment p - Email from Fletcher Hahn (Neighbor) dated December 19, 2014**
- Attachment q - Photos of Public Notice**
- Attachment r - MFR from EPA dated May 13, 2014**
- Attachment s - Written Testimony from Hui Xia**

The Minutes of the Public Hearing set forth below are not the official record and are provided for the convenience of the parties. The official record is the recording of the hearing that can be transcribed for purposes of appeal.

SCOTT McCORMICK appeared, presented the Resource Stewardship Department Staff Report, and testified that the site is located on Eld Inlet and contains .8 acres of tidelands. The applicant will plant the geoducks between the plus three foot and minus four foot levels at mean lower low water. He then described the project. The applicant will place the geoduck seed in PVC tubes that will rise two to three inches above the natural beach grade. The tubes will be covered by water 80 percent of the time. The applicant will install area wide netting to ensure that individual nets and tubing stay onsite. The applicant must acquire a shoreline substantial development permit plus State and Federal permits prior to commencing operation. The County responsible official conducted SEPA review and issued a DNS on December 22, 2015. No appeals were filed by the appeal date of January 12, 2016. The applicant submitted a Biological Evaluation, and the County also considered the Sea Grant Report, the RCWs, and the Thurston County Code. The geoduck farm will likely create some impacts, but subject to compliance with conditions of

approval as well as with agency conditions, the impacts will be minimal and of short duration. No eelgrass or other vegetation of importance is in the area. The project will create no significant impacts to any element of the environment. He has received few public comments and those received generally support the project. Staff recommends approval and he noted Condition 16 that requires the marking of the tubes and netting.

DAWN PEEBLES appeared and referred to one condition of approval that would be applicable if the applicant utilized landward access to the project.

HUI XIA appeared on behalf of the request and read from a prepared statement. The applicant prepared applications for all three farms that will together consist of 1.5 acres in the same area. The beach has a high potential for supporting geoducks, and both Thurston County and the State encourage aquaculture at locations such as the present. No parks, marinas, or other public facilities are located in the area that would draw people to the beach. Two houses exist in the area so the farm will not have much human contact. The inlet does not contain a navigational channel and the farm will not interfere with other uses of the water. The net and tubes will be in the ground for 18 to 24 months and will be covered by water 80 percent of the time. They have worked with the Squaxin Island Tribe which has observed their operation. On March 16, 2016, the Tribe sent a letter that it had no objection to the project. The beach is not a high value area, is not a shoreline of statewide significance, and does not support eelgrass or other vegetation. They like to place their farms in more developed areas that are already altered. The Biological Evaluation shows the mitigation. They need clear, clean water for growing and are very interested in keeping the water clean. They are not located in a herring or smelt breeding area and no portion of the farm is above plus three feet where breeding occurs. No overlap will occur between forage fish and the farm. No eelgrass is located in any location. The Corps' permit will follow and will address herring spawning areas. The project is compatible with the RRR 1:5 zone classification that allows agriculture uses. The definition of agriculture includes geoduck farms. This farm will not be the first in the community as two farms are to the north, one of which they operate. They have always been in compliance with all regulations and have received no complaints. They use the large, area wide netting in addition to individual nets secured by rubber bands on the tubes. Most of the time the tubes are underwater and 80 percent of the time they are not visible. They will maintain the beach on a regular basis and clean the beach whether the items belong to them or not. Other property owners come to them due to their ethical work. They produce local jobs, especially in the winter when they harvest, when jobs are needed most. The project is also consistent with the Comprehensive Plan. She then questioned Condition 4 that requires the applicant to provide a copy of the survey submitted to the Corps. She suggested a revision and staff agreed that she would provide a copy of the Corps' permit. The Corps requires marking of all netting and tubes. She then introduced Exhibits R, S, and T. She then testified that the requirement of cumulative impact must meet six conditions and this site does not.

The parties then agreed that all testimony presented in the present case could also be used in the other two substantial development permits for geoduck farms on adjacent

parcels. No one spoke further in this matter and the Hearing Examiner took the matter under advisement. The hearing was concluded at 10:35 a.m.

NOTE: A complete record of this hearing is available in the office of the Thurston County Resource Stewardship Department.

