ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT OF THE HEARING EXAMINER FOR THURSTON COUNTY

CASE NOS: 2010100540, 2010100420, and 2010100421 (Appeal of three administrative determinations by Resource Stewardship Department)

APPELLANTS: Taylor Shellfish Co., Inc., d/b/a Taylor Shellfish Farms; and Blind Dog Enterprises LTD, d/b/a/ Arcadia Point Seafood.

SUMMARY OF APPEALS: Taylor Shellfish Farms and Arcadia Point Seafood appeal determinations by the Thurston County Resource Stewardship Department that certain proposed geoduck aquaculture operations are "developments" under the state Shoreline Management Act.

SUMMARY OF ORDER:

The Department's summary judgment motion that the proposed geoduck operations are a "development" under the SMA because they involve "construction of a structure" is granted. The Appellants' summary judgment motion on the same issue is denied.

The summary judgment motions by the parties on whether the proposed operations are a "development" under the SMA because they involve "removal of any sand, gravel, or minerals" are denied due to the presence of genuine issues of material fact.

On the third ground of the administrative determinations, whether the tubes and netting serve as an obstruction on the beach, summary judgment is granted in favor of the Appellants on the issue of sediment movement: the proposed operations are not developments due to their effect on the movement of sediment. Summary judgment is not entered at this time on the other issues relating to this third ground, due to the need for further examination of the public trust doctrine and review of whether any Shoreline Hearings Board decisions address whether the "placing of obstructions" includes obstructions to marine life.

RECORD:

The procedural history of these motions is described in the Order, below. The following documents are relevant to these motions and are admitted into the record:

Exhibit 1. Appeal dated July 6, 2010 by Taylor Shellfish Co., Inc., d/b/a Taylor Shellfish Farms of the administrative determination dated June 30, 2010 by the Thurston County Resource Stewardship Department relating to proposed geoduck aquaculture operation, Project No. 2010100540. This exhibit contains the Appeal of Administrative Decision form, the Notice of Appeal of Administrative Decision, and attachments.

Exhibit 2. Appeal dated July 8, 2010 (stamped as received by Development Services on July 9, 2010) by Blind Dog Enterprises LTD, d/b/a/ Arcadia Point Seafood of the administrative determination dated July 1, 2010 by the Thurston County Resource Stewardship Department relating to proposed geoduck aquaculture operation, Project No. 2010100420.
This exhibit contains the Appeal of Administrative Decision form, the Notice of Appeal of Administrative Decision, and attachments.

Exhibit 3. Appeal dated July 8, 2010 (stamped as received by Development Services on July 9, 2010) by Blind Dog Enterprises LTD, d/b/a/ Arcadia Point Seafood of the administrative determination dated July 1, 2010 by the Thurston County Resource Stewardship Department relating to proposed geoduck aquaculture operation, Project No. 2010100421.
This exhibit contains the Appeal of Administrative Decision form, the Notice of Appeal of Administrative Decision, and attachments.

Exhibit 4. E-mail sent August 23, 2010 from Thomas Bjorgen to the parties.

Exhibit 5. E-mail sent August 24, 2010 from Thomas Bjorgen to the parties (Prehearing order).

Exhibit 6. E-mail sent October 26, 2010 from Thomas Bjorgen to the parties (Second prehearing order).

Exhibit 7. E-mail sent November 2, 2010 from Thomas Bjorgen to the parties (Second prehearing order supplement).

Exhibit 8. E-mail sent November 24, 2010 from Laura Kisielius to Thomas Bjorgen.

Exhibit 9. Stipulated Facts Regarding Proposed Geoduck Farm Operations, dated December 3, 2010, and accompanying e-mail sent December 3, 2010 from Laura Kisielius to Thomas Bjorgen.

Exhibit 10. E-mail sent December 8, 2010 from Thomas Bjorgen to the parties (Third prehearing order).

Exhibit 11. Appellants' Motion in Limine, dated December 8, 2010, with attachments.

Exhibit 12. Thurston County's Response to Motion in Limine, dated December 15, 2010, with attachments.

Exhibit 13. Appellants' Reply in Support of Motion in Limine, dated December 22, 2010, with attachments.

Exhibit 14. E-mail sent January 3, 2011 from Thomas Bjorgen to the parties.

Exhibit 15. E-mail sent January 3, 2011 from Jeff Fancher to Thomas Bjorgen, and e-mail sent January 4, 2011 from Laura Kisielius to Thomas Bjorgen.
Exhibit 16. E-mail sent January 6, 2011 from Thomas Bjorgen to the parties.

No testimony was taken in deciding these motions.

ORDER

A. Nature and location of the proposed geoduck operations.

The Appellants desire to establish shellfish farms on tidelands along Henderson Inlet in unincorporated Thurston County. To that end, Appellant Taylor Shellfish leased tidelands on Thurston County Assessor's Parcel No. 11905230300, known as the Lockhart property. Appellant Arcadia Point leased two tideland parcels, Assessor's Parcel No. 11905330200 (the McClure property) and Assessor's Parcel No. 11905230400 (the Thiesen property). The Lockhart and Thiesen properties are adjacent. The McClure property is approximately 1/4 mile south of the Thiesen property. Ex. 9, Stipulated Facts, Section 1.

