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BEFORE THE  
PIERCE COUNTY HEARING EXAMINER

APPELLANT: TAYLOR SHELLFISH  
FARMS

APPEAL APPLICATION NO. 612676

ADMINISTRATIVE APPEAL  
AA11-07

INTERVENORS' PROPOSED  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

FINDINGS OF FACT

1. In 2000, Taylor filed an application for a Shoreline Substantial Development Permit ("Permit") from Pierce County "to construct" and operate a geoduck aquaculture facility on property it leases from the Foss family. Ex. 1A (Notice of Appeal at 3, ¶ 6); Ex. 56 (2000 Application).

2. The Pierce County hearing Examiner granted the Permit in January, 2001 (Permit SD 22-00). Ex. 1A (Notice of Appeal at 3, ¶ 6); Ex. 59 (2001 Permit).

3. The Permit includes a restriction that provides that the Permit expires if the project "has not been completed within five (5) years after the approval of the Permit." Ex. 1A (Permit, Condition No. 5). The Permit provides that the five year term can be extended by up to one additional year if good cause is shown, but no longer. Id.

1           4.       More than six years after issuance of the Permit, the County was asked by Taylor  
2 to determine whether the Permit had expired (necessitating cessation of the operations or an  
3 application for a new Permit). Individual staff members had varying views on the issue, but most  
4 believed the permit had expired. Tr. 1:19:20 (Booth). Mr. Booth made clear to Taylor that any  
5 views he expressed to the contrary were only his personal views and not that of the County.  
6

7           5.       On August 8, 2007, the Pierce County Department of Planning and Land Services  
8 issued a formal Administrative Determination concluding that “the Permit has expired and further  
9 work at the site will require application for and approval of a new shoreline substantial  
10 development permit (SSDP).” Ex. 1A at 1. The Administrative Determination concluded that  
11 Taylor’s operations constitute “development” as that term is used in the Shoreline Management  
12 Act. Id. The Administrative Determination also concluded that the Permit had expired after six  
13 years (five years plus the one year extension). Id. The Department of Ecology also is of the  
14 opinion that this permit expires after six years. Tr. 1:73:16 (Murphy); Ex. 149.  
15

16           6.       On August 22, 2007, Taylor filed its Notice of Appeal of administrative  
17 determination. Ex. 1A. Taylor’s appeal raises two issues. First, Taylor claims that its operations  
18 do not constitute “development” for which a shoreline permit is required by the Shoreline  
19 Management Act. Second, Taylor claims that even if a shoreline permit is required, that the  
20 permit it obtained in 2000 has not expired because Taylor commenced operations within the  
21 initial five year term.  
22

23           7.       Taylor does not dispute that the total costs or fair market value of its operations  
24 exceeds the monetary threshold (\$5,000 as adjusted for inflation) in RCW 90.58.030(3)(e).  
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1           8.       In 2000, Taylor leased private tidelands along approximately one mile of Case  
2 Inlet from the North Bay Partnership (Foss Lease) for the purpose of establishing a commercial  
3 geoduck farm. The lease area covers approximately 12 acres.

4           9.       Taylor's operations include three phases: planting, cultivation, and harvesting.  
5 Taylor does not plant the entire beach at one time but rather does so in stages. At any given  
6 point, some areas of the beach of the lease area are being planted, others are in cultivation, and  
7 others are ready for harvest (or are actively being harvested). Once an area is harvested, it is  
8 replanted "almost immediately." Tr. 1:161:13 (Cooper). As a result, Taylor's operations  
9 constitute "a perpetual cycle of planting, cultivation, and harvesting." Notice of Appeal, ¶ 4.

10           10.       In the planting phase, Taylor inserts PVC pipes into the substrate on one foot  
11 centers (i.e., up to 43,000 per acre). See e.g., Ex. 150 (photo #35). Employees plant 3-4 baby  
12 geoducks by hand into each pipe. As of this date, approximately 900,000 geoducks are in the  
13 ground on this site. Tr. 2:16:24 (Phipps).

14           11.       One of Taylor's consultant's, Dr. Fisher, repeatedly characterized the tube and net  
15 array as a "structure." See, e.g., Tr. 3:134 -3:135; 3:157 – 3:158 ("the tubes and netting  
16 themselves . . . is the structure I'm referencing"); Tr. 2:37:20 (tubes and nets provide "structured  
17 habitat because it's creating three-dimensional relief"); Tr. 2:35:23 (same). Taylor's  
18 representative on regulatory compliance issues agreed with the County's characterization of the  
19 pipes as a "structure." Tr. 1:104:4-13 (Cooper).