FINDINGS, CONCLUSIONS, AND DECISION:

FINDINGS:

1. The Hearing Examiner has admitted documentary evidence into the record, heard testimony, and taken this matter under advisement.
2. This project required review pursuant to the State Environmental Policy Act (SEPA) because of the proposed work in and over surface waters. Thurston County Resource Stewardship acting as the Responsible Official (RO) issued a threshold Mitigated Determination of Significance (MDNS) on December 22, 2015 (Attachment h). The SEPA determination was not appealed and became final on January 12, 2016, and imposed 15 mitigating measures.
3. Written notice of the public hearing was sent to all property owners within 500 feet of the site and notice was published in The Olympian on May 6, 2016, at least ten (10) days prior to the hearing. The site was also posted on May 6, 2016.
4. The underlying property owner, Russell Duncan, has a possessory ownership interest in an irregularly shaped, 18 acre parcel of property located at 9222 Hunter Point Road N.W., Olympia, in unincorporated Thurston County. The parcel is located within the Rural Residential Resource One Dwelling Unit Per Five Acres (RRR1/5) zone classification of the Thurston County Code (TCC). The parcel extends from Hunter Point Road on the west to Eld Inlet on the east and then onto the tidelands. The Duncan parcel is within the Rural Shoreline designation of the Shoreline Master Program for the Thurston Region (SMP).
5. Improvements on the site include single-family residential homes. The abutting parcel to the north contains 3.43 acres and is unimproved. Smaller lots with single-family residential homes are located to the south. Owners of the two adjacent parcels to the south have also submitted applications for a shoreline substantial development permit to allow commercial, intertidal, geoduck operations on their tidelands.
6. The applicant, Henderson Shellfish, Inc., has acquired a leasehold interest in approximately .8 acres of Duncan's tidelands. On March 27, 2014, the applicant submitted an application for a shoreline substantial development permit to establish a commercial, intertidal, geoduck operation on said tidelands. The farm is proposed

in the intertidal zone between plus three feet to minus four feet of water depth as measured at mean lower low water (MLLW). The farm would involve placement of approximately 34,000, ten inch long, six inch diameter, gray, PVC tubes at a density of one tube per square foot of tideland. The applicant would cover each PVC tube with an individual net and would also install area wide, 40 foot by 40 foot, predator nets over the entire farm. The nets and tubes would protect the geoduck seed from predators.

7. The initial farming activities will include site preparation, seed planting, predator net placement, and tube placement. The tubes and netting would remain on the tidelands for approximately 12 to 18 months, at which time the applicant would remove them. After three to five years the applicant would harvest the geoducks utilizing a hand pressurized, hose and nozzle system with muffler and insulation box. The applicant would mount the pumps on a non-propelled barge and anticipates that harvesting would occur over a seven day period. The applicant would install the tubes in straight lines and anticipates that water would cover the tubes approximately 80 percent of the time. In addition to the substantial development permit, the applicant must also acquire State and Federal permits.
8. As previously found the RO issued a MDNS following SEPA review and imposed 15 mitigating measures. The MDNS was largely based upon a Biological Evaluation (BE) prepared by Greenland Solutions dated January, 2014 (Attachment f to Exhibit 1). The BE addresses impacts of the farm on endangered species and essential fish habitat pursuant to the Magnuson-Stevens Fishery Conservation and Management Act and the 1996 Sustainable Fisheries Act. The BE addresses potential effects of the farm on several endangered and threatened species to include Chinook salmon, steelhead, and bull trout. The BE also satisfies the requirements of a Habitat Assessment required by FEMA for non-exempt projects within the 100 year floodplain. The BE sets forth a list of 20 conservation measures that may become project conditions or otherwise integrated into recommended conditions. The RO also considered the final Washington Sea Grant Report to the Washington State Legislature for Geoduck Aquaculture as well as other available documents. Said studies show that farm impacts will be of short duration and limited intensity and do not rise to a significant level as defined in Section 197-11-794 of the Washington Administrative Code (WAC). The BE also shows an absence of native eelgrass on the entire site.
9. Section 20.09A.020 TCC provides that agriculture is an allowed use within the RRR 1/5 zone classification. Section 20.03.040(3) TCC includes in the definition of agriculture the raising, harvesting, and processing of clams and oysters. Therefore, the proposed geoduck farm is an outright permitted use in the RRR 1/5 classification. However, because of the farm's location within the jurisdiction of the SMP, the applicant must acquire a shoreline substantial development permit. The County may attach conditions as necessary to assure consistency of the project with the State Shoreline Management Act (SMA) and the SMP.