Arcadia Point intends to use the McClure and Thiesen properties for geoduck farming. Its proposed method of operation is set out in Sections 4, 5, 8 and 9 of the Stipulated Facts at Ex. 9. In summary, the area on which the geoduck operations would be located on the McClure property is from .60 to .75 acres in size. On the Thiesen property the area is approximately 1.0 to 1.5 acres. PVC tubes four inches in diameter and ten inches in length would be pushed vertically into the beach substrate at a density not to exceed one tube per square foot. Approximately four to six inches of each tube will be exposed at the surface of the sand when the tide is out. Juvenile geoduck clams will be inserted into each tube, which will then be covered with a mesh cap secured with a rubber band. The purpose of the tubes and mesh caps is to prevent predators from killing juvenile geoducks. In 12 months or less, the mesh caps will be removed and the tubes will be covered with area netting to contain the tubes as the geoducks grow and push the tubes from the sand and to protect them from predators. The net is secured using "U" shaped rebar, which will be pushed in flush with the sand. No later than 24 months after insertion, the tubes and area netting will be removed entirely, although the netting may be installed again depending on the level of benthic predators. Between five and seven years after planting, the geoducks will be removed. Harvesting will take place by loosening the sand around the geoduck using a pressurized hose and nozzle and a vessel-mounted high volume, low pressure water pump. The clams would be extracted one at a time by hand. Ex. 9, Stipulated Facts, Sections 4, 5, 8 and 9.

Taylor Shellfish intends to use the Lockhart property for geoduck farming. The area subject top the operations would be from .12 to .9 acres in size. Its proposed method of operation is the same as that described above, with the small differences noted in Section 6 of the Stipulated Facts. These differences are not relevant to the decision of these motions.

The parties stipulate that the purpose of the area or canopy nets "can be to contain loose tubes, to prevent predators from killing juvenile geoducks, or both." Ex. 9, Section 8.

B. Procedural history.

The Appellants and the County staff disagreed whether the proposed activities constituted "development" under RCW 90.58.030 (3), part of the state Shoreline Management Act (SMA). The Appellants and the County Staff agreed that the Appellants would submit information to the County for the sole purpose of allowing the Staff to administratively determine whether the proposals were "developments" under the SMA. The Appellants submitted this information. Ex. 9, Stipulated Facts, Sections 2 and 3.

On June 30, 2010 the Resource Stewardship Department issued an administrative determination for the proposal on the Lockhart property, found at Ex. 1. On July 1, 2010 the Department issued administrative determinations for the proposals on the Thiesen and McClure properties, found, respectively, at Ex. 2 and 3.

Each of these administrative determinations concluded that the proposed activities constituted "development" under the SMA.[1] Each determination rested on the same four grounds:

1. The placement of tubes and netting on the beach constitutes construction of a structure.

2. The method of harvest will remove some amount of sand and other minerals from the seabed.

3. The tubes and netting serve as an obstruction on the beach.

4. The tubes and netting, even though temporary, will potentially interfere with the normal public use of the surface waters, particularly during low tides.

See Ex. 1, 2 and 3.

On July 6, 2010 Taylor Shellfish Farms appealed the Department's determination relating to the proposed operations on the Lockhart property.
On July 9, 2010 Arcadia Point Seafood appealed the administrative determinations relating to the proposed operations on the Thiesen and McClure properties.

On December 3, 2010 the parties submitted a set of stipulated facts, found at Ex. 9.

On December 8, 2010 the Appellants submitted a motion in limine, found at Ex. 11, asking that issues related to the first three grounds of the administrative determinations set out above be determined as a matter of law on the basis of the stipulated facts, without the submission of testimony. The motion also asked that the fourth ground be determined after a hearing, with the opportunity to submit testimony and other evidence.

On December 15, 2010 the Department filed its response to the motion in limine, found at Ex. 12. The Department opposed the motion in limine and also asked that, based solely on

[1] Each of these determinations also concludes that the proposals are "substantial" developments, because they exceed the set monetary threshold. Their characterizations as "substantial" is not at issue in these appeals.

the stipulated facts, all three proposals be found to meet the definition of development, obviating the need for a hearing on the appeals.

On December 22, 2010 Appellants filed their reply in support of their motion in limine, found at Ex. 13. Among other matters, the Appellants characterized the Department's position as seeking to convert the motion in limine to a partial summary judgment motion requesting a decision on the first three grounds of the administrative determinations as a matter of law based on the stipulated facts. After receiving clarification from each party, the Hearing Examiner at Ex. 16 characterized the posture of the motions as follows:

> Each party requests summary judgment in its favor on each of the first three grounds on which the administrative determinations at issue are based. Each party asks that summary judgment be granted on the basis of the stipulated facts of December 3, 2010.
>
> Neither party asks to submit additional briefing on the summary judgment motions.
>
> Each party agrees that the fourth ground of the administrative determinations would be decided through an evidentiary hearing. The results of the summary judgment motions may affect whether that ground is reached.
>
> If any part of the motion in limine remains live after the summary judgment decision, it will be decided soon after.

C. <u>The summary judgment motions</u>.

1. <u>Authorization of summary judgment motions</u>.

Summary judgment in Superior Court is granted

> "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Superior Court Civil Rule (CR) 56.

Chapter II, Section 2.6 of the Hearing Examiner Rules imposes a page limitation for motions, plainly implying that motions are authorized. The heart of summary judgment is simply the determination that under agreed or uncontested facts, a party is entitled to prevail under applicable law. Since this determination would be made without an evidentiary hearing, it is suitable for decision by motion under the Hearing Examiner Rules, especially when all parties agree to it. Thus, summary judgment is one of the motions impliedly authorized by the Hearing Examiner Rules.

2. <u>Interpretation of relevant SMA provisions</u>.

