

**PUBLIC HEARING BY THE PIERCE COUNTY HEARING EXAMINER**

---

**In Re:** )  
 )  
**Administrative Appeal: AA16-07** )  
**Taylor Resources, Inc.** )  
 )

---

**Transcript of Proceeding**  
**Before Terrence F. McCarthy**  
**Thursday, November 1, 2007**

---

**APPEARANCES**

**For the Appellant:** **SAMUEL W. PLAUCHE, IV**  
**TADAS KISIELIUS**  
**GordonDerr**  
**2025 First Avenue, Suite 500**  
**Seattle, Washington 98121**

**For Pierce County:** **JILL GUERNSEY**  
**Office of the Pierce County**  
**Prosecutor**  
**955 Tacoma Avenue South, Suite**  
**301**  
**Tacoma, Washington 98402**

**For the Intervener Coalition to Preserve Puget Sound Habitat:**  
**DAVID A. BRICKLIN**  
**Bricklin Newman Dold, LLP**  
**1001 4th Avenue, Suite 3303**  
**Seattle, Washington 98154**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**APPEARANCES - (continuing)**

**For the Intervener North Bay Partners:**

**JERRY R. KIMBALL  
Attorney at Law  
1200 Fifth Avenue, Suite 2020  
Seattle, Washington 98154**

**Also present: Sherry Cox, Clerk**

**Reported by: Linda M. Grotefendt, CCR  
License No. 3013**

<b>INDEX OF EXAMINATION</b>		
		<b>PAGE:LINE</b>
1		
2	<b>WITNESS:</b>	
3	<b>TY BOOTH</b>	
4	Narrative testimony by Mr. Booth	10:22
	Cross-examination by Mr. Kisielius	30:4
5	Cross-examination by Mr. Kimball	49:12
	Cross-examination by Mr. Bricklin	57:10
6	Direct Examination by Ms. Guernsey	62:5
7	<b>BRAD MURPHY</b>	
8	Direct Examination by Ms. Guernsey	64:18
	Cross-examination by Mr. Kimball	67:17
9	Cross-examination by Mr. Bricklin	71:5
	Cross-examination by Mr. Kisielius	76:11
10		
	<b>VICKI DIAMOND</b>	
11		
	Direct Examination by Ms. Guernsey	81:3
12	Cross-examination by Mr. Kisielius	85:12
	Cross-examination by Mr. Kimball	87:1
13		
	<b>DIANE COOPER</b>	
14		
	Direct Examination by Mr. Kisielius	97:17
15	Cross-examination by Ms. Guernsey	116:22
	Cross-examination by Mr. Kimball	128:8
16	Cross-examination by Mr. Bricklin	132:22
	Redirect Examination by Mr. Kisielius	145:10
17	Recross-examination by Ms. Guernsey	150:18
	Recross-examination by Mr. Bricklin	155:1
18	Voir Dire Examination by the Hearing Examiner	155:15
	Further Recross-examination by Mr. Bricklin	163:18
19		
	<b>BRIAN PHIPPS</b>	
20		
	Direct Examination by Mr. Kisielius	166:10
21		
22	<b>OTHER MATTERS</b>	
	<b>DESCRIPTION</b>	<b>PAGE</b>
23		
24	Opening Statement by Mr. Plauche	91
25		

INDEX OF EXHIBITS					
	NO.	DESCRIPTION	ID'D	OF'D	AD'D
1					
2					
3	1	Staff Report and attached exhibits	8		38
4	48	Map of Foss farm and Washington Shellfish site	109	109	109
5					
6	50	Metzger map of Foss farm	100	100	100
7					
8	51	Geoduck Environmental Code of Practice	167	167	167
9	52	Photographs	173	173	173
10	53	Photographs	180	180	180
11	54	Aerial photo of Foss farm location	99	99	99
12	55	Aerial photo of Washington Shellfish location	110	110	110
13					
14	56	JARPA permit application	102	102	102
15					
16	57	County's prior Staff Report	44	44	45
17					
18	58	Hearing Examiner's Decision	45	45	45
19					
20	60	(No description given)		188	188
21					
22	61	Photographs	193	192	193
23					
24	62	Transcript	188	188	188
25					
	64	(No description given)		190	190
	66	Letter from Vicki Diamond to L.H. Hendricks	32	31	32
	67	Email from Pat Pendergrass to Trish Byers	33	33	33
	68	(No description given)		145	145
	69	Substantial Development Permit Decision	154	147	147

INDEX OF EXHIBITS - (continuing)					
	NO.	DESCRIPTION	ID'D	OF'D	AD'D
1					
2					
3	70	Permit	148	148	
4	73	(No description given)		38	38
5	74	Notification to Puyallup Tribe	149	149	149
6	76	Photographs	175	175	175
7	77	(No description given)		38	38
8	78	(No description given)		38	38
9	79	Department of Natural Resources email by Sarah Dzimba1	106	106	106
10					
	81	Letter from the Department of the Army, Seattle District Army Corps of Engineers to Catherine Townsend	115	115	115
11					
12					
	149	Email by Brad Murphy, Department of Ecology	70	75	75
13					
14					
15					
16					
17					
18					
19					
20					
21					
22					
23					
24					
25					

1                   BE IT REMEMBERED that the Hearing of  
2           Administrative Appeal AA16-07 was held on Thursday,  
3           November 1, 2007, at 10:10 a.m., at Pierce County Public  
4           Services Building, Public Meeting Room, 2401 South 35th  
5           Street, Tacoma, Washington, before Linda M. Grotefendt,  
6           Notary Public in and for the State of Washington.

7  
8                   THE HEARING EXAMINER: Good morning. My name is  
9           Terrence F. McCarthy. I am the Deputy Hearing Examiner  
10          appointed to hear the Taylor Shellfish Farm Appeal,  
11          Application Number 612676, Administrative Appeal Number  
12          AA11-07 (sic).

13                  This is a very crowded room, and it's going to get very  
14          warm very rapidly, so I'm going to leave all the doors open.  
15          Please, please, keep the personal conversations to -- just  
16          have them nonexistent so that we can hear everything that's  
17          going on.

18                  If the person in front of you gets up and testifies and  
19          says everything you ever wanted to say, don't feel like you  
20          need to get up and say it again. All you need to do is get  
21          up and say "ditto," and I'll understand your testimony.

22                  Today I'll hear from the County, then I'll hear from the  
23          Appellant, and then I'll hear from the Interveners. And I'm  
24          wondering, at this point, if we have any preliminary motions  
25          that need to be heard.

1                   MS. GUERNSEY: Mr. Examiner, Jill Guernsey, Deputy  
2                   Prosecuting Attorney, for the record. I'm not sure about  
3                   preliminary motions, but I would like to just say that I  
4                   have just a few witnesses today, and we intend to present Ty  
5                   Booth first; Vicki Diamond, Supervisor of Current Planning,  
6                   second. And I know there are two individuals here from the  
7                   State: Perry Lund and Brad Murphy, and I think Brad Murphy  
8                   is going to testify. I don't believe Perry Lund is going to  
9                   testify.

10                  THE HEARING EXAMINER: Thank you. Taylor  
11                  Shellfish?

12                  MR. PLAUCHE: It's Samuel Plauche for Taylor  
13                  Shellfish. The only preliminary matter we have is, we've  
14                  had some preliminary discussions about exhibits, and we've  
15                  sort of numbered them sequentially, with the County's  
16                  exhibits going first and Mr. Bricklin's going second and  
17                  then our exhibits going third. And we've got a sort of  
18                  numbering system internal to us.

19                  I presume that you would like us to number the exhibits  
20                  for the hearing as they come in? Or we've got a full set of  
21                  exhibits for you as well. It's your preference.

22                  THE HEARING EXAMINER: If you've adopted a  
23                  numbering system and you have numbered them, then I'll be  
24                  happy to adopt your system, and you can introduce them by  
25                  number that way. It sounds like that would be the easiest

1 system. Is that correct?

2 MR. PLAUCHE: Yes. Thank you.

3 THE HEARING EXAMINER: Do you want to have all  
4 those exhibits handed in at one time, or how do you want to  
5 do that?

6 MR. PLAUCHE: I think that might be the easiest  
7 thing, yeah. So we've got a set of our exhibits for you,  
8 and some may or may not come in. David, do you have yours  
9 copied for the Examiner (indicating to Mr. Bricklin)?