20           12.       According to Taylor, the PVC pipes create a barrier which "temporarily protects  
21 the vulnerable juvenile geoducks from predators." Ex. 1A (Notice of Appeal, ¶ 2). Taylor  
22 typically also places large (50' by 50') canopy nets over the tubes. Tr. 1:174:7 (Phipps). Like the  
23 pipes, the purpose of the nets is to obstruct predators from reaching the juvenile geoducks, Tr.

1 2:11:20 (Phipps); Tr. 2:55:1 (Fisher), but the nets obstruct other animals, too, Tr. 2:11:24  
2 (Phipps); Tr. 2:90:20 (Leudtke); Ex. 150 (photo #34); Ex. 152.

3 13. Taylor's preference is to use "canopy nets," covering the entire array of pipes, but  
4 will use "individual tube nets and rubber bands" if an eagle nest is found in the vicinity. Tr.  
5 4:28:8 (Phipps).  
6

7 14. The PVC pipes and associated netting usually remain in place for approximately  
8 six to eighteen months, but can be there as long as two years. Tr. 1:161:3 (Cooper).

9 15. The approximate volume of the PVC tubes inserted into the beach can be  
10 calculated. Depending on the length of the tube inserted into the substrate, the volume of the  
11 material inserted into the beach in a single acre ranges from 12 to 28 cubic yards. Multiplied by  
12 the 12 acres in Taylor's Foss lease, the amount of material inserted into the beach amounts to  
13 between 144 and 216 cubic yards. Ex. 21. The Army Corps of Engineers states that geoduck  
14 operations "do not necessarily result in the discharge of fill," (Ex. 81), but the Army Corps does  
15 not exclude the possibility either.  
16

17 16. Four to five years after planting, the geoducks are harvested. Cooper 1:143:3.  
18 Approximately three-quarters of the harvesting is done by "beach harvest" on the beach at low  
19 tide with the use of a water jet; the remainder by "dive harvest", diving when the tide is high and  
20 using a water jet. Tr. 1:180:2 (Phipps). The water jet dislodges the substrate to a depth of three  
21 feet creating a hole large enough that "most of the time" the harvesters dangle their feet in it. Tr.  
22 1:182:7 (Phipps). See also Ex. 13 (*Dirty Jobs* video and Phipps narrative in the video). The  
23 water jet dislodges sand and other native beach material. Some of the sediments suspended in the  
24 water column during the operation are moved off-site by currents. Tr. 2:180:12 (Parsons and Ex.  
25 150, photo #47); Tr. 3:169:9 (Fisher has seen and measured plume). Downgradient, the sand  
26

1 sediment settles out, changing the shape and structure of the beach down current. Tr. 2:180:12  
2 (Parsons): Ex. 150 (Photo #49).

3           17.     The PVC tubes and netting create a physical obstruction to the public's use of the  
4 area, including the waters of Puget Sound. The facility occupies a large swath of tidelands,  
5 excluding others from using those tidelands. When the tide is out, the facility interferes with  
6 access to Puget Sound and obstructs beachcombers and other recreational users of the tidelands.  
7 When the tide is in, the tubes and nets obstruct use of the shallow waters of Puget Sound by water  
8 craft like kayaks, canoes, and shallow draft motor boats. E.g., Tr. 2:94:17 (Luedtke); Tr. 3:50:18  
9 (Pinneo). The tubes and nets also obstruct use of the area by windsurfers, divers and fishers. Tr.  
10 2:128:21 (Daley-fishing); Tr. 2:150:12 (Daley-fishing); Tr. 3:20 - 21 (Paradise-diving); Tr. 3:23  
11 (Paradise-windsurfers). The obstructive nature of the operations increases during planting and  
12 harvesting when barges, workers, hoses, and other equipment are present. The Foss farm is  
13 planted in segments, Tr.1:171:7 (Phipps), making all aspects of the operation ongoing. Inserting  
14 50,000 tubes takes a 6-8 man crew five days. Tr. 4:19:21 (Phipps). Planting 150,000 geoduck  
15 seed in 50,000 tubes takes a 6-8 man crew 5 days. Tr. 4:19:2 (Phipps). Harvest of geoducks takes  
16 a 3 man crew 20-25 days. Tr. 4:23:2 (Phipps). During one five month period, Taylor's records  
17 indicated barges were present at this site for pulling tubes for 40 days. Tr. 3:108:13 (Phipps).  
18 Neighbors believed they were there even longer. Maintenance and seed survival checks by the  
19 project manager and crew managers take four days a month. Tr. 4:22:1 (Phipps). When the nets  
20 are pulled out, the maintenance crew is there longer. Tr. 4:22:10 (Phipps). Crews harvest during  
21 the winter in the middle of the night during low tide Tr. 4:24:6 (Phipps). Planting of tubes and  
22 seed are done April to September on low tide days. Tr. 4:20:13 (Phipps). Operations on different  
23 segments may thus take around 70 to 80 days or more during the period between February  
24  
25  
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1 through September, taking into consideration some overlap in functions. This is approximately  
2 one-third of the days for an eight month period including weekends and holidays.