Each party makes a number of arguments as to how the SMA should be interpreted in resolving the issues presented by this appeal. These more general points are addressed before reaching the specific issues on appeal.

The Department points out that RCW 90.58.900 states that the SMA

> "is exempted from the rule of strict construction, and it shall be liberally construed to give full effect to the objectives and purposes for which it was enacted."

The Department also notes that the Supreme Court has held that "the SMA is to be broadly construed in order to protect the state shorelines as fully as possible." Buechel v. Department of Ecology, 125 Wn.2d 196, 203 (1994).

The SMA serves both the purposes of protecting the natural and ecological functions of the shorelines and planning for and fostering all reasonable and appropriate uses. See 90.58.020. Therefore, the mandate of RCW 90.58.900 to liberally construe the Act to serve its purposes does not perceptibly push in either direction in construing the definition of development. The holding in Buechel, on the other hand, has much less of the protean about it. The Court's direction to broadly construe the Act to protect the shorelines as fully as possible leans in favor of a broader scope of the definition of "development", everything else being equal, since that will ensure a more thorough implementation of shoreline policies through the permitting process.

The Appellants contend that the broader scope of "development" argued by the Department is inconsistent with the policies of the SMA. The Appellants state that RCW 90.58.020 directs that preference be given to shoreline uses that, among other things, recognize and protect the statewide interest over local interest, result in long term over short term benefit, and protect the resources and ecology of the shoreline. The Appellants then cite to WAC 173-26-241 (3) (b) which states that shellfish aquaculture is of statewide interest and that, "properly managed, it can result in long-term over short-term benefit and can protect the resources and ecology of the shoreline." Therefore, Appellants argue, shellfish aquaculture is a preferred use under RCW 90.58.020, leaving the Department's broad reading of "development" inconsistent with the Act.

However, the statement in RCW 90.58.020 on which the Appellants rely applies to shorelines of statewide significance, and the sites at issue are not such shorelines under the definitions in RCW 90.58.030. On the other hand, the preferences in RCW 90.58.020 cited by the Appellants do seem consistent with the general purposes of the Act. This shows that the Appellants' argument retains its force, even if these are not shorelines of statewide significance.

Turning to the merits of that argument, RCW 90.58.020 states in pertinent part:

> "The department, in adopting guidelines for shorelines of statewide significance, and local government, in developing master programs for shorelines of statewide significance, shall give preference to uses in the following order of preference which:
>
> (1) Recognize and protect the statewide interest over local interest;

(2) Preserve the natural character of the shoreline;

(3) Result in long term over short term benefit;

(4) Protect the resources and ecology of the shoreline;

(5) Increase public access to publicly owned areas of the shorelines;

(6) Increase recreational opportunities for the public in the shoreline;

(7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary."

This, by its express terms, is a ranking of preference among different uses. It does not suggest that any use, no matter how highly ranked, should be preferred over no development by narrowing the scope of permitting requirements. Such a conclusion would ignore the status of the natural features of the shorelines as an element of the statewide interest and the highly ranked position of the natural character of the shorelines in the hierarchy of preferences in RCW 90.58.020. Thus, these policies do not favor either interpretation of "development" in these appeals.

The Appellants state also that shellfish beds are identified as both priority habitats and critical saltwater habitats by the state shoreline rules. They argue that the Department's attempt to regulate shellfish beds as developments is antithetical to the SMA's protection of critical saltwater habitats and that a similar argument was rejected by the Ninth Circuit in APHETI v. Taylor Resources, 299 F.3d 1007 (2002). The issue in that case, in the words of the Court, was

"whether the mussel shells, mussel feces and other biological materials emitted from mussels grown on harvesting rafts . . . constitute the discharge of pollutants from a point source without a permit in violation of the Clean Water Act."

APHETI, supra. The Court answered this question in the negative for a number of reasons. Most pertinently, the Court stated that

"Congress plainly and explicitly listed the “protection and *propagation* of . . . shellfish” as one of the goals of reduced pollution and cleaner water. 33 U.S.C. § 1251(a)(2) (emphasis added) . . . It would be anomalous to conclude that the living shellfish sought to be *protected* under the Act are, at the same time, “pollutants,” the discharge of which may be *proscribed* by the Act. Such a holding would contravene clear congressional intent, give unintended effect to the ambiguous language of the Act and undermine the integrity of its prohibitions."

Id. at 1016. The Applicant argues it is similarly anomalous to conclude that shellfish beds to be protected from encroaching development are also regulated as development under the SMA. Ex. 13, pp. 6-7.

The Appellants' argument is supported by the inference in APHETI that the Clean Water Act's goal of protecting and propagating shellfish means that the natural emissions of shellfish are not subject to NPDES permits. The shoreline rules have a similar goal of protecting

shellfish beds as critical saltwater habitats. The heart of the Court's reasoning, though, was the anomaly of deeming shellfish protected by the Act to be pollutants which can be proscribed under the Act. A similar contradiction is not present in requiring shellfish operations to obtain a permit under the SMA, since the more particular scrutiny afforded by the permit process should better reconcile potentially conflicting shoreline policies touching shellfish farming. Without deciding the issue, the rationale of APHETI could provide an argument against denial of a permit once the merits of the permit are reached. For the reasons given, though, I do not believe it supports any exemption from the permit process itself.

WAC 173.26.020 (24) defines priority habitat as "a habitat type with unique or significant value to one or more species." It states further that an area classified as priority habitat must have one or more of thirteen listed attributes, one of which is "shellfish bed". However, to say that a priority habitat may be a shellfish bed does not imply that all shellfish beds are priority habitats. To do so ignores the heart of the definition that a priority habitat must have unique or significant value to one or more species. The stipulated facts and cited legal authority are insufficient to show that the beds in question are priority habitats.