10 THE HEARING EXAMINER: well, I'll mark the ones  
11 that are admitted, and the ones that aren't will be there.

12 MR. BRICKLIN: We'll provide you a set tomorrow, of  
13 ours.

14 THE HEARING EXAMINER: Of yours?

15 MR. BRICKLIN: Yes.

16 THE HEARING EXAMINER: Do the County and the  
17 Appellant wish to present theirs today?

18 MR. PLAUCHE: (Produces binders to the Hearing  
19 Examiner.)

20 MS. GUERNSEY: Mr. Examiner, the County Staff  
21 Report, Ty Booth's Staff Report, is Exhibit 1. It has a  
22 number of exhibits to it. So I think we just have one hard  
23 copy of a PowerPoint that Mr. Booth is going to do that  
24 we'll just add as -- pick up where we left off. Just a  
25 moment. 1R is the last one that's in the Staff Report. If

1 we could make the hard copy of the PowerPoint 1T.

2 MR. BRICKLIN: S.

3 MS. GUERNSEY: S? Thank you. Good catch.

4 THE HEARING EXAMINER: Good catch, right.

5 MS. GUERNSEY: It's going to be a long day.

6 THE HEARING EXAMINER: Mr. Plauche, your exhibits  
7 -- how are they numbered, and would they start with 2?

8 MR. PLAUCHE: No. Mr. Bricklin's go 2 through 47,  
9 and then our exhibits go 48 through end. I'm not sure what  
10 the last number is.

11 THE HEARING EXAMINER: And did you discuss how you  
12 wish to proceed? The County first and then the Appellant  
13 and then Mr. Bricklin?

14 MR. PLAUCHE: I think that's acceptable.

15 THE HEARING EXAMINER: I'll hear from the County at  
16 this time.

17 MS. GUERNSEY: Could I also just say, before we  
18 start: There are a couple more chairs up here. We could  
19 probably get a couple more if anyone needs them.

20 THE HEARING EXAMINER: The other thing is: If you  
21 haven't signed in, please sign in before you leave, if you  
22 want a copy of my decision. The only way I'll know that you  
23 want a copy is if you sign in. I know some of you came  
24 through this back door here, so you may not have signed in  
25 yet; but on a break, or something like that, you can sign

1           in.

2                   we will break at noon for lunch, and will one hour be  
3 sufficient time?

4                   MS. GUERNSEY: Yes.

5                   THE HEARING EXAMINER: we'll break at noon and be  
6 back at 1 o'clock. And then we will adjourn at 4 o'clock  
7 this afternoon.

8                   MR. BRICKLIN: Mr. Examiner? David Bricklin. What  
9 is the expectation regarding testimony from the public  
10 generally as opposed to witnesses being called by the  
11 parties?

12                   THE HEARING EXAMINER: My feeling is, basically,  
13 we're going to hear from the witnesses. And I'll hear from  
14 you on input from the public, but this is an appeal process,  
15 so I think it's basically limited to the witnesses presented  
16 by the attorneys.

17                   MR. BRICKLIN: All right. Thank you.

18

19                   TY BOOTH, having been first duly sworn upon  
20 oath by the Hearing Examiner, testified as follows:

21

22                   MR. BOOTH: Thank you, Mr. Examiner. Ty Booth,  
23 Pierce County Planning Department. Is that working  
24 (indicating to microphone)?

25                   I'll start that again. Thank you, Mr. Examiner. Ty

1 Booth, Senior Planner with the Pierce County Planning and  
2 Land Services Department, and I will summarize the Staff  
3 Report for this case this morning. I'll try to be brief, as  
4 I know there will be lots of testimony during the course of  
5 this hearing, and I'll try not to take up your time.

6 The appeal this morning is regarding Shoreline  
7 Substantial Development Permit Case Number SD22-00. SD22-00  
8 was applied for on July 10th of 2000. The hearing was held  
9 on December 6th of 2000. The case was approved by Examiner  
10 Causseaux, not you, on December 28th of 2000.

11 Conditions 4 and 5 of that decision is the main focus of  
12 this hearing. And to summarize those conditions:  
13 Essentially, an application, after approval, has two years  
14 in which to start getting moving on their project and five  
15 years to finish the project altogether, although a one-year  
16 time extension may be granted. So, in essence, a permit is  
17 good for up to six years' time.

18 Now, I have listened to the tape of the December 6th,  
19 2000 hearing, and the only ones who testified were Diane  
20 Cooper, of Taylor Shellfish, and myself. We seem to have  
21 gathered a few friends--

22 MS. COOPER: We have.

23 MR. BOOTH: --during that time.

24 On the tape, Ms. Cooper testified that this type of  
25 intertidal geoduck operation was a, quote, unquote, "new

1 venture" for Taylor.

2 I would like to just show a couple slides of the site.  
3 These weren't included previously, as exhibits. I have  
4 given you a hard copy. I set one on your table. The first  
5 set of photos I'm going to show are basically just showing  
6 where this site is located in relation to the County.

7 THE HEARING EXAMINER: The photo -- the hard copy  
8 has been marked as 2S. Is that -- or 1S.

9 MS. GUERNSEY: 1S.

10 THE HEARING EXAMINER: Thank you.

11 MR. BOOTH: (Referring to slides.) I know we're  
12 presenting to you -- and this may be difficult for some  
13 members of the audience, but again, we're trying to make  
14 presentation to you (indicating to Hearing Examiner). So  
15 I'll do my best Vana White or weatherman impersonation, I  
16 suppose.

17 Anyhow, this is just a map that comes off the County's  
18 Geographic Information System, or GIS. It's basically just  
19 trying to give you a flavor of where this site is exactly  
20 located. Of course, the main land over here, Anderson  
21 Island, McNeil Island, the Key Peninsula, Joemma Beach State  
22 Park. And the site is about a quarter to a half mile up the  
23 beach to the north; so on the west side of the Key Peninsula  
24 and to the south and to the east of Heron Island. So it  
25 should be a little bit further up.

1           And this is just a little bit more zoomed-in version of  
2           the site; again, indicating where the State park is located.  
3           And again, the Taylor-Foss farm on the west side of the Key  
4           Peninsula, southeast of Heron Island, further up toward the  
5           top.

6           I should indicate, since there are, I understand, a few  
7           attorneys in the room, that there is a disclaimer at the  
8           top. That's just put on any County map, basically, that's  
9           issued, just to give people an indication that the  
10          information may not always be completely accurate.

11          This is a zoomed-in version of the site, just kind of  
12          focusing in on where this is located, and this is now  
13          overlaying the parcel lines onto the map. The parcels  
14          highlighted in yellow are the parcels, at least according to  
15          the Assessor-Treasurer's Office, that are owned by the Foss  
16          family.

17          This is a 2005 aerial photo of the area with the parcel  
18          lines overlaying. And this is, again, the main reason why  
19          that disclaimer is up there: because when you lay on the  
20          parcel lines, they don't always match up with the photo.

21          Just giving you an indication of what the site looks  
22          like. The Foss site is pretty much undeveloped. It's  
23          high-bank waterfront, and we'll show you some photos of that  
24          a little bit later on.

25          This is a view of a residential development just to the

1 north of the site; again, the Foss parcels highlighted in  
2 yellow. And I only include this stretch of beach because  
3 that's kind of really the only residential development  
4 that's near to this site.

5 THE HEARING EXAMINER: It would be to the south?

6 MR. BOOTH: The Foss site would be to the south.  
7 This string of homes would be just to the north.

8 Okay. I'll get back to some of the photos a little bit  
9 later in the presentation.

10 Now, again, SD22-00, for the Taylor-Foss farm, was the  
11 first geoduck case that was ever applied for and received  
12 approval of a Shoreline Substantial Development Permit in  
13 unincorporated Pierce County.

14 Conditions 4 and 5, regarding the six-year time limit,  
15 are standard conditions imposed on shoreline permits, and  
16 these standard conditions were imposed on this permit.  
17 These conditions were not discussed at the hearing. I  
18 listened to the tape; it wasn't exceedingly long. But the  
19 conditions were not discussed at the hearing.