3 18. Crew uses scows (barges) to bring in tubes. Tr. 4:19:19 (Phipps). Crews use boats  
4 for harvest and cleanup. TR. 4:25:6 (Phipps). When planting and harvesting operations are in  
5 progress, Taylor flags the waters to keep boaters and divers out of the area. Tr. 1:34:15 (Cooper).  
6

7 19. In significant respects, Taylor's operations are similar to the operations at issue in  
8 *Washington Shell Fish, Inc. v. Pierce County*, 132 Wn. App. 239 (2006), Tr. 1:127:3 (Cooper),  
9 though Taylor's operations have not been so plagued with loose lines. Both operations have  
10 tubes in the tidelands with geoduck seed in the tubes. Tr. 1:127:3 (Cooper). Both operations are  
11 for the purposes of culturing and extracting geoduck Tr. 1:127:8 (Cooper). Both operations have  
12 hundreds of tubes in the tideland with geoduck seed in them, inches apart from each other. Tr.  
13 1:127:14 (Cooper). Both operations use dive harvesting for part of the harvest. Tr. 1:126:8,  
14 1:133:16 (Cooper), Tr. 1:180:2 (Phipps). Both operations flag the area to preclude recreation  
15 users and boaters from the dive harvest area. (Cooper 1:134:15). Debris is dislodged from both  
16 operations. Tr. 11:112:3 (Cooper), Tr. 2:92:7 (Leutdke), Ex. 150 (photo #50).  
17

18 20. The PVC tubes and netting also obstruct native plant, animals, and fish species.  
19 Indeed, it is the very purpose of the predator exclusion devices (the tubes and nets) to obstruct  
20 predators, e.g., wildlife, from occupying their normal habitat. Native species also are  
21 inadvertently trapped under the predator exclusion netting or are caught in the netting. Tr.  
22 2:128:8 (Daley). The entire facility is one large obstruction to native species in the tidelands.  
23

24 21. The Environmental Code of Practice (ECOP), Ex. 51, is an accurate description of  
25 the intended operations and practices at the Foss Farm with the following qualifications:  
26

1 (1) On the Foss Farm, Taylor has used and will use six-inch (as opposed to  
2 four-inch) diameter tubes. Tr. 3:122:4 (Phipps).

3 (2) On the Foss Farm, Taylor has used and will use canopy nets for predatory  
4 exclusion as opposed to individual tube nets and rubber bands, unless an eagle nest is found in the  
5 vicinity. If an eagle nest is found in the vicinity, Taylor will use individual tube nets and rubber  
6 bands, pursuant to an agreement with the Tahoma Audubon Society. Tr. 4:28:8 (Phipps).

7 (3) On the Foss Farm, Taylor has not and will not use the “harvest by hand”  
8 method of harvest described in ECOP. Letter from Kisielius to Examiner McCarthy, Oct. 5,  
9 2007.

10  
11 22. The description of water jet harvesting in ECOP indicates that it involves piercing  
12 the substrate with the water jet to create a hole: “The nozzle is inserted next to the geoduck  
13 siphon;” and “the average size hole produced is about one-third cubic feet” in deep water harvests.  
14 The ECOP allows water jet pressure up to 100 pounds per square inch. While this is far less  
15 pressure than necessary to drill through rock, it is sufficient to drill into a beach. Past harvesting  
16 at this site by Taylor has resulted in holes being created at least knee high. Tr. 2:19:13 (Phipps);  
17 Ex. 53 (first photo); Ex. 13 (*Dirty Jobs* video).

18  
19 23. Harvesting with the water jet is not at all like recreational clam digging or raking.  
20 According to the ECOP, water jet harvest is a highly efficient method of extraction and “100  
21 geoducks per hour can be harvested with this method.” On the other hand, the ECOP states that  
22 the hand digging method “can be very difficult and time consuming effort since geoducks are  
23 buried so deeply (36 inches) in the substrate.”