On the other hand, WAC 173-26-221 (2) (c) (iii) does plainly define critical saltwater habitats to include all commercial and recreational shellfish beds, among other items.[2] Master programs, according to WAC 173-26-221 (2) (c) (iii) (B), "shall include policies and regulations to protect critical saltwater habitats and should implement planning policies and programs to restore such habitats." This subsection states further that "all public and private tidelands or bedlands suitable for shellfish harvest shall be classified as critical areas", presumably critical saltwater habitats.

The designation of shellfish beds as a critical area, though, hardly implies a blanket exemption from shoreline permit requirements. On the contrary, the complexities of applying other shoreline policies in light of those protecting critical saltwater habitats, if anything, increases the worth of a principled permit process. Designation as a critical saltwater habitat does not support a narrower reading of "development" and a consequently narrower scope of the permit process.

3. The first ground of the administrative determinations: that the placement of tubes and netting on the beach constitutes construction of a structure.

By agreement of the parties, the facts on which summary judgment will be decided are those set out in the stipulation of facts at Ex. 9. Those facts relevant to decision of this first ground are set out in Sections 4, 5, 6 and 8 of the stipulation and are summarized above, although not necessarily comprehensively. Any factual allegations not set out in the stipulation will be considered, if at all, only in deciding whether genuine issues of material fact are present.

[2] WAC 173-26 comprises the 2003 shoreline rules, which govern the adoption of shoreline master programs. The County's current SMP was adopted before those rules were promulgated and therefore is not subject to their terms. WAC 173-26-010, however, states that "[t]he provisions of this chapter implement the requirements of [the SMA]." Therefore, I believe the Appellants are correct that these rules may be consulted in interpreting the SMA, even though the County's new master program is not yet adopted.

Factual allegations outside the stipulation will not be considered in establishing any matter of fact.

A substantial development permit (SDP) is required for a use or activity on the shorelines which is both "substantial" and a "development". RCW 90.58.140. Under RCW 90.58.030 (3) (e), a development is "substantial" if its total cost or fair market value exceeds $5718 or if it materially interferes with the normal public use of the water or shorelines of the state. It is not disputed that the cost or value of each proposed operation would exceed this monetary threshold. Thus, the validity of the administrative determinations turns on whether the proposed geoduck operations count as "development".

"Development" is defined by RCW 90.58.030 (3) (a) as

> "a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, 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;"

This definition is the same as that in WAC 173-27-030.

Under these definitions, the key question in the challenge to the first ground of the administrative determinations is whether the proposed operations will involve "construction" of a "structure".

The shoreline rules define "structure" as

> "a permanent or temporary edifice or building, or any piece of work artificially built or composed of parts joined together in some definite manner, whether installed on, above, or below the surface of the ground or water, except for vessels."

WAC 173-27-030 (15).

The Thurston Region Shoreline Master Program (SMP), on the other hand, defines "structure" as

> "[a]nything constructed in the ground, or anything erected which requires location on the ground or water, or is attached to something having location on or in the ground or water."

This definition, especially its reference to "anything erected which requires location on the ground or water", could, in this context, be substantially broader than the definition in WAC 173-27-030 (15).

Local master programs must be consistent with the shoreline rules found in the WAC. RCW 90.58.080 (1).[3] An ordinance improperly conflicts with a statute if it "permits or licenses

[3] See Footnote 2, above.

that which the statute forbids and prohibits, and vice versa." Weden v. San Juan County, 135 Wn.2d 678, 693 (1998); citing Bellingham v. Schampera, 57 Wn.2d 106, 111 (1960). The broader scope of the definition of "structure" in the SMP, above, does not prohibit that which the statute (or rule) permits, but rather it arguably requires an SDP for an activity for which the statute or rule would not. The requiring of a permit, though, could have just as severe consequences as a flat prohibition. Thus, the Weden/Schampera approach seems also suited to determining whether an SMP's broader definition of "development" would conflict with the WAC rule. Since the broader SMP definition would require an SDP for a use for which the WAC rule would not, it would raise an impermissible conflict by analogy to those decisions.

Perhaps an even more basic principle in determining whether a subordinate level of government may expand restrictions adopted at a superior level is legislative intent. See Ray v. ARCO, 435 U.S. 151 (1978). In that case the Supreme Court held that certain state regulations of oil tankers were preempted by federal law, because

> "[e]nforcement of the state requirements would at least frustrate what seems to us to be the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers."

Ray, 435 U.S. at 165. Although the SMA is focused on local control, it does include detailed definitions as to what counts as a substantial development and establishes the permit for a substantial development as a centerpiece of shoreline regulation. This permitting scheme was adopted by the legislature in service of the sometimes jostling goals of protecting the natural and ecological functions of the shorelines, while planning for and fostering all reasonable and appropriate uses. See 90.58.020.

The adoption of detailed permit thresholds to serve potentially conflicting goals strongly suggests that the legislature intended they be followed. Although a county has ample scope in adopting the policies under which SDPs are judged, I think it must accept the state's call as to when they are required. Therefore, the definition of structure in WAC 173-27-030 (15) will control.

Returning to the examination of that definition, the geoduck activities described in the stipulation do not constitute "a permanent or temporary edifice or building". Thus, they do not involve a structure under the first element of the definition.