20 The question comes up: when these conditions were  
21 imposed, or put forward, by County staff, was it  
22 contemplated by the County, the County staff, what this  
23 would mean later on? what's it mean by recommending that  
24 these conditions be added to the decision?

25 From my end, was that contemplated: what it would mean

1           in the long term? I doubt it. I can't remember back seven  
2           years. It was not discussed during the hearing. This,  
3           again, was a new venture, according to the tape, for Taylor,  
4           and it was certainly new for the County as well; again, the  
5           first Shoreline Substantial Development Permit for geoduck  
6           in unincorporated Pierce County.

7           Now, the Applicant's attorneys may say, in response to  
8           what I just said, hypothetically: Isn't it poor practice  
9           for the County to impose a condition when it really doesn't  
10          know what it means or is going to mean in the long term?

11          In response to this hypothetical question, which they  
12          have not raised--so not trying to put words in your mouth--  
13          certainly, the County does not intend to impose or recommend  
14          conditions when we don't know what they mean. We don't do  
15          that. But this, again, was a completely new activity for  
16          the Applicant, was new for the County, and the standard  
17          condition was imposed.

18          Again, this is a standard condition that's imposed on  
19          the shoreline permits that are processed by the County. So  
20          it was just done; kind of a boilerplate. It was automatic  
21          that we did it.

22          Now, could we have foresaw the future? Could we have  
23          foresaw this (indicating to proceeding)? Could we have  
24          predicted or wanted what we have here today? No. But with  
25          that in mind, for those who are here at the hearing and

1           intending to testify or listen and who may be thinking the  
2           County was negligent in issuing this permit in the first  
3           place because of the myriad of impacts that have since been  
4           stated to occur as a result of geoduck farms--may or may not  
5           be created by geoduck farms--I point out that this is not  
6           the purpose of the hearing.

7           The purpose of the hearing today is not to discuss what  
8           the environmental impacts, what the various variety of  
9           impacts that we all know about -- that's not the purpose of  
10          this hearing. The purpose of the hearing today is to  
11          discuss that time period, that six-year time period. In  
12          addition, the Applicant has also included a question in  
13          their appeal about whether or not this constitutes  
14          development and needs a Shoreline Substantial Development  
15          Permit.

16          So I'm not going to attempt to get into discussing what  
17          impacts are created by this project, in terms of impacts to  
18          the water, to the neighbors, etcetera. That's not the  
19          purpose of this hearing.

20          Now, Taylor has asserted that the County has informed  
21          them, over the years, that the six-year permit condition  
22          only applies to the establishment of the farm and, provided  
23          they did that within the six-year time frame, that they  
24          could then operate the farm in perpetuity.

25          Now, I would say that I have probably been--she may

1 disagree--the closest contact Ms. Cooper, Diane Cooper, with  
2 Taylor Shellfish, has had with the County. Diane Cooper has  
3 been the face of Taylor Shellfish for the interactions  
4 Taylor has with the County. I can't say, over the years,  
5 that I haven't had contact with somebody else from Taylor,  
6 but she has been the face of Taylor for Pierce County.

7 Now, I have been the planner on two Taylor permits that  
8 have been approved, including this one. Overall, I have  
9 processed six of the eight clam or geoduck farms that have  
10 been approved in the County. Further, I have six more that  
11 I have been assigned that have not yet gone through a  
12 hearing. One of those six is a Taylor application.

13 Now, I believe Ms. Cooper and I have developed a good  
14 working relationship over the years, and we have had frank  
15 discussions about various issues relating to geoducks. And  
16 Lord knows, there are a lot of issues regarding geoducks  
17 that have come up.

18 At some point, that six-year timing issue came to the  
19 surface. Now, I don't know when it first was brought up in  
20 our discussions, as to what those timing restrictions mean.  
21 I do remember having many, many discussions with Ms. Taylor  
22 (sic) about the issue, and I always remember stating that my  
23 personal opinion was the same as Taylor's -- personal  
24 opinion, that, for many of the same reasons that Taylor puts  
25 forward, that I believe geoduck operations should be allowed

1 to operate -- once they establish their farm within six  
2 years, they should be allowed to operate in perpetuity.

3 There are provisions in the Code where somebody can seek  
4 revocation of a permit, etcetera. There are mechanisms to  
5 pull a permit if it gets out of hand. But my personal  
6 opinion was that, should they establish the farm in the  
7 six-year period, they should be allowed to operate in  
8 perpetuity. And I always indicated that I was not  
9 representing the official position of the Pierce County  
10 Planning and Land Services Department. I was very careful  
11 to say this.

12 Now, you might ask: Why am I giving out my personal  
13 opinion in discussions with the Applicant? Well, when you  
14 work and develop -- and work with somebody over many, many  
15 years, you develop a working relationship, and there's a  
16 free flow of information back and forth, and that's what  
17 happened, at least from my standpoint.

18 Now, I have wrestled with the six-year time issue since  
19 at least 2005. It may have been sooner, probably was  
20 sooner, but the best my recollection can go back and I can  
21 document is 2005.

22 For example, the other shoreline permit that I've worked  
23 on for Taylor was SD54-05. This was the Rogers site. This  
24 case was presented before Hearing Examiner Causseaux, and,  
25 at the hearing--and I've listened to this tape as well--I

1 brought up the issue about the six-year period and how it's  
2 a difficult issue and we don't really have a grasp on it.  
3 And this is on record. There is discussion in that hearing:  
4 Again, my testimony, as well as Ms. Cooper's. And  
5 Ms. Cooper, in that hearing, indicates that she understands  
6 the issue, also, is unresolved.

7 Now, this is approximately one year before the County  
8 sent our letter to the Applicant, stating that their time  
9 period had expired for the Taylor-Foss farm. So it's not as  
10 such that we just sprang it upon them one day. They were of  
11 the understanding, at least a year before we sent this  
12 letter, that it was unresolved, that the timing issue was  
13 unresolved.

14 Now, around this whole time, there have been many  
15 meetings, here in the Planning Department, with regards to  
16 the geoduck issue overall. And, again, I was a definite  
17 minority in supporting that permits are good for perpetuity.  
18 There was me and maybe one or two other people in the  
19 Department who had that same position. The vast majority of  
20 everybody else felt that the six-year period applied to not  
21 only the establishment of the farm, but also to how long it  
22 can operate.

23 Now, earlier this year, a complaint came in from a  
24 member of the public that the permit had expired for the  
25 Taylor-Foss farm. At that point -- subsequent to that,

1           there were many more discussions, in depth, internally,  
2           within the County, as to what the time period means.

3           Eventually, a decision was made, and we issued the  
4           decision in July, saying that the permit expires after six  
5           years. I should note that a revocation was also filed in  
6           that time, by Mr. Bricklin, on behalf of some area property  
7           owners. They since withdrew that appeal, if "withdraw" is  
8           the correct term.

9           Now, we didn't make our decision based on the  
10          revocation. The timing -- certainly, they pushed the issue  
11          along, but we make decisions here all the time where people  
12          don't agree, so that was not the basis why we issued the  
13          letter saying the permit expires after six years. Anyhow,  
14          we issued the decision in July. Taylor has appealed it.

15          Again, I indicated that Ms. Cooper and I have had many  
16          discussions over the years about my personal opinions but  
17          that it was not the representation of the Department. The  
18          decision came out in July. I support the decision that was  
19          issued. If I did not agree with it, I would not be here.  
20          It's a free world. I could have found employment elsewhere.  
21          So I fully agree with the decision that the County issued in  
22          July.

23          So the six-year time limit is what it is. If the  
24          Applicant seeks to change what the Code says, that's not a  
25          process here. That's a legislative process, through the

1       elected officials.

2               Now, on a related issue, if anybody brings up why it  
3       took us a half a year for us to make a decision on whether  
4       or not the permit is good--the complaint came in early this  
5       year. We issued our decision in July--I would like to make  
6       note that we have received unprecedented amount of  
7       correspondence, calls, emails, everything, regarding the  
8       whole geoduck industry as a whole.

9               We have received it from all ends. So we were taking  
10       all of this into consideration. And considering how  
11       everything is interrelated, as evidenced by the crowd here,  
12       we took our time to be careful in issuing a decision.

13              I should note, in part, that, aside from being bombarded  
14       with various points on all sides, it is a very complicated  
15       legal issue as well, as documented by the four attorneys  
16       sitting in the front row here and an additional one over  
17       there. So it's a complicated issue.