10. The project satisfies applicable policies of the SMP as set forth on pages 8-10 of the Staff Report. The site is located within an area of high aquaculture potential, and policies encourage aquaculture uses in such areas. The farm will not impact navigational access nor commercial traffic due to its location in Eld Inlet on the northeast side of the Steamboat Island Peninsula approximately 3,000 feet south of Hunter Point. Views from upland properties should not be unduly adversely impacted since the tubes will be visible for only 20 percent of the 24 hour cycle (approximately five hours) for an approximately 18 month period.
11. The project likewise satisfies all General Regulations for aquaculture as set forth on pages 40-41 of the SMP and as discussed on pages 10-14 of the Staff Report. According to the Sea Grant Final Report, geoduck farms do not cause extensive erosion or accretion along the shorelines, and any such action that does occur is quickly disbursed by tides upon removal of the tubes. The applicant proposes no upland activities and thus many of the general regulations are not applicable. No land clearing will occur, and therefore the storm drainage criteria are not applicable. The Thurston County Environmental Health Department has reviewed the project and determined that because no project related activities will occur on or near the on-site septic system and well, it will have no impacts thereon. The Washington Sea Grant Study performed by the University of Washington and the shellfish industry determined that the aquaculture industry in south Puget Sound is of significant economic and environmental importance and can be part of a sustainably managed shoreline environment.
12. As requested by the applicant and staff, the Examiner has modified proposed Condition 4.

CONCLUSIONS:

1. The Hearing Examiner has the jurisdiction to consider and decide the issues presented by this request.
2. The applicant has shown that the request for a shoreline substantial development permit to allow establishment of a commercial, intertidal, geoduck farm satisfies all criteria set forth in the SMP and therefore should be granted subject to the following conditions:
 1. The proposed project must be consistent with all applicable policies and other provisions of the Shoreline Management Act, its rules, and the Shoreline Master Program for the Thurston Region.
 2. Aquaculture preparation, planting, maintenance and harvesting shall be in compliance with the most current version of the Washington State Geoduck Growers Environmental Codes of Practice for Pacific Coast Shellfish

Aquaculture except as otherwise conditioned or required by Thurston County Resource Stewardship.

3. An unobtrusive but visible sign shall be placed at each aquaculture bed listing the name and contact information for a person designated to immediately address problems associated with the aquaculture bed when discovered by citizens or agency representatives.
4. The applicant shall submit its Surf Smelt and Sandlance Survey to the Thurston County Resource Stewardship Department prior to any aquacultural activities on the site.
5. The applicant / operator shall routinely inspect, document, and report any fish or wildlife found entangled in anti-predator nets or other culturing equipment. At least twice a month during the time the nets are installed, they shall be inspected and a record of observations maintained. Live entangled fish and wildlife shall be released upon observation. During the required bi-monthly site visits the applicant / operator shall remove from the beach or secure any loose nets, tubing or aquaculture related debris.
6. Only washed gravel shall be used for shellfish bed preparation. Unsuitable material (e.g., trash, debris, concrete, asphalt, tires) shall not be discharged, used as fill or in aquaculture operations.
7. 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.
8. All protective tubes and netting related to the proposed Geoduck aquaculture shall be removed from the shoreline within twenty-four (24) months of installation.
9. Shellfish culturing shall not be placed above the tidal elevation of +5 MLLW in order to minimize potential impacts to forage fish habitat.
10. Land vehicles and equipment will not be washed, stored, fueled, or maintained within 150 feet of any waterbody. All vehicles will be inspected for fluid leaks daily within 150 feet of any waterbody.
11. Harvest activities will occur during low tides where the least amount of turbidity will occur.