The second element is disjunctive: "any piece of work artificially built or composed of parts joined together in some definite manner . . ." Under this, a use involves a structure if it involves a "piece of work artificially built". Under customary definitions, the PVC tubes are pieces of work and are artificially built. This seems plainly to classify them as structures under WAC 173-27-030 (15). The Appellants argue to the contrary that although the tubes are artificial, the tubes and netting together are not a piece of work artificially built, since "built" is defined as "composed of pieces or parts joined systematically". Ex. 13, p. 10. Since the tubes are not joined together by the net, the Appellants argue, the use is not "built" under applicable definitions. Id.

Under this argument, a use could consist of different structures (pieces of work artificially built), but would not itself be a structure unless the constituent structures were "joined

systematically". This position taxes logic with the result that a use consisting exclusively of structures would itself not be a structure unless the constituent structures were satisfactorily joined. Similarly, it contradicts the definition of structure as "any piece of work artificially built". (Emph. mine.) It also would effectively remove the "or" from the definition of structure by requiring that constituent structures also be joined systematically. For these reasons, I don't believe this argument is consistent either with the text of the definitions or the purposes they serve. The proposed geoduck operations involve structures.

The second prong of the disjunctive definition noted above is "a piece of work . . . composed of parts joined together in some definite manner". Whether the proposal involves a structure under this definition is less certain. The only way in which the PVC tubes are arguably "joined together" in the proposed operations is through the area net which is spread over them. The net is not attached to the tubes, but is stretched over them and anchored to the sea bottom with rebar. The Appellants argue through a forceful analogy that if this is enough to make a structure, then every woodpile with a tarp over it is also a structure, since the tarp protects the pile from the elements as the net protects the geoducks from predators. If it be objected that the net also holds loose tubes together, the analogy could be modified to a tarp spread over a pile of leaves to keep them from blowing away. In either event, deeming the presence of the tarp sufficient to transform the pile into a structure seems counter to both ordinary usage and the building codes.

What may seem absurd under one set of laws, though, is not necessarily so under others. As far as process is concerned, the heart of the purpose of the SMA is the recognition that

> "coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest. There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines."

RCW 90.58.020.

Turning to substance, the legislature stated that

> "[i]t is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto."

RCW 90.58.020.

The SMA implements these policies in part through a permit system. The definition of development is in large part the litmus showing when a permit is required for a proposed use. Whether or not it is absurd to deem the tarp to make a structure, it is not irrational or absurd for the legislature to decide that having parts joined together in some definite manner makes a piece of work a "structure" in applying this prong of the definition of development. To fully serve the SMA policies just noted, interpretation should lean in the direction of the broader reading of these definitions. Inclusion of a doubtful case in the permit process better serves those policies, both procedural and substantive, than exclusion.

The PVC tubes, mesh caps and nets are pieces of work, individually or collectively. The tubes are parts of that work. Their array or configuration is in "a definite manner". The question, then, is whether they are "joined together" in that manner.

The area net is spread over and comes into contact with the tubes, but is not attached to them. The two purposes of the nets are to contain loose tubes and afford protection from predators. Ex. 9. Thus, the nets do not hold the tubes together or in place. Only when they come loose does the net contain them.

"Join" is not defined in the SMA, its implementing rules or the SMP. The principal dictionary definitions of "join" are

> "to put or bring together and fasten, connect or relate so as to form a single unit, a whole or continuity . . .
>
> to put or bring into close contact, association or relationship . . .
>
> to come into the company of . . ."

Webster's Third New International Dictionary (1976). The third of these entries, though, is likely not apt, since its examples all relate to persons.

The use of the terms "fasten" and "connect" in the first entry suggests that the net does not "join" the tubes, since the net is not attached to them and only holds them together if they come loose from the sea bottom. On the other hand, the facts that the net is anchored so as to close the area of the tubes to predators and that it is placed to contain the tubes as they are pushed from the sand suggests that it brings the parts into association or relationship, thus falling within the second entry. Ordinary English usage welcomes either reading.

The objective of statutory construction is "to ascertain legislative intent as expressed in the statute." Martin v. Meier, 111 Wn.2d 471, 479 (1988). More specifically,

> "[i]n determining the meaning of words used but not defined in a statute, a court must give careful consideration to the subject matter involved, the context in which the words are used, and the purpose of the statute [cit. om.] 'Language within a statute must be read in context with the entire statute and construed in a manner consistent with the general purposes of the statute.' [cit. om.]"

PUD of Lewis County v. WPPSS, 104 Wn.2d 353, 369 (1985). In short, the "paramount concern"

> "is to ensure that the statute is interpreted consistently with the underlying policy of the statute."

Safeco Insurance Co. v. Meyering, 102 Wn.2d 385, 392 (1984).

For the reasons expressed above, when the text of the law and available definitions leave the matter equally doubtful, the procedural and substantive polices of the SMA are better served by navigating the permit process. Therefore, the PVC tubes should be deemed "joined" for purposes of the definition of "structure".

The final step is to determine whether the use involves the "construction" of a structure, as stated in RCW 90.58.030 (3) (a), when none of the constituent parts of the operations is actually constructed in the shoreline. Although "construction" is not defined in the SMA, other definitions in it answer this question.

RCW 90.58.030 (3) (e) defines substantial development and exempts from its scope the "construction or modification of navigational aids such as channel markers and anchor buoy." Unless they are deemed "obstructions', navigational aids would only be deemed developments or substantial developments by virtue of involving construction of a structure. Buoys and the like are constructed on shore and placed in waters subject to the SMA. Thus, under the Act the placement of structures in the shorelines counts as construction. Therefore, placement of the tubes and nets involve "construction" of a structure.