24  
25 24. Water jet harvesting results in the removal of sand and gravel from the beach.  
26 ECOP recognizes that the harvesting will “emulsify” the beach. During these operations,

1 sediments are disturbed and sediment plumes created. Tr. 3:170:11 (“there is sediment that’s  
2 disturbed—no one is denying that”) (Fisher). Pictures showed the sediment plumes created by  
3 this activity. See, e.g., Tr. 2:180:12 (Parsons referencing Ex. 150 (photo #47)). Prevailing  
4 currents carry the re-suspended materials off the property and deposit it off-site. Tr. 2:180:21  
5 (Parsons referencing line of sediment deposition on Ex. 150, (photo #49); Tr. 2:180 -2:184  
6 (“fines” re-suspended from harvesting); Tr. 3:28:24 (Paradise). According to ECOP, “the beach  
7 level will be lowered about one to two inches by the harvest.” Personal observations at this site  
8 indicate the volume lost may be greater than that. Tr. 2:97:22 (Leudtke).

10           25.     One to two inches of lost material equates to approximately 134 to 268 cubic yards  
11 of material per acre. Ex. 26. Taylor’s lease covers 12 acres, equating to the dredging and  
12 removal of nearly 1,500 to 3,000 cubic yards of material for each cycle of planting and  
13 harvesting. Moreover, Taylor may make multiple passes across any given tract to avoid leaving  
14 any valuable geoducks in the sand, TR. 1:143:5 (Cooper), further increasing the amount of  
15 material removed. Even if part of the material removed per acre is 60 – 80 cubic yards of geoduck  
16 biomass, Tr. 3:155:5 (Fisher), that leaves 74 to 178 cubic yards of other material removed per  
17 acre.

19           26.     Agitation dredging is a form of dredging that essentially involves shooting a jet of  
20 water into the substrate and then removing the displaced material through various means,  
21 including allowing currents to remove the dislodged material. Tr. 2:168:12 (Parsons). The water  
22 jet harvest technique for geoducks is functionally the same as agitation dredging. *Id.* Guidance  
23 from WDFW on their habitat conservation plan is that in relation to shoreline activities, semantics  
24 should not obscure the true function of a process. Tr. 2:168:6 (Parsons).



1           27. In addition to the obstruction with fishing described above, Taylor's operations  
2 interfere with fishing in a more indirect, but potentially more important way. There was  
3 substantial evidence that these operations interfere with the natural ecosystem and, in particular,  
4 the ecosystem upon which endangered salmon depend. Juvenile salmon heading out to sea hug  
5 the shoreline where food is more plentiful and large predatory fish are absent. The aquaculture  
6 facility forces juvenile salmon further offshore, reducing their access to their normal food sources  
7 and exposing them to greater predation. The facility also impairs the growth and abundance of  
8 forage fish upon which the juvenile salmon prey. These forage fish likely utilize the tidelands at  
9 issue here for rearing habitat. Taylor's operations are likely causing a decrease or elimination of  
10 forage fish habitat in this area. Also, the planted geoducks, growing at high densities, consume  
11 phytoplankton and zooplankton which are an important food source for forage fish. These  
12 adverse impacts to salmon, salmon habitat, and the species on which salmon prey for survival  
13 ultimately interfere with the ability of these waters to sustain a recreational salmon fishery. Tr.  
14 2:132 -2:135; 2:138 – 2:142; Tr. 2:147:23 (Daley). Moreover, to the extent these operations  
15 result in monocultures over a large area (like 12 acres), Tr. 2:135:7 (Daley), the cumulative  
16 adverse impact on habitat will increase, Ex. 142 at 503 ("If clam farming is a homogenizing force  
17 at large scales, then the greatest impact of clam aquaculture may result from cumulative impacts  
18 of several tenures within a given geographical area").

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22           28. Taylor submitted and referred to many studies in an effort to demonstrate that  
23 there are few or no significant environmental impacts associated with its operations. However,  
24 none of the studies addressed a facility or operation like that at issue here. Few studies involve  
25 geoducks. Tr. 3:193:11 (Davis). Many of Taylor's studies addressed cultivation of oysters (e.g.,  
26 Exhibits. 99. 106, 109, 113, 115, 122, 124, 125, 130, 138 and 139) or oysters in their natural