18              I'll try to wrap it up here shortly. Of note, we have a  
19       long history -- the County has a long history of requiring  
20       renewals for permits after six years. There are two  
21       specific references I indicated in the Staff Report.

22              The Washington State Department of Natural Resources has  
23       two sites in South Puget Sound where they essentially dump  
24       dredged material. What that means is, when they have Port  
25       projects and they dredge material out of the waterways, they

1           need someplace to dump it.

2           They have established two dredge disposal sites within  
3           South Puget Sound. One is in Commencement Bay. One is  
4           between Anderson and Ketron Island, both within  
5           unincorporated Pierce County. They have, over the years, on  
6           both sites, come in for renewals after every six years.

7           And, in fact, just yesterday, at 3:00 p.m., on  
8           Halloween, I was standing here doing the latest renewal for  
9           the Anderson/Ketron site. This was the fourth permit they  
10          have requested, because their permit expires, I believe, mid  
11          this month, mid November. So they were in again for their  
12          fourth permit over the life of that disposal site.

13          Now, these DNR disposal sites are similar. Obviously  
14          doesn't involve geoduck, but the sites are similar in that  
15          they both involve ongoing development. Unlike building a  
16          house, a dock, or bulkhead, these activities continue on.  
17          Geoduck farming continues on, disposing of dredge material  
18          continues on.

19          Unless you're rich, you don't normally continue building  
20          your house for years and years and years. Or if you're  
21          poor, maybe I should say. Also, the same thing with  
22          bulkhead. You build it, you're done, you move on. The  
23          geoduck operations and the disposal sites -- they continue  
24          on. There's ongoing activity.

25          Now, aside from the timing issue, which is the main

1 focus of the appeal, the Applicant has also inserted into  
2 their appeal the issue of whether or not geoduck farms  
3 constitute development. And in the Staff Report, I note how  
4 the County has long required shoreline permits for projects  
5 that involve mucking around in the water. Now, "mucking" is  
6 certainly not a trigger definition for requiring Shoreline  
7 Substantial Development Permits. But maybe let me go back  
8 to the project--just about done--show some photos of the  
9 site that I took on July 6th and July 13th of this year, and  
10 then I'll wrap it up.

11 (Indicating to slides.) This first page just indicates  
12 who took the photos, when they were taken. It was at a low  
13 tide, again, on July 6th. I have plenty more photos of this  
14 site visit, which all the parties have been provided before  
15 the hearing. I'm not going to go through all of them. I  
16 just picked out some, just to give you a flavor of what the  
17 site looks like.

18 If you recall, on the earlier photos, I indicated there  
19 was a housing -- kind of a residential area just to the  
20 north of the Taylor-Foss farm. This would be a view of that  
21 string of homes, just on the very north end, so we would be  
22 looking south on the beach. Taylor-Foss farm would be  
23 further off in the distance. We'll move that way as we walk  
24 down the beach.

25 It's a little bit closer view. This is toward the south

1 end of that housing development, or that residential area.  
2 And the Foss farm would be located further off into the  
3 right of the photo, toward that spit of land.

4 This would be kind of a panoramic view, panning from  
5 left off to the right. As we move a little bit further --  
6 and here we are. And I should point out, this is a good  
7 survey point, or observation point. In the photo, there are  
8 these pilings toward the spit of land, and that's a good way  
9 to kind of navigate where these photos are being taken from.

10 So the Taylor-Foss farm -- I've got to get out a little  
11 pointer here. The Taylor-Foss farm would kind of be where  
12 I'm showing the red dot on the screen.

13 If we can move to the next. And this would be, again,  
14 panning out into the water. This would be looking  
15 essentially from the site, back to the north, toward the  
16 residential development, which would be up around the  
17 corner. So I'm basically right -- and I should make note:  
18 Right here, this green area in the foreground, that is  
19 netting.

20 If we could move on to the next one. And this is  
21 additional netting that's located of the beach for the Foss  
22 farm.

23 MR. BRICKLIN: Ty, can you go back to the one  
24 before, just for a second?

25 MR. BOOTH: I can do that --

1 MR. BRICKLIN: Or not.

2 MR. BOOTH: Yeah, I can do that a little bit later,  
3 if you want to reference it. I might knock the whole system  
4 down, knowing my computer skills.

5 MR. BRICKLIN: All right.

6 MR. BOOTH: It's a little bit closer-up view of the  
7 site. And if we could move to the next one. Again, a view  
8 back toward the north and that residential development.

9 And this would be a similar view. And the netting would  
10 be kind of in this submerged area in the foreground. Just  
11 an additional photo. If we could move on to the next one.  
12 And the next. So that's essentially what I saw when I went  
13 out to the site on July 6th.

14 Now we move on to the photos for Friday the 13th, July  
15 13th, and this was at an even lower tide. The other one  
16 was, I think, 1.5. This was negative 3.4. So we'll go into  
17 these photos now, if we may.

18 This, again, is--I use the pointer--the reference point,  
19 up in the upper right-hand corner, of the pilings up on the  
20 spit. Again, a view in that area. And on this site visit,  
21 now, there are workers out there. And there is a barge with  
22 workers. And we'll continue on to the next slide.

23 And if we could move on to the next one. Just showing  
24 -- again, not getting into issues about geoduck farming:  
25 good; is it bad; what environmental impacts, etcetera; and

1           just showing you what the site looked like.

2           If we could move on to the next one and the next one.  
3           Next, please. Next. Next. And I think this is the last  
4           one. If you could just --

5                     MS. MCELNEY: Oops.

6                     MR. BOOTH: That's all right. I'll try and fix  
7           that. I do want to touch on this photo, this last photo,  
8           just for a moment.

9           Again, the main point of this hearing was the six-year  
10          time period. The Applicant has also inserted whether or not  
11          this type of activity constitutes development. There might  
12          being slight differences in the versions of what requires a  
13          Shoreline Substantial Development Permit, but I will read  
14          what I inserted in the Staff Report.

15                    "A Shoreline Substantial Development Permit shall be  
16          obtained for any development or use consisting of the  
17          construction or exterior alteration of structures; dredging;  
18          drilling; dumping; filling; removal of any sand, gravel, or  
19          mineral; bulkheading; driving a piling; placing of  
20          obstructions, or any project of a permanent or temporary  
21          nature which interferes with the normal public use of the  
22          surface waters overlaying land subject to the Shoreline  
23          Management Act at any state of water level in which  
24          development or use exceeds a cost or fair market value of  
25          2500."

1           That dollar figure has since been updated to be \$5,718.  
2           But I will make note: This is a photo of what the site  
3           looked like as of July 13th. And just kind of going through  
4           what I just read, it discusses that "a Shoreline Substantial  
5           Development Permit shall be obtained for any development or  
6           use."

7           I know there's a question about what the definition of  
8           "development" is, but I think it's clear that this is a use.  
9           In addition, what I just read talks about constructing  
10          structures. That's probably doubtful. There aren't any  
11          buildings being built out there.

12          However, is there any dredging? Certainly, it's not  
13          like dredging in a port canal or anything like that.  
14          However, the Applicant certainly does insert hydraulic wands  
15          into the beach to loosen up the substrate, which causes  
16          turbidity, the soil to dissipate throughout the beach,  
17          somewhat similar to dredging. Definitely not dredging,  
18          though.

19          The definition also discusses drilling. Are they doing  
20          any drilling? They're not doing any oil or gas drilling,  
21          but they certainly are inserting water, hydraulic wands into  
22          the beach to emulsify the beach. They're inserting  
23          high-pressure water into the beach. In addition, they are  
24          inserting plastic PVC tube into the beach.

25          Are they doing any dumping? No, they're not doing any

1           dumping of materials. Are they doing any filling? No,  
2           they're not doing that. Are they removing any sand or  
3           gravel? Certainly, they're not doing that. They're not  
4           removing sand or gravel for the purposes of commercial sale,  
5           for any purpose like that.

6           However, it goes on to say: Are they removing any  
7           mineral? Certainly, they're not removing any mineral, like  
8           coal or diamonds or anything like that. However, they  
9           certainly are removing geoducks from the beach.