These conclusions, however, are contradicted by Attorney General Opinion (AGO) 2007 No. 1. That opinion addressed, among others, the question whether shoreline substantial development permits are required for planting, growing and harvesting farm-raised geoducks by private parties. The method of geoduck operations examined by the AGO is virtually the same as that involved in these appeals. The AGO concluded that geoduck operations would fall within the definition of "development" in the SMA only if they caused substantial interference with normal public use of the surface waters, one of the elements of that definition. The AGO concluded that geoduck operations would not fall within any of the other elements of the definition of development.

The AGO cited the definition of structure from WAC 173-27-030 (15) as "a permanent or temporary edifice or building, or any piece of work artificially built or composed of parts joined together in some definite manner", the same definition analysed above. The AGO noted that the PVC tubes are not edifices or buildings and do not form an edifice or building taken together. The opinion stated also that the tubes are not parts joined together in a definite manner. Therefore, it concluded, geoduck operations do not involve structures.

This analysis, however, ignored without explanation the element of the definition including "any piece of work artificially built". In doing so, the AGO read the word "or" out of the definition in violation of the canon of construction that a legislative body is presumed not to have used superfluous words and that meaning, if possible, must be accorded to every word in a statute. See Applied Industrial Materials v. Melton, 74 Wn. App. 73 (1994). The only way of

according meaning to every word in the definition of "structure" is to deem it also to include "any piece of work artificially built". When that is done, as shown above, the proposed operations must be deemed to involve structures.

In addressing the "composed of parts joined together" prong of the definition, the AGO concluded that the tubes do not meet this description, but did not analyse the definition of "join" or the structure or function of the area net. Those analyses, as shown above, indicate that the tubes and net constitute a structure under this prong also.

The AGO states that its conclusion is reinforced by the decision in Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801 (1992), in which the Court rejected the argument that the removal of railroad trestles was a development, because it modified a structure. The Department argues at Ex. 12 that Cowiche Canyon has no application to this case, because it involves removal, not installation. The Appellants reply at Ex. 13 that the relevance of the case lies in its use of a common-sense approach in concluding that removal is not modification. The Appellants are correct, but the analysis above applies that common-sense approach in concluding that these operations are structures under the definition.

As the Appellants point out in Ex. 13, Attorney General Opinions are not controlling, but are entitled to great weight. Thurston County v. City of Olympia, 151 Wn.2d 171, 177 (2004). As also pointed out by Appellants, greater weight attaches to an agency interpretation when the legislature acquiesces in that interpretation, and the legislature has not overturned this AGO, even though it has adopted legislation concerning geoducks since its issuance. Legislative acquiescence, however, "is not conclusive, but is merely one factor to consider." Meyering, 102 Wn.2d at 392.

These rules, I believe, mean that an Attorney General Opinion is something more than a tiebreaker if a decision cannot be made on other grounds. They mean, at least, that an AGO must play a prominent and weighty role in making the decision. It is not, however, conclusive.

Here the AGO failed to consider part of the definition which it was construing, the element deeming "any piece of work artificially built" to be a structure. Nor did it offer any analysis construing the definition to exclude that element. This decision, therefore, does not so much disagree with the AGO's analysis, as fill in an element not treated in it. This decision does disagree with the AGO's conclusions, but, for the reasons above, I believe that disagreement is well founded.

The other element of the definition, "piece of work . . . composed of parts joined together in some definite manner . . ." is, as noted, a much closer call. As such, the deference accorded Attorney General Opinions becomes more important. However, as noted the AGO does not analyse the definition of "join" or the structure or function of the area net. When that is done, and the policies of the SMA and the canons of construction are examined, the discussion above shows, I believe, that the better interpretation is that this counts as a structure. Following the AGO in spite of this would elevate "great weight" to conclusiveness, which is not the role of an AGO.

4. The second ground of the administrative determinations: that the proposal will involve the removal of sand, gravel or minerals.

As noted, "development" is defined by RCW 90.58.030 (3) (a) to include "removal of any sand, gravel, or minerals".

The Department states at Ex. 12, pp. 9-10, that proposed operations will remove sand from the site, will generate a turbid plume which transports sediment off the site, will result in loss of elevation at the site due to sand removal, and will increase erosion during storms. The Department bases these factual allegations on a consultant statement and the Washington Geoduck Growers Environmental Codes of Practice, part of Ex. 12.

None of these factual allegations are included in the stipulation of facts at Ex. 9. The principal stipulated facts concerning harvesting are that the sand around the geoduck will be loosened using a pressurized hose and nozzle and a vessel-mounted high volume, low pressure water pump. The clams will then be extracted one at a time by hand. See Ex. 9, Sections 4 and 9.

The parties have stipulated that the summary judgment motions will be decided on the basis of the stipulated facts. This is consistent with the nature of summary judgment, which can only rely on facts which are agreed or which raise no material issue. See CR 56. The Appellants make clear at Ex. 13, p. 2 that they dispute the factual allegations made by the Department in Ex. 12 and are ready to offer contrary evidence.

For these reasons, the factual allegations in Ex. 12 cannot be relied on for the truth of the matters asserted. Only the facts stipulated in Ex. 9 may play that role. The allegations in Ex. 12, however, along with the Appellants' statement at Ex. 13, p. 2, show that the amount and nature of sand or sediment removal is a genuine issue of fact.