1 habitat (Exhibits. 100, 107, 117, 119, 120, 123, and 126) and were not useful for that reason. Tr.  
2 2:129:23 (Daley). Many of the studies examined situations far from Puget Sound, including  
3 many on the East Coast, where habitat issues are significantly different (e.g., Exhibits. 98  
4 (Wales), 101 (Atlantic Coast), 102 (Tasmania), 103 (Tasmania), 105 (Holland), 106 (Rhode  
5 Island), 109 France), 111 (Nova Scotia), 112 (Scotland), 113 Ireland, 116 (New Zealand), 117  
6 (France), 118 (Sweden), 119 (Virginia), 120 (Virginia and South Carolina), 122 (France), 123  
7 (North Carolina), 126 (Chesapeake Bay), 128 (Massachusetts), 131 (North Carolina), and 137  
8 (Wales)). These studies have little relevance, too. Tr. 2:129:23 – 2:130:16 (Daley); Tr. 3:194:10  
9 (Davis). The study of impacts in the freshwater environment of Lake Washington also is not  
10 relevant. Tr. 2:144:21 (Daley). Exhibit 142 involved a study of geoduck aquaculture in British  
11 Columbia, but the sites studied were much smaller, Tr. 3:162 – 3:164, and the author warned  
12 against extrapolating from that study to other sites. Ex. 142 at 496, 503. See also Tr. 3:165:7 –  
13 3:166:17 (Fisher concurring). By its own terms, that study cannot be used to assess the impacts  
14 associated with the Taylor facility which is many times larger than the sites examined in Exhibit  
15 142. Dr. Fisher also pointed out that there was a “very big difference” between the aquaculture in  
16 that study and that being done by Taylor and that the habitat is not the same. Tr. 3:164:15. None  
17 of Taylor’s studies (or any other study) have addressed the impact of geoduck aquaculture on  
18 forage fish. Tr. 2:131:16 (Daley). Mr. Troutt conceded that his testimony had nothing to do with  
19 whether geoduck aquaculture constitutes “substantial development” under the SMA. Tr. 4:12:18-  
20 21.

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24 29. The geoduck aquaculture industry is in its infancy. There is much that is not yet  
25 known about the impacts associated with these facilities. Ex. 16 (Sea Grant report); Tr. 2:143:13  
26 (Daley); Tr. 3:187:11 (Davis referencing Ex. 114). Requiring re-application on a periodic basis

1 will provide the State and the County with assurance that new information regarding the project's  
2 impacts is taken into account.

3 CONCLUSIONS OF LAW

4 1. The parties agree that this appeal presents two issues: (1) whether Taylor  
5 Shellfish's geoduck operations constitute "development," as that term is defined in the Shoreline  
6 Management Act, thus requiring a Shoreline Substantial Development Permit and, if so, (2)  
7 whether the permit Taylor obtained for its Foss Farm property in 2000 has expired.

8 2. The citizens of Washington State adopted the Shoreline Management Act (SMA),  
9 ch. 90.58 RCW, through citizen initiative, finding that "the shorelines of the state are among the  
10 most valuable and fragile of its natural resources and . . . there is great concern throughout the  
11 state relating to their utilization, protection, restoration, and preservation." RCW 90.58.020.

12 3. The State policy enunciated in the Act calls for restricting construction on  
13 privately owned and publicly owned shorelines of the State to protect against adverse effects to  
14 the public health, the land and its vegetation and wildlife, and the waters of the state and their  
15 aquatic life. Id. That section further states "in the implementation of this policy, the public's  
16 opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be  
17 preserved to the greatest extent feasible consistent with the overall best interests of the state and  
18 the people generally." Id.

19 4. The Shoreline Management Act explicitly requires that its provisions be broadly  
20 construed "to protect the State's shorelines as fully as possible." See RCW 90.58.900. When  
21 doubt exists, the courts repeatedly have required and employed a broad reading of the Act to  
22 assure that its environmental protection purposes are served. Bellevue Farm Owners Association  
23 v. State of Washington Shorelines Hearings Board, 100 Wn. App. 341, 386, 997 P.2d 380 (2000);  
24  
25  
26

1 Buechel v. State Department of Ecology, 125 Wn.2d 196, 203, 884 P.2d 910 (1994); Hunt v.  
2 Anderson, 30 Wn. App. 437, 439, 635 P.2d 156 (1981).

3           5.       The Supreme Court has directed that “analysis of the SMA must be made with  
4 [this] legislative mandate in mind: “This chapter is exempted from the rule of strict construction,  
5 and it shall be liberally construed to give full effect to the objectives and purposes for which it  
6 was enacted.” Clam Shacks of America, Inc. v. Skagit County, 109 Wn.2d 91, 93 (1987)  
7 (quoting RCW 90.58.900).

9           6.       All “development” within the shorelines of the State of Washington must be  
10 consistent with the policies of the Shoreline Management Act and regulations adopted pursuant to  
11 the Act. RCW 90.58.140. If such development is a "substantial development," as that term is  
12 defined by the Act, then the developer must obtain a shoreline substantial development permit.