10           Are they doing any bulkheading? No. Are they driving  
11           any pilings? No, they're not driving piling. But, again,  
12           they are inserting hydraulic wands into the beach, they're  
13           inserting PVC tube into the beach.

14           Are they placing any obstructions on the beach? I'll  
15           let the photo speak for itself. Is it a project of a  
16           permanent or temporary nature? Again, I'll let the photo  
17           speak for itself. Is this area overlaid by surface waters  
18           of the State? I think it's obvious that it does.

19           And would the fair market value of this project exceed a  
20           value of \$5,718? I would think it would, with the cost of  
21           the netting, the tubes, the labor, the barge, the fuel,  
22           etcetera.

23           In summary, we are requesting that the Hearing Examiner  
24           uphold our Administrative Determination issued in July of  
25           this year. I don't have anything further unless you have

1 any questions.

2 THE HEARING EXAMINER: Burden of proof in this  
3 case?

4 MR. BOOTH: I'm sorry?

5 THE HEARING EXAMINER: Is there a burden of proof  
6 in this case?

7 MR. BOOTH: I'm not a lawyer, so I can't speak to  
8 that one.

9 THE HEARING EXAMINER: Anything further?

10 MS. GUERNSEY: Of this witness?

11 THE HEARING EXAMINER: Uh-huh.

12 MS. GUERNSEY: I don't have any further questions  
13 of this witness. Do you want to take questions from the --

14 THE HEARING EXAMINER: I will do that. I remind  
15 you of what Weyerhaeuser says: "Limited."

16 MR. KISIELIUS: Thank you. Tadas Kisielius, on  
17 behalf of Taylor Shellfish. I just have a couple follow-up  
18 questions.

19 THE HEARING EXAMINER: Will you state your name  
20 again, please?

21 MR. KISIELIUS: Tadas Kisielius.

22 THE HEARING EXAMINER: Let's spell that for the  
23 record, please.

24 MR. KISIELIUS: The first name is T-a-d-a-s. The  
25 last name is K-i-s-i-e-l-i-u-s.

1                   THE HEARING EXAMINER: Good. I didn't have you  
2                   identified on the record.

3

4

CROSS-EXAMINATION

5 BY MR. KISIELIUS:

6 Q Mr. Booth, you had indicated that you had taken a position  
7 and conveyed the position, on the permit expiration, that  
8 the permit did not expire, when you initially talked with  
9 Ms. Cooper; is that correct?

10 A Could you restate that question again?

11 Q You had testified that you indicated to Ms. Cooper,  
12 initially, that the permit did not expire; is that correct?

13 A That was my personal opinion, but I was not representing  
14 the official County point. I always clarified that, that  
15 "I'm not representing the official" -- we had many  
16 discussions over the years, and that was my personal  
17 opinion, but I always indicated I was not representing the  
18 official County position.

19 Q Okay. And were you the staff person in charge of  
20 processing this permit application?

21 A Yes.

22 Q And did you write the Staff Report on this permit  
23 application?

24 A I did.

25 Q And you indicated, also, that you are responsible for -- I

1 think it was either six or eight other applications, of a  
2 similar geoduck operation, currently pending. Is that  
3 correct?

4 A Sorry. I keep forgetting to address the Examiner on the  
5 responses. That is correct.

6 Q And so, as the staff person in charge of these permits,  
7 isn't it your responsibility, when an applicant has a  
8 question about the interpretation, to provide the County  
9 interpretation?

10 A I think my testimony spoke to that. This -- and I went  
11 through what was occurring. This is a new industry, and we  
12 were struggling with many issues regarding this type of  
13 industry.

14 Q Okay. If I can ask you to comment on a couple of exhibits.  
15 The first is marked Exhibit 66, in our first binder. I'll  
16 give you a copy of that to read.

17 THE HEARING EXAMINER: Hold on for a minute now.  
18 Let's let everyone get on the same page.

19 MR. KISIELIUS: For the Examiner's benefit, all of  
20 the exhibits I'll be referring to are from the same binder,  
21 the one that's marked Exhibits 48 through 87.

22 MR. BOOTH: 81.

23 THE HEARING EXAMINER: It's always the last one,  
24 isn't it? Exhibit Number 66--

25 MR. KISIELIUS: That's correct.

1 THE HEARING EXAMINER: --which is a letter from  
2 Vicki Diamond--

3 MR. KISIELIUS: That's right.

4 THE HEARING EXAMINER: --to L.H. Hendricks will be  
5 admitted into evidence.

6 Q And, Mr. Booth, I've highlighted a portion on that email.  
7 I'm wondering if you could please read the highlighted  
8 portion.

9 A "Once these geoduck permits are issued, how long do they  
10 run?" Response: "we have not placed any expirations on  
11 this particular activity for several reasons. The  
12 aquaculture is to be an ongoing activity, and, once the  
13 seeds are planted, it would take up to approximately seven  
14 years for the geoduck to reach a size to harvest for  
15 market."

16 Q To be clear, that response was written by...? Could you  
17 indicate who the response was written by?

18 A Vicki Diamond.

19 Q So is Ms. Diamond's statement, that the permits don't  
20 expire, consistent with the information you had previously  
21 given Ms. Cooper?

22 A I don't want to speak for Ms. Diamond.

23 Q Okay. But the statement, right there, that says permits do  
24 not expire -- I'm not asking you to speak to her state of  
25 mind. I'm just asking about the position that's taken in

1           that letter and whether it's consistent with your earlier  
2           statements to Ms. Cooper.

3                       THE HEARING EXAMINER: Do you need to read the  
4           entire statement, or just the one sentence?

5                       MR. KISIELIUS: I'd be happy to explore this  
6           further with Ms. Diamond if that's preferable. I'm also  
7           going to hand up, now, Exhibit 67.

8                       THE HEARING EXAMINER: Exhibit 67 is a memo from  
9           Pat Pendergrass to Trish Byers, Vicki Diamond, and will be  
10          admitted into evidence.

11    Q       I'd ask that you read the highlighted portion of that email  
12          as well, please.

13    A       "Authorization to conduct activities is limited to five  
14          years plus one year extension. DOE, Jeff Stewart,  
15          indicated they thought the development was the planting,  
16          growing, and harvesting of a crop of clams. In other  
17          words, the one SD gets a crop harvested. The Hearing  
18          Examiner has not agreed on this yet. Ty has already tried  
19          it."

20    Q       And so could you read the date on that as well, please?

21    A       June -- I've not seen this email prior to now. It's dated  
22          June 5th of 2006.

23    Q       Okay. And so, could you explain again: Is the statement  
24          that's highlighted there consistent with your understanding  
25          of the situation, in terms of the five-year permit?

1 A I can't speak -- I did not write this email, and I don't  
2 want to take one highlighted portion, that you've  
3 highlighted, out of an entire email which has many more  
4 paragraphs. And things can be taken out of context when  
5 you just highlight one paragraph.

6 Q If you'd like, you could read into the record the earlier  
7 two paragraphs, to provide the context.

8 A well, I'd like to read the whole email if I'm going to  
9 provide any comment on this.

10 Q We can take that time.

11 THE HEARING EXAMINER: We'll take a five-minute  
12 recess, and you can read it. We'll be in recess for five  
13 minutes.

14 MR. KISIELIUS: If I might, if it would help to  
15 speed this along, if I could give Mr. Booth the copies of  
16 the exhibits that I'd like to be referring to, so he could  
17 get familiar during this recess.

18 THE HEARING EXAMINER: That would be good.

19 MR. KISIELIUS: Thank you.

20 (Recess taken from 10:52 a.m. to 11:02  
21 a.m.)

22 THE HEARING EXAMINER: Good morning. The hearing  
23 will be reopened.

24 MS. GUERNSEY: Could we once again tell people to  
25 turn off their phones again, because I think we have some

1 new people?

2 THE HEARING EXAMINER: Would all of you please make  
3 sure you turn off your telephones? Not just silent. Turn  
4 them off, please.

5 You may proceed. Yes, go ahead.

6

7 CROSS-EXAMINATION - (continuing)

8 BY MR. KISIELIUS:

9 Q When we broke, I asked you to take a look at Exhibit Number  
10 67. So having had a chance to look at it and try to  
11 understand the context, the last sentence of the paragraph  
12 that you read refers to some of your efforts with respect  
13 to permit expirations on geoduck, and I'm wondering if you  
14 could expand on that.