The Department points out also that the definition of development includes "removal of **any** sand, gravel, or minerals" (emph. added) and argues that by their nature these operations will result in some removal of sand and sediment through injection of pressurized water and loosening of the geoducks. Based on the stipulation only, I expect the Department is correct in this factual assertion. However, I do not believe the Department is correct in the implied corollary, that the disturbance of the minutest amount of sediment counts as removal under the definition. If that were the case, as the Appellants argue, walking on the beach at low tide would be a "development", since some sand or mud would be removed on shoes. To avoid this strained or absurd consequence, some minimal amount or type of removal of beach material must be allowed without triggering characterization as a development. The nature of that threshold need not be determined here. Its presence, though, means that the Department's argument cannot be accepted.

The Appellants invoke in their favor the canon of construction providing that the meaning of words may be indicated or controlled by those with which they are associated. See State v. Roggenkamp, 153 Wn.2d 614, 623 (2005). They argue that since sand, gravel, and minerals are all materials that are mined in the shorelines, this prong of the definition is intended only to capture the mining of those materials. The purpose of the canons of construction, as with all statutory construction, is to identify and serve legislative intent. Martin, supra. To determine that intent, a court will look first to the language of the statute. Where statutory language is plain and unambiguous, a statute's meaning must be derived from its wording. SEIU v. Superintendent of Public Instruction, 104 Wn.2d 344, 348 (1985).

The use of the word "any" in this definition signals a plain intent to include actions beyond mining. The ambiguity in the *de minimus* threshold just discussed is best dissolved by judicial implication of a reasonable minimum level, not through narrowing the definition's scope to contradict its terms. Further, the inclusion of "dredging" in the definition of development, an activity commonly associated with seabed mining, suggests that the prong of the definition under consideration was intended to reach beyond mining. The reference to "removal of any sand, gravel, or minerals" is not restricted to mining.

The Appellants' principal argument on this point rests on the AGO discussed above and the adherence of the Department of Ecology and Department of Natural Resources to it. The AGO characterized geoduck harvesting as incidentally releasing silt and sediment which may temporarily be found in the surrounding water. AGO 2007 No. 1, p. 2. The AGO concluded that this did not involve the "removal of any sand, gravel, or minerals" for two reasons. First, the disruption of substrate around a geoduck cannot legally be distinguished from clam digging or raking and it would be too burdensome to require substantial development permits for all significant clam beds. Id. at 7. Second, only a "minimal" amount of materials would be removed.

The Attorney General is authorized to give written opinions "upon constitutional or legal questions." RCW 43.10.030 (7). The conclusion that a specific set of facts falls within a statutory definition is an opinion on a legal question. Thus, this AGO's analysis of whether described geoduck operations constituted a structure was an authorized role of an AGO. Here, in contrast, without citing any evidence, the AGO concludes that the geoduck operations will only remove a "minimal" amount of materials and thus do not meet this prong of the definition of development. This conclusion is announced, no matter what the consistency of the substrate, what the pressure of the water used, what the length of water injection, or what the characteristics of water or current; and without any consideration of how much sand or sediment might in fact be removed under these varying conditions. These are factual determinations and, as the assertions of the Appellants and Department suggest, likely highly contested factual determinations. As such, they are not amenable to determination as a matter of law or by definition. The AGO's attempt to do so, I believe, was beyond the authority of RCW 43.10.030 (7).

The AGO also expresses concern that a contrary interpretation would have the unintended consequence of requiring other clam operations to obtain a substantial development permit. This would be persuasive if it were established that geoduck and other clam harvesting disrupts a similar amount of substrate and that other clam harvesting is exempt from obtaining a substantial development permit. The first point is a matter of fact which is assumed by the AGO. The second is a legal issue which is touched only through the statement: "We find no indication that the SMA has ever treated clam harvesting, alone, as development." AGO 2007 No. 1, p. 2. The lack of such an indication, however, doe not necessarily show that all clam harvesting is in fact exempt under the SMA.

Whether these geoduck proposals constitute development through the removal of any sand, gravel, or minerals raises a number of issues of material fact and is not amenable to resolution through this AGO. Therefore, the summary judgment motions by Appellants and the Department on this issue are denied.

5. The third ground of the administrative determinations: that the tubes and netting serve as an obstruction on the beach.

RCW 90.58.030 (3) (a) defines development to include "placing of obstructions". Because the definition also includes "any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters", the obstructions referred to seem intended to be other than those interfering with normal public use of the surface of the waters. The administrative determination on appeal is consistent with this view, finding that the tubes and netting are an obstruction "on the beach".

The tidelands on which these operations are proposed are privately owned. See Ex. 9, Section 1. Under general principles of property law, the private owners could exclude the public from walking on their beaches. See Presbytery of Seattle v. King County, 114 Wn.2d 320 (1990) (the right to exclude others is one of the fundamental attributes of property ownership). The AGO discussed above concluded that tubes could obstruct one walking on the beach, but that would only be relevant if the public had a right to use the tidelands. Thus, the AGO concluded, a geoduck operation on private tidelands would not constitute development through the placing of obstructions. Implicit in this holding is the view that "obstructions" refers to the impeding of human passage, not that of fish, shellfish or sediment.

The AGO's conclusion that tubes and nets cannot obstruct public passage on beaches which the public has no right to use is sound in both logic and policy. Before resting in that conclusion, though, the public trust doctrine must be examined.