13 Id. Specifically, the Shoreline Management Act states:

14                   (1)     A development shall not be undertaken on the shorelines of  
15 the state unless it is consistent with the policy of this chapter and,  
16 after adoption or approval, as appropriate, the applicable guidelines,  
17 rules, or master program.

18                   (2)     A substantial development shall not be undertaken on  
19 shorelines of the state without first obtaining a permit from the  
20 government entity having administrative jurisdiction under this  
21 chapter.

22 RCW 90.58.140.

23           7.       SMA broadly defines "development" as:

24                   ... a use consisting of the construction or exterior alteration of  
25 structures; dredging; drilling; dumping; filling; removal of any sand,  
26 gravel, or minerals; bulkheading; driving of piling; placing of  
obstructions; or any project of a permanent or temporary nature  
which interferes with the normal public use of the surface of the  
waters overlying lands subject to this chapter at any state of water  
level.

1 RCW 90.58.030(3)(d). The Pierce County Shoreline Master Program repeats this definition of  
2 “development.” PCC 20.04.130.  
3

4 8. “Substantial” development means any “development” of which the total cost of fair  
5 market value exceeds \$5,000 (as adjusted for inflation) or any development, which materially  
6 interferes with the normal public use of the water or shorelines of the State. RCW  
7 90.58.030(3)(e). Under the Shoreline Management Act "no 'substantial development' exists if  
8 there is not 'development' within the meaning of RCW 90.58.030(3)(d), because for there to be a  
9 'substantial development,' there must first be a 'development.'" Cowiche Canyon Conservancy v.  
10 Bosley, 118 Wn.2d 801, 812 (1992).  
11

12 9. In this case, there is no dispute that the \$5,000 threshold in the “substantial”  
13 development definition is met. Taylor’s appeal raises only the issue of whether its activity  
14 constitutes a “development” (and whether the five year permit has expired).

15 10. For purposes of the Shoreline Management Act implementation, the Department  
16 of Ecology has defined “structure” as “a permanent or temporary or edifice or building, or any  
17 piece of work artificially built or composed of parts joined together in some definite matter.”  
18 WAC 173-27-030(15). The PVC tubes which Taylor installs in the beach (at the rate of  
19 approximately 40,000 per acre) are a “piece of work artificially built.” Further, PVC tubes are  
20 “joined together in a definite manner,” in that they are planted in rows and sections to form  
21 discrete groupings and the large canopy nets hold them together so that they will not dislodge and  
22 become marine debris.  
23

24 11. The Attorney General Opinion, Ex. 68 (2007 AGO , No. 1., concluded that the  
25 tubes are not “structures,” but the AGO did not consider at all the part of the definition that states  
26

1 that a “structure” is “any piece of work artificially built.” In addition, the AGO focused solely on  
2 the individual tubes and not the entire configuration, which is, in the words of Taylor’s Notice of  
3 Appeal, “constructed” on site. Ex. 1A (Notice of Appeal) at 3, ¶ 6.

4  
5 12. The Legislature has characterized the PVC geoduck predator exclusion devices as  
6 structures. Specifically, the Legislature has established a requirement for the Sea Grant program  
7 to conduct a study of the “environmental effects of structures commonly used in the aquaculture  
8 industry to protect juvenile geoducks from predation.” RCW 28B.20.475 (5)(a). This recent  
9 legislation deals with the same subject as the SMA (i.e., activities in the shorelines). The two  
10 laws should be construed consistently with each other. Halleur v. Spectrum Properties, Inc., 123  
11 Wn. 2d. 126, 146 (2001).

12  
13 13. The evenly placed tubes, alone or combined with nets, rubber bands, rebar stakes  
14 and poles, and the extent of the area so configured, form an artificially built piece of work and/or  
15 constitute “parts joined together in some definite manner.” For this reason alone, and given the  
16 broad construction of the SMA mandated by the Legislature and the Supreme Court, and given  
17 the Legislature’s characterization of these facilities as “structures,” the facility constitutes a  
18 “development” as that term is used in the SMA.

19  
20 14. Taylor’s operations constitute “the placing of obstructions” as that term is used in  
21 the definition of “development” in the SMA. The tubes and netting create a physical obstruction  
22 to the public’s use of the tidelands. When the tide is in, the tubes and nets create a physical  
23 obstruction to the use of the waters for boating, diving, fishing, and other recreational pursuits.  
24 The tubes and nets also obstruct native fish species, crabs, and other tideland animals.