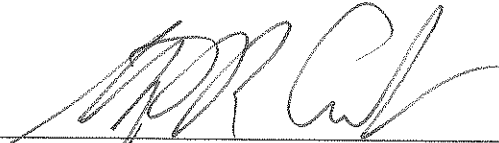
12. Permanent lighting of the aquaculture beds shall not be permitted. Any temporary lighting shall be directed such that off-site glare is minimized to the extent possible.
13. All individual screens placed on tubes shall be secured with UV-resistant fasteners.
14. If archaeological artifacts are observed during any phase of the aquaculture operation, all work shall be immediately halted. The State Department of Archaeology and Historic Preservation, the Thurston County Resource Stewardship Department and affected Tribes shall be contacted to assess the situation prior to resumption of work.
15. No physical work on the aquaculture beds shall be initiated until all required State and Federal permits and approvals have been granted.
16. All tubes, mesh bags, and nets used on the tidelands below the ordinary high water mark (OHWM) shall be clearly, indelibly, and permanently marked to identify the permittee name and contact information (e.g., telephone number, email address and mailing address). On area nets, if used, identification markers will be placed with a minimum of one identification marker for each 100 square feet of net.
17. Ensure that all anti-predator nets and tubes are secured in place to prevent them from escaping from the project area.
18. The property owner and applicant shall consider requests by researchers affiliated with federal, state and County governments to conduct research related to geoduck aquaculture at the site. Access shall be granted by the owner and applicant if the research will not disrupt farming activities.
19. If access to the beach for planting geoduck tubes, netting, pumps or any other equipment will be over the upland portion of the property, it will need to be done so as to prevent any vehicle or equipment travel or parking over any portion of the septic system or system components or near the well. Staging or equipment and materials for this project also should not be done on any portion of the septic system or system components.
20. The following Conservation Measures per the project Biological Evaluation (Attachment ... pg. 24) shall be followed during the life of the project.
 - a) Work will be completed in the dry during periods of tidal exposure wherever possible.
 - b) Equipment will be vessel-based and will not operate on the beach.

- c) Compliance with applicable State water quality standards (WAC 173-201A)
 - d) Spill cleanup materials shall be available on vessels used in project operations.
 - e) Use only approved screens on water pumps.
 - f) Use of hand-operated hand jets per (WAC 220-52-019)
 - g) Regular inspection and maintenance of fuel hoses, oil valves and fittings for leaks.
21. 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 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 filings have been terminated, except as provided in RCW 90.58.140(5)(a) and (b).
22. **Note:** The subject Shoreline Substantial Development Permit shall also act as the project FEMA 100-Year Floodplain Permit as conditioned herein.
23. The decision set forth herein is based upon representations made and exhibits, including plans and proposals submitted at the hearing conducted by the hearing examiner. Any substantial change(s) or deviation(s) in such plans, proposals, or conditions of approval imposed shall be subject to the approval of the hearing examiner and may require further and additional hearings.
24. The authorization granted herein is subject to all applicable federal, state, and local laws, regulations, and ordinances. Compliance with such laws, regulations, and ordinances is a condition precedent to the approvals granted and is a continuing requirement of such approvals. By accepting this/these approvals, the applicant represents that the development and activities allowed will comply with such laws, regulations, and ordinances. If, during the term of the approval granted, the development and activities permitted do not comply with such laws, regulations, or ordinances, the applicant agrees to promptly bring such development or activities into compliance.

DECISION:

The request for a shoreline substantial development permit to allow establishment of a commercial, intertidal, geoduck operation on .8 acres of private tidelands at a site located at 9222 Hunter Point Road N.W., Olympia, is hereby granted subject to the conditions contained in the conclusions above.

ORDERED this 2nd day of June, 2016.



STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

TRANSMITTED this 2nd day of June, 2016, to the following:

APPLICANT: Henderson Shellfish
Attn: Hui Xia
8822 Libby Road N.E.
Olympia, WA 98506

OWNER: Russell Duncan
9222 Hunter Point Road N.W.
Olympia, WA 98502

OTHERS:

THURSTON COUNTY

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 **\$651.00** for a Request for Reconsideration or **\$866.00** 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 \$651.00 for Reconsideration or \$866.00 for Appeal. Received (check box): Initial _____ Receipt No. _____
 Filed with the Resource Stewardship Department this _____ day of _____, 20___.