Our Supreme Court outlined the public trust doctrine in the following holdings from Caminiti v. Boyle, 107 Wn.2d 662 (1987):

> ". . . the State's ownership of tidelands and shorelands is not limited to the ordinary incidents of legal title, but is comprised of two distinct aspects.
>
> The first aspect of such state ownership is historically referred to as the jus privatum or private property interest. As owner, the state holds full proprietary rights in tidelands and shorelands and has fee simple title to such lands. Thus, the state may convey title to tidelands and shorelands in any manner and for any purpose not forbidden by the state or federal constitutions and its grantees take title as absolutely as if the transaction were between private individuals . . .
>
> The second aspect of the state's ownership of tidelands and shorelands is historically referred to as the jus publicum or public authority interest . . . More recently, this jus publicum interest was more particularly expressed by this court in WILBOUR v. GALLAGHER, 77 Wn.2d 306, 316, 462 P.2d 232, 40 A.L.R.3d 760 (1969), CERT. DENIED, 400 U.S. 878 (1970) as the right
>
> > 'of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.'
>
> The state can no more convey or give away this jus publicum interest than it can "abdicate its police powers in the administration of government and the preservation of the peace . . . Thus it is that the sovereignty and dominion over this state's tidelands and

> shorelands, as distinguished from TITLE, always remains in the State, and the State holds such dominion in trust for the public. It is this principle which is referred to as the 'public trust doctrine'. "

Caminiti, 107 Wn.2d at 668-670 (footnotes and citations omitted). See also Wilbour v. Gallagher, 77 Wn.2d 366 (1969), State v. Longshore, 141 Wn.2d 414 (2000), and Washington State Geoduck Harvest Assoc. v. DNR, 124 Wn. App. 441 (2004).

The requirements of the public trust doctrine, the Court held, "are fully met by the legislatively drawn controls imposed by the Shoreline Management Act . . ." Caminiti, 107 Wn.2d at 670.

As stated in the excerpt from Wilbour v. Gallagher, above, the public trust doctrine protects the right of navigation,

> "together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters."

In the unpublished opinion of Bainbridge Island v. Brennan, No. 31816-4-II, (2005), Division II of the Court of Appeals held that under the public trust doctrine, the public may use tidelands when covered by water, but the public has no right to walk across private property when the tide is out.

The Supreme Court approached the same issue in State v. Longshore, above, when it decided that the public trust doctrine does not give the public the right to gather naturally growing shellfish on private property. The Court expressly stated, though, that it did not determine whether the public has a right to cross over private tidelands on foot. Longshore, 141 Wn.2d at 429, n. 9.

With the unpublished status of Brennan and the express "non-decision" of Longshore, the fairest conclusion is that our appellate courts have not yet decided whether the public trust doctrine gives the public the right to walk across private tidelands. Consistently with the AGO, whether the PVC tubes are obstructions on the beach and hence "developments" depends on whether the public has that right. Given the complexities of the application of the public trust doctrine, this is not an issue that should be decided without briefing. Therefore, the summary judgment motions on this issue should not be decided at this time.

The remaining issue is the Department's contention that the tubes and nets constitute obstructions on the beach, because they impede the passage of fish and other sea creatures or the flow of sediment.

"Obstruction" is not defined in either the SMA, its implementing rules, or the SMP. No case law or Shoreline Hearings Board decisions on the meaning of obstruction were cited. As noted, the AGO takes the position that obstruction applies only to human passage. The Department argues that the mandate to construe the SMA broadly to protect the state shorelines as fully as possible means that obstructions to marine life must also be considered. The Appellants cite the AGO, point out that the Department's consultants conclude that the effect of the tubes on sediment movement is likely negligible, point out that requiring marine

animals to move around the tubes does not comport with the accepted definition of obstruction, and raise a number of factual issues.

With none of the arguments being definitive, I would normally defer to the view expressed in the AGO, because it is a rational way of implementing the purposes of the SMA. However, because the issue might be treated in the decisions of the Shoreline Hearings Board, it makes most sense to allow the parties to research that, if desired, before deciding whether obstructions of marine life count as obstructions under the definition of development. The one holding that can be made at this time is that the proposed operations do not meet the definition of development due to their effect on sediment flow. Even if the obstruction of sediment flow fell within the definition of development, the facts alleged by the Department, if considered, would show only that the proposals' effect on sediment movement would be negligible. Thus, assuming all pertinent legal and factual issues favorably to the Department, no obstruction of sediment would be shown.

D. Summary of order.

1. The Department's summary judgment motion that the proposed geoduck operations are a "development" under the SMA because they involve "construction of a structure" is granted. The Appellants' summary judgment motion on the same issue is denied. The first ground of the administrative determinations on appeal, that the placement of tubes and netting on the beach constitutes construction of a structure and consequently a development, is upheld.

2. The summary judgment motions by the parties on whether the proposed operations are a "development" under the SMA because they involve "removal of any sand, gravel, or minerals" are denied due to the presence of genuine issues of material fact.

3. On the third ground of the administrative determinations, whether the tubes and netting serve as an obstruction on the beach, summary judgment is granted in favor of the Appellants on the issue of sediment movement: the proposed operations are not developments due to their effect on the movement of sediment. Summary judgment is not entered at this time on the other issues relating to this third ground, due to the need for further examination of the public trust doctrine and review of whether any Shoreline Hearings Board decisions address whether the "placing of obstructions" includes obstructions to marine life.

4. The effect of the above decisions is that the proposed operations are deemed "developments" under the SMA under the first ground of the administrative determinations, requiring a substantial development permit for the proposals. Thus, unless this determination is reversed, a hearing on a substantial development permit is required for the proposed operations, and the appeals of the other grounds of the administrative determinations are mooted, as well as the motion in limine.

Dated this 21st day of January, 2011.

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Thomas R. Bjorgen