15 MR. BRICKLIN: Mr. Examiner, David Bricklin. I'd  
16 object to this line of inquiry, if I may. As I understand  
17 it, these questions are intended to develop the County's  
18 history on this issue.

19 This is a legal issue regarding what is the meaning of  
20 this permit terminology, which is drawn right from the  
21 statute and, as a legal issue, it's totally irrelevant what  
22 the County staff might have opined about the meaning of that  
23 definition at some time in the past. Estoppel does not  
24 apply in situations involving legal issues.

25 So this line of inquiry is irrelevant and, given the

1 amount of time we have for this hearing, I thought it would  
2 be better to move on to inquiries that are relevant.

3 MR. KISIELIUS: And this entire appeal is of the  
4 County's administrative interpretation of this Code, and  
5 this speaks to the County's prior administrative  
6 interpretation of this Code.

7 The question of the County having an inconsistent prior  
8 Code also speaks to the amount of deference you need to give  
9 to their current interpretation, so it's absolutely relevant  
10 to this proceeding.

11 THE HEARING EXAMINER: I don't think of their past  
12 practice as, one way or the other, having anything to do  
13 with my current interpretation of the way that an ordinance  
14 reads. You know, I have to read that ordinance. You know,  
15 the Hearing Examiner frequently disagrees with the staff's  
16 interpretation of decisions. That's not uncommon at all.

17 So I don't think, particularly when you're asking this  
18 gentleman to read a memorandum that he hasn't seen before,  
19 as I understand his testimony, sometime from the past, in  
20 history -- I think it's beyond what I need to know.

21 MR. KISIELIUS: Mr. Examiner, if I may, there's a  
22 statute in the Code that requires you to give a certain  
23 amount of deference to the County's interpretation in  
24 reaching your decision.

25 THE HEARING EXAMINER: I'm aware of that.

1                   MR. KISIELIUS: And past interpretations that are  
2 inconsistent do speak to the weight which you are supposed  
3 to -- the deference you are supposed to give them. So  
4 establishing the fact that it is inconsistent -- if the  
5 County's willing to stipulate to the fact that they had  
6 previously taken an inconsistent prior interpretation, we  
7 would be happy just to step back and not ask these  
8 questions.

9                   THE HEARING EXAMINER: My understanding of his  
10 testimony thus far is that they were all over the board on  
11 what this meant and that, you know, they have just recently  
12 developed a position on it. Am I misunderstanding  
13 something?

14                   MR. KISIELIUS: No. But Mr. Booth has testified as  
15 to his personal opinion. These exhibits go to the extent to  
16 which others in the Planning Department agreed with his  
17 opinion.

18                   THE HEARING EXAMINER: I'm going to limit you on  
19 this a great deal, because I'm not finding it helpful. I'm  
20 really not. You've raised a legal issue here, and I'm going  
21 to interpret the legal issue based upon, you know, the law.  
22 And how they interpreted it at one time or another is not  
23 helpful to me.

24                   MR. KISIELIUS: If we could simply just introduce  
25 some of these exhibits into the record.

1 THE HEARING EXAMINER: Certainly.

2 MR. KISIELIUS: And we were asking Mr. Booth to  
3 look at Exhibit 67, Exhibit 73.

4 THE HEARING EXAMINER: My tendency, incidentally,  
5 is to admit exhibits and then separate the wheat from the  
6 chaff. I've always done that. So this is an administrative  
7 procedure, so the rules are relaxed a little bit.

8 MR. KISIELIUS: Okay.

9 THE HEARING EXAMINER: So Exhibit 73 will be  
10 admitted into evidence.

11 MR. BRICKLIN: And just for the record, Your Honor,  
12 if we can have an objection to that on relevancy grounds,  
13 both of those.

14 THE HEARING EXAMINER: Certainly.

15 MR. BRICKLIN: Thank you.

16 MR. KISIELIUS: And we already admitted 67; is that  
17 correct?

18 THE HEARING EXAMINER: That's correct. 66, 67, and  
19 73 are admitted at this time, as well as Exhibit 1, as far  
20 as I'm concerned.

21 MR. KISIELIUS: And finally, I had given him  
22 Exhibits 77 and 78 to review.

23 THE HEARING EXAMINER: 77 and 78?

24 MR. KISIELIUS: That's correct.

25 THE HEARING EXAMINER: Fine. Both will be admitted

1           into evidence.

2                       MR. BRICKLIN: We have the same objection, for the  
3           record, Your Honor.

4                       THE HEARING EXAMINER: Do you know if he even saw  
5           these exhibits?

6                       MR. PLAUCHE: We provided them to the County.

7                       THE HEARING EXAMINER: Do you know if he ever saw  
8           them and reviewed them in the performance of his duties?

9                       MR. KISIELIUS: I do not know that. I could ask  
10          Mr. Booth.

11       Q       Have you even seen any of the exhibits, that you reviewed  
12               during that last recess, in the performance of your duties?

13       A       At some time in my life, I may have, but, with the quantity  
14               of emails I get and that get exchanged, I couldn't say one  
15               way or another.

16       Q       I will ask you just a couple more questions about -- again,  
17               you had testified to your personal opinion. Is it safe to  
18               say that, from Taylor's standpoint, you were the face of  
19               Pierce County, from the perspective of their permit  
20               applications and their permits?

21       A       I believe my testimony indicated that I was -- I think I  
22               stated this, that I was primarily, I think, the main  
23               contact for Ms. Cooper. I did not handle all of their  
24               shoreline permits, but I'd probably say that, when she had  
25               a question, we would discuss it.

1 Q Okay. You had also testified that the language at issue  
2 here, on the five-year expiration, was boilerplate, that it  
3 was something that you include in all Shoreline Substantial  
4 Development Permits. If the County wanted to establish an  
5 expiration, could it have used different language, that was  
6 more definitive?

7 MR. BRICKLIN: Objection, Your Honor.

8 THE HEARING EXAMINER: Sustained.

9 Q I will direct you to the County's Staff Report and  
10 exhibits. I believe these are 1R. If you could flip to  
11 Page 6, please, and read Paragraph 5B. Oh, you don't have  
12 it. Sorry. (Produces document to witness.)

13 MR. BRICKLIN: 1R?

14 MR. KISIELIUS: Yes.

15 Q Could you just read that paragraph into the record?

16 A "The permits herein granted shall run from June 16th, 1982,  
17 to September 15th, 1984, and shall thereafter automatically  
18 expire and become null and void. In the event Bars 4 or 5  
19 cannot be removed within the permit period, a separate  
20 application for a permit shall be required."

21 Q And so the County had provided this as an example of the  
22 type of permit that is ongoing activity; is that correct?

23 A That's correct.

24 Q So this is an example that you had of the permit language  
25 establishing an expiration?

1 A I believe what I read -- in preparing for this hearing, I  
2 read, in the Code, that the local jurisdiction can impose a  
3 lesser time line if they want to. For the most part, we  
4 just put in that standard, boilerplate language. But,  
5 apparently, there are cases when we have cinched up the  
6 noose, so to speak, and I do -- I did -- I'm the one who  
7 did the research. If this is -- I don't know what case  
8 this is you're referring to.

9 Q This is what was given to us and put forward. I think it's  
10 got your notations at the bottom.

11 A Okay. I'm the one who pulled this, and I was trying to  
12 find cases that had -- similar, and I did note that and --  
13 when I reviewed this, that some of the decisions had  
14 smaller time lines, or shorter time lines.

15 Q Okay. I want to explore, a little bit, your testimony  
16 regarding the issue of development and whether this  
17 constitutes --

18 A (Produces exhibit back to Mr. Kisielius.)

19 Q -- your testimony that, in your opinion, this constitutes  
20 development, and you read from the County's definition of  
21 "development." And just to summarize -- I want to make  
22 sure that this is consistent with what you said.

23 As I understand it, you had noted that it was similar  
24 to dredging, drilling, removal, and obstruction. Is that  
25 correct?

1 A I made comparisons.

2 Q And then, were there any others that I haven't mentioned?

3 A (No audible response given.)

4 Q Excuse me. I'm sorry. I think you also said interference  
5 with normal public use of the surface waters.

6 A I believe I made comparisons with regards to that it's a  
7 use; that I made a comparison with regards to dredging and  
8 drilling; also removal of sand, gravel, or mineral; also  
9 made a comparison to the driving of pilings and placing of  
10 obstructions; and discussed that it was a project of a  
11 permanent or temporary nature which interferes with the  
12 normal public use of the shoreline.