25  
26 15. The AGO concludes that the tubes and nets do not constitute an obstruction, even  
though “the tubes could obstruct a walker.” The AGO gives no consideration to the possibility

1 that the tubes and net constitute an obstruction to fish and wildlife (even though elsewhere in the  
2 AGO, the tubes are characterized as “a temporary barrier” (AGO at 7; Westlaw reprint page 6)).  
3 The AGO also fails to consider whether the operations act as “an obstruction” to boaters and  
4 swimmers. Even as to beach walkers, the AGO does not rule out that these facilities constitute an  
5 obstruction, but rather indicates that the determination should be made on a case-by-case basis.  
6 AGO at 10. For all these reasons, the AGO is not inconsistent with the conclusion that Taylor’s  
7 Foss Lease facility constitutes “the placing of obstructions” as that term is used in the SMA,  
8 particularly given the broad construction of the SMA mandated by the Legislature and the  
9 Supreme Court.

11           16. For similar reasons, Taylor’s operations interfere with the normal public use of  
12 surface waters. The very existence of tube and net structure, the barge, hoses and other devices  
13 limits access to the water and precludes the use of the surface waters by fishers, boaters, divers,  
14 and other recreational users. When the tide line is in the midst of the geoduck facility, all access  
15 to the surface water at that location is precluded. At higher tides, boaters need to avoid the area  
16 lest they hit the bottom on the protruding pipes and nets. Taylor’s barges, boats, and with water  
17 jet hoses, and work crews obstruct boaters and recreational users during planting and harvesting  
18 operations. When large swaths of tideland are converted to this type of use, as has already  
19 happened at the Foss Lease site, the practical consequence is that the surface water areas are  
20 effectively made off-limits to the public. During certain periods of time, Taylor marks the area as  
21 off limits to the public with buoys and stakes. These various activities clearly interfere with the  
22 normal public use of the surface waters. These operations thus “interfere with normal public use  
23 of surface waters” and constitute “development” as that term is used in the SMA. These  
24 conclusions are supported by the broad construction of the Act required by the statute and the  
25  
26

1 Supreme Court. This conclusion also is supported by the Court of Appeals decision in  
2 *Washington Shell Fish* which found the geoduck aquaculture activities there to constitute  
3 “development” because they interfered with the normal public use of the water.

4  
5 17. Taylor’s activities also involve “drilling” as that term is used in the SMA definition  
6 of “development.” The Attorney General states that “[t]he term ‘drilling’ is commonly defined in  
7 terms of creating a hole. See Miriam-Webster online dictionary, Drill ‘2 a (1): to bore or drill a  
8 hole in; (2): to make by piercing action < drill a hole>.” AGO at 7 (Westlaw reprint at 6). The  
9 AGO concluded that inserting the tubes into the beach does not constitute “drilling,” but the AGO  
10 did not consider whether use of the water jets during harvesting is “drilling.”

11  
12 18. The water jet device, as it is used in geoduck harvesting, is a “drill” and its  
13 operation constitutes “drilling.” A description of water jet harvesting in ECOP clearly indicates  
14 that it involves piercing the substrate to create a hole: “the nozzle is inserted next to the geoduck  
15 siphon” and “the average size hole produced is about one third cubic feet” in deep water harvest.  
16 Taylor’s witnesses describe the water jets as creating a “hole,” and, for instance, testified that the  
17 harvester sits with “feet dangling in the hole.” TR 1:182:4 (Phipps); Tr 2:19:13 (Phipps); Ex. 53  
18 (first photograph). See also Ex. 13 (CD of “Dirty Jobs” video). The conclusion that the use of the  
19 water jet during the harvest operation constitutes “drilling” is further supported by the broad  
20 construction of the Act which is required by the SMA and the Supreme Court.

21  
22 19. Taylor’s harvesting operations also involve the “removal of sand, gravel and  
23 minerals” from the beach and thus constitute “development” as that term is defined in the SMA.  
24 The harvest activity dislodges material that is taken by currents offsite. Thus, the sediment  
25 (including sand, gravel and minerals) is “removed” from the beach and deposited elsewhere. This  
26 qualifies as “development” as that term is used in the SMA and is supported by the broad



1 construction of the Act required by the Statute and the Supreme Court. More than a *de minimus*  
2 amount of material is removed. See Exhibit 26.