13 Q And are you familiar at all with the Attorney General's  
14 opinion from this year, 2007, Attorney General Opinion  
15 Number 1?

16 A I have read that.

17 Q And is it your testimony that this activity is -- similar  
18 to these types of activities that are in your definition of  
19 "development" -- is that consistent with the Attorney  
20 General's opinion?

21 A It's been a while since I read it, but my recollection is  
22 that was just an opinion.

23 Q But the question is: Is it consistent with that opinion?

24 THE HEARING EXAMINER: Is what consistent?

25 MR. KISIELIUS: His current testimony, that the

1 activity in question is comparable to -- the listed  
2 activities in the definition of "development" consistent  
3 with the Attorney General's opinion on the same question.

4 MR. BRICKLIN: Objection, Your Honor. I don't know  
5 what the relevance -- or his authority is to compare the  
6 Attorney General's opinion.

7 THE HEARING EXAMINER: I'm going to sustain it.

8 MR. BOOTH: Does that mean I have to answer, or not  
9 answer?

10 THE HEARING EXAMINER: No. It's sustained. You  
11 don't answer.

12 Q I have one last line of questions for you. Back in 2000,  
13 when you were going through the permit process, did you, as  
14 the person reviewing the application, make any  
15 determinations as to the activity's interference with  
16 normal public use of the surface waters?

17 A On SD22-00?

18 Q That's correct, yes.

19 A It was the very first geoduck application submitted --  
20 Shoreline Substantial Development Permit for geoduck  
21 application submitted in the County. It was all new to me.

22 Q But did you make an assessment at all on whether it  
23 interfered with normal public use of the surface waters at  
24 that time?

25 A My analysis would have been contained in the Staff Report,

1 and I don't recall what that Staff Report says.

2 MR. KISIELIUS: I'd like to introduce, as an  
3 exhibit, the County's prior Staff Report.

4 THE HEARING EXAMINER: What exhibit number is that?

5 MR. KISIELIUS: I'll have that for you in just one  
6 second. I'm sorry.

7 THE HEARING EXAMINER: Okay.

8 MR. KISIELIUS: Exhibit Number 57. (Produces  
9 document to witness.)

10 Q Can you turn to Page 6, please, of the Staff Report?

11 A (Witness complies.)

12 Q And read the first of the two, out of the paragraphs. And  
13 I apologize. I don't have the numbers, so if you could  
14 read those numbers.

15 THE HEARING EXAMINER: I'm sorry. I can't hear  
16 you.

17 MR. KISIELIUS: I'm sorry. I'm asking him to read  
18 the first of two highlighted paragraphs and, because I gave  
19 him my copy, I can't direct you to which number that is, so  
20 I'm asking him to read which paragraph.

21 MR. BRICKLIN: What page are you on?

22 MR. KISIELIUS: Page 6.

23 MR. BRICKLIN: Thank you.

24 THE WITNESS: Letter F, in parentheses. "The  
25 proposal would be located in the intertidal area where

1 navigational access would not be restricted. Further, the  
2 Applicant would be leasing the private beach from the upland  
3 property owners. Therefore, Staff finds that the proposal  
4 meets this policy."

5 Q And you're responding to a policy there. Does this speak  
6 to some of the issues that you've raised, in terms of  
7 interference with normal public use of the waters?

8 A That comment was in response to Item F, which states:  
9 "Aquacultural enterprises should be located in areas where  
10 the navigational access for upland owners and commercial  
11 traffic is not significantly restricted."

12 Q I understand the question wasn't presented to: "Does this  
13 interfere with normal public use of the surface waters,"  
14 but does the finding there, that you've made, as the staff  
15 person, speak to the issue of interference with normal  
16 public use of the surface waters and/or obstruction?

17 THE HEARING EXAMINER: This finding was with  
18 reference to what's stated in Condition Number F. That's  
19 the way I read it.

20 MR. KISIELIUS: If I can enter in Exhibit Number  
21 58, which is the Hearing Examiner's Decision --

22 THE HEARING EXAMINER: Exhibit 57 and 58 will be  
23 admitted into evidence.

24 MR. KISIELIUS: Thank you.

25 Q -- and just ask Mr. Booth to read, on Page 5, Paragraph E.

1 MS. GUERNSEY: Could I just stop for a second?  
2 We're missing Page 1 under Exhibit 58. Mine begins with  
3 Page 2 of the Hearing Examiner's Decision, and I want to  
4 make sure it's not that way in all the books.

5 THE HEARING EXAMINER: It is. It's in mine.

6 MS. GUERNSEY: Okay. We can find Page 1 and  
7 photocopy it and introduce it.

8 MR. KISIELIUS: Okay. And we can actually just use  
9 -- we can --

10 MS. GUERNSEY: 1F, is it?

11 MR. KISIELIUS: I apologize for not having that  
12 first page in there. But, no, this is not --

13 MS. GUERNSEY: We'll figure it out and fix that.

14 MR. KISIELIUS: Okay.

15 MS. GUERNSEY: I think our Staff Report, Exhibit  
16 1F, also skipped some pages.

17 MR. KISIELIUS: Oh, okay.

18 MS. GUERNSEY: We'll get a complete set and make  
19 sure it's in the record.

20 Q If we could have Mr. Booth read that paragraph into the  
21 record, and we'll provide a -- unless the Examiner would  
22 like to wait, and we can call for him again.

23 THE HEARING EXAMINER: No. Finish what you're  
24 doing. We can substitute that page anytime.

25 MR. KISIELIUS: Okay. Thank you.

1 MR. BOOTH: Which paragraph am I --

2 Q Page 5, Paragraph E.

3 A "No conflicts will occur between the aquaculture use,  
4 navigation, boating, recreational boating, commercial  
5 fishing, and commercial traffic. The Applicant has leased  
6 shorelines from property owners."

7 Q So does that speak to the issue of obstruction or  
8 interference with normal public use of the surface water?

9 MR. BRICKLIN: Your Honor, I'd object to this.  
10 Among other things, it's based on a factual record that was  
11 made, to the extent there was one made, six or seven years  
12 ago. The issue before you today is to be based on the  
13 evidence presented now, not then.

14 THE HEARING EXAMINER: I'm going to look at the  
15 evidence presented today. But what are you reading from?

16 MR. KISIELIUS: That is Page 5, Paragraph E.

17 THE HEARING EXAMINER: Okay. Just a second. Oh,  
18 that's the Hearing Examiner's findings.

19 MR. KISIELIUS: That's correct.

20 MR. BRICKLIN: Based on the evidence presented six  
21 years ago, not the evidence being presented at this hearing.

22 THE HEARING EXAMINER: That's the Hearing  
23 Examiner's Decision, okay.

24 MR. KISIELIUS: And my response would be, this is  
25 the County's interpretation of the permit that was issued in

1           2000.

2                   THE HEARING EXAMINER: No. That is the Hearing  
3           Examiner's interpretation of what was presented in 2000.  
4           That's what it says.

5                   MR. KISIELIUS: That's correct. I was asking  
6           Mr. Booth if he could speak to whether that addresses those  
7           issues that he had testified to previously.

8                   THE HEARING EXAMINER: Do you know?

9                   MR. BOOTH: Oh, I didn't know if I was supposed to  
10          answer or not.

11                  MR. BRICKLIN: Same objection, Your Honor. I don't  
12          think it really is relevant, given --

13                  THE HEARING EXAMINER: You may answer if you can.

14                  MR. BOOTH: I prepared this. That was the very  
15          first Shoreline Substantial Development Permit for geoduck  
16          aquaculture. The Staff Report I prepared was with my  
17          understanding of what was proposed at the time.

18                  If I presented -- if we took that same case and they  
19          were applying today, would the Staff Report have looked  
20          different? I imagine so. It's seven years later. We've  
21          learned a lot about geoducks.

22                  MR. KISIELIUS: Thank you. I have no additional  
23          questions for you. But if I could have my copy of the  
24          exhibit back. Sorry. Thank you.

25                  MS. GUERNSEY: Mr. Examiner, Attorney Jerry

1 Kimball, on behalf of Foss, one of the Interveners, has also  
2 joined with us a little later, after the hearing began this  
3 morning, and he is present here.

4 THE HEARING EXAMINER: Thank you.

5 MR. KIMBALL: Mr. Examiner, thank you. If I may, I  
6 would like to ask Mr. Booth a couple of follow-up questions.

7 THE HEARING EXAMINER: Certainly. Could I have  
8 your name again?

9 MR. KIMBALL: Jerry Kimball, K-i-m-b-a-l-l.

10 THE HEARING EXAMINER: Thank you.

11

12 CROSS-EXAMINATION

13 BY MR. KIMBALL:

14 Q Mr. Booth, did the County do any factual investigation at  
15 the time it issued this determination, that the permit had  
16 expired, regarding whether or not navigational access has  
17 been restricted during the period of time since the initial  
18 staff -- or the Hearing Examiner's findings of 2000/2001  
19 and the present; during that intervening six or seven  
20 years?

21 A You're talking about the seven years -- the decision we  
22 issued in July, the subject of this appeal?

23 Q Yes.

24 A Was there any consideration of navigational access in  
25 issuing that decision?

1 Q whether there was any change from the prior finding in the  
2 conditions -- from the prior finding to now.

3 A My recollection is we didn't investigate. The decision in  
4 July was based on the law and interpretation of it in the  
5 six-year period. We didn't base it on any looking in terms  
6 of the uses impacting navigation or not.

7 Q So it was strictly a legal decision as to the meaning of  
8 this five-year-run period with one potential extension?

9 A Yes.

10 Q And in that regard, I wanted to ask you: As I read the  
11 permit that was issued in -- I believe it's actually dated  
12 January 9 of 2001 -- Conditions 4 and 5, that you spoke to  
13 in your initial presentation. Paragraph 5 indicates that  
14 "if a project for which a permit has been granted pursuant  
15 to the Act has not been completed within five years after  
16 the approval of the permit by local government, the local  
17 government that granted the permit shall, at the expiration  
18 of the five-year period, review the permit and, upon a  
19 showing of good cause, do either of the following." And  
20 that's either extend it for a year or terminate it,  
21 correct?

22 A I believe that's what it states.

23 Q What review occurred at the end of that five-year period?

24 A My recollection, there was no review.

25 Q There is nothing in your records to show that there was a

1           determination of good cause for a one-year extension,  
2           correct?

3    A       Correct.

4    Q       And the one-year extension occurred not by act but by  
5           ignoring the five-year expiration, correct?

6    A       I don't know if I would say "ignoring." It just happened.

7    Q       Just happened. The fact that it just happened is  
8           consistent with the view that you state you were expressing  
9           personally as to: This is enacted -- once you get the farm  
10          established, what you're doing is you're growing geoducks  
11          and you're harvesting and replanting and it has some  
12          perpetuity to it, correct?

13   A       I would not say that. It's the applicant's responsibility  
14          to know when -- if they need an extension, when they need  
15          to apply for an extension.

16   Q       Mr. Booth, I don't want to quibble with you but, as I  
17          understand your testimony, you have told our Hearing  
18          Examiner McCarthy that this permit terminated at the end of  
19          six years, not five, and that that is the decision the  
20          County has made, which implies, in fact, that there was an  
21          extension renewal for an additional year for good cause,  
22          correct?

23   A       We have discussed the six-year period. There, however, was  
24          not an extension applied for nor granted.

25   Q       But the County was fully aware of the ongoing nature of the

1 activity?

2 A We have -- certainly. I mean, I knew that it was out  
3 there. We have hundreds and hundreds and hundreds of  
4 projects we approve, and can we keep track of all of them?  
5 It's the applicant's responsibility.

6 Q This is a hot-button project, correct?

7 A I have a gazillion hot-button issues.

8 Q You spoke, in your initial presentation, about something to  
9 the effect that, basically, everybody was kind of feeling  
10 their way along. This was at the beginning of geoduck  
11 aquaculture that this permit application occurred and was  
12 granted, correct?

13 A I would agree with that characterization.

14 Q My clients, the owners of the land -- have they ever been  
15 uncooperative with the County in exploring this as a  
16 development process or as a process that is in a developing  
17 industry?

18 A Honestly, I don't ever recall meeting the property owners.  
19 They may have attended the hearing, but I don't recall ever  
20 -- the face of this permit has been Taylor. I don't recall  
21 ever meeting the property owner, or owners.

22 Q Taylor has been extremely cooperative in attempting to meet  
23 concerns that are raised?

24 A Yes.

25 MR. BRICKLIN: Objection, Your Honor: Relevance.

1 THE HEARING EXAMINER: Overruled. You may respond.

2 THE WITNESS: Yes.

3 Q The last photo you showed in your presentation and that you  
4 wanted to leave on the board for consideration -- the  
5 process that was occurring at that time was the removal of  
6 the PVC pipe from the beach in the distant area that is  
7 also reflected by a net that has been pulled off of that  
8 pipe in the foreground, correct?

9 A My recollection, there was many things occurring in that  
10 photo.

11 Q Was that one of them?

12 A I couldn't -- I don't have intricate knowledge as to, if I  
13 see a field of pipes sitting in the ground, if that is  
14 where they have just put pipes in, if they're at the stage  
15 where the pipes are coming out, if they're at the stage  
16 where the nets -- I don't know.

17 Q The pipes in the background, that were not covered, were  
18 not in the state they were left in after either being put  
19 in -- well, during the time that they were left in the  
20 ground, left in the beach soil; is that correct?

21 A I didn't understand the question.

22 Q Let me see if I can say something intelligent. Once the  
23 pipes are in, they're covered with a net, correct?

24 A That's my understanding.

25 Q So the pipes in the background would have been in process,

1           either coming in or going out?

2    A       I would agree with that, if they're not covered with a net.

3    Q       You made a comment--

4    A       Sorry (indicating to Hearing Examiner).

5    Q       --in response to Mr. Kisielius's question about interfering  
6           with the normal public -- well, the normal use of the  
7           beach. Has that been a consideration for the County?

8    A       I made that statement today.

9    Q       The County does not assert that the public has a right to  
10           go upon and use my clients' land, does it?

11   A       I'm not going to get into that legal issue. I just know,  
12           if you're -- if you're Joe and Sally down at the State park  
13           and you walk up and down the beach, which people frequently  
14           do, they typically don't get into saying: "well, we're on  
15           somebody's property lines. Can I walk on their property or  
16           not?"

17   Q       Well, isn't, in fact, the property posted?

18   A       I believe I -- I believe, in the photos, that I -- if I  
19           recall, and the photos -- not that I presented today, but I  
20           think there's a sign that says "no clam digging" or  
21           something. And there might be a sign that says "private  
22           property," but I don't remember.

23   Q       Okay. And if it is private property and my clients own the  
24           beach, the tidelands, to lowest low-water, then there would  
25           not be an issue of the public access to and from the beach,

1 other than as permitted by them as landowners?

2 MR. BRICKLIN: Objection; calls for a legal  
3 conclusion.

4 MR. KIMBALL: Well, let me rephrase, Mr. Examiner.

5 Q Is it the County's position, in making this determination,  
6 that, if a landowner owns to lowest low-water, on the  
7 tidelands, that that landowner is obligated to accommodate  
8 the public coming and going on their beach, bringing their  
9 boat ashore, using their beach, leaving?

10 MR. BRICKLIN: Same objection. He's speaking about  
11 an obligation.

12 THE CLERK: You need to speak into a microphone.  
13 I'm sorry.

14 MR. BRICKLIN: Same objection, Your Honor. He's  
15 asking about an obligation, which sounds like seeking a  
16 legal opinion.

17 MR. KIMBALL: I asked the County's position in  
18 making its determination, Mr. Examiner.

19 THE HEARING EXAMINER: You can respond if you know  
20 how to, if you know the answer.

21 THE WITNESS: When I made that statement earlier, I  
22 was not looking at it from a legal standpoint. I'm just  
23 looking at it -- there's a beach. People have used the  
24 beach. The legal issue -- I don't know the legality of  
25 ownership and beach use, all of that.

1 Q One last thing, I believe, Mr. Booth. The overview photo  
2 that you showed, with an overlay of