3           20. Taylor's operations also involve placing "fill" in the beds of Puget Sound when it  
4 inserts PVC tubes into the substrate at the rate of up to 43,000 per acre. In just one rotation of  
5 planting on a twelve acre tract, the amount of fill from these tubes range between 144 and 216  
6 cubic yards. Ex. 21. The amount of fill increases as the number of rotations increase. While the  
7 insertion of the tubes may not be "fill" as it is typically envisioned, it is "fill" nonetheless,  
8 especially given the broad construction of the Act required by the statute and the Supreme Court.  
9

10           21. The water jet harvest method employed by Taylor constitutes "dredging" as that  
11 term is used in the SMA. The Act and regulations do not define "dredging." However, in the  
12 engineering world, there is a type of dredging, called agitation dredging, which employs  
13 essentially the same techniques as used by Taylor. Given the broad reading of the statute  
14 required by the statute and the Supreme Court, these operations constitute "dredging" as that term  
15 is used in the SMA.  
16

17           22. There is a five year term limit (with a possible one-year extension) for  
18 construction activities requiring a Shoreline Substantial Development Permit. The five year term  
19 limit is set forth in the Revised Code of Washington, the Washington Administrative Code, the  
20 Pierce County Code, and in SD 22-00. As stated in the statute:  
21

22                   Authorization to conduct construction activities shall  
23 terminate five years after the effective date of a substantial  
24 development permit. However, local government may  
25 authorize a single extension for a period not to exceed one  
26 year based on reasonable factors, if a request for extension  
has been filed before the expiration date and notice of the  
proposed extension is given to parties of record and to the  
Department [of Ecology].

1 RCW 90.58.143(3).

2 23. The corresponding State regulation appears to be identical to the statute except  
3 that the regulation refers to conducting “development” activities as opposed to “construction”  
4 activities. WAC 173-27-090(3). Likewise, PCC 20.76.030.G(3) states that “[a]uthorization to  
5 conduct development activities shall terminate five years after the effective date of a permit. The  
6 Examiner may authorize a single, one-year extension as set forth in Subsection 2 above.”  
7

8 24. As stated earlier, the SMA is to be construed broadly to assure its salutary  
9 purposes are accomplished. Those purposes are advanced by applying the five year term limit to  
10 an activity like geoduck aquaculture where so little is currently known about its impacts. Only by  
11 requiring re-application on a periodic basis are the State’s interests and the County’s interests in  
12 protecting the shoreline environment adequately served. Only through that mechanism can Pierce  
13 County be assured that it will be able to take account of new information regarding the project’s  
14 environmental impacts that may develop in the ensuing years (assuming a new permit is issued in  
15 the first place).  
16

17 25. In DNR v. Kitsap County, SHB 78-37 (1980 WL 131174), aff’d 107 Wn.2d 801  
18 (1987), the Shorelines Hearings Board reversed a Kitsap County decision to deny a permit for  
19 sub-tidal clamming at Agate Pass, but added a condition that the substantial development permit  
20 expire after five years. That decision was affirmed by the Supreme Court. See also San Juan  
21 County v. DOE, SHB No. 88-52 (1989) (affirming San Juan County Shoreline Program’s  
22 inclusion of expiration limits for aquaculture).  
23

24 26. Taylor’s analogy to operations like on-going dairy farming are inapt. A grazing  
25 dairy herd, by itself, probably does not meet any of the definitions of “development.” Whether  
26

1 cattle graze in the shoreline environment on a single occasion or repeatedly, a Substantial  
2 Development Permit likely is not necessary.

3 27. Taylor's situation is more like a dairy farmer who each year built a new shed (i.e.,  
4 a structure) on a different portion of his field within a shoreline. A Substantial Development  
5 Permit for that activity would expire after five years. If the farmer wanted to continue building  
6 new sheds (structures) along the same shoreline stretch in succeeding years, the farmer would  
7 need to obtain a new permit.  
8

9 28. The analogies cited by the County staff, like dredging the Nisqually River, also are  
10 persuasive. Shoreline permits for repetitive activities like those are routinely subject to the five  
11 year term. See Ex. 1 at 6.

12 29. Like repetitive dredging, Taylor's proposed aquaculture activities involve new  
13 "development" on a repeat basis. As Taylor's witnesses explained during the hearing, the  
14 operations move progressively along the beach. Each year, different parts of the beach are  
15 subject to new installation of the tubes, cultivation of the geoducks, and harvesting. Both the  
16 planting and harvesting phases constitute "development." Different sections of the beach are  
17 subject to this renewed "development" each year.  
18

19 30. Given the liberal construction of the Act required by the statute itself and the  
20 construction of the Act given by the agency (Ecology) charged with enforcing the Act, the  
21 County's interpretation of the five year condition is affirmed.  
22

23 Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

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HEARING EXAMINER

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CPPSH\Findings of Fact – FINAL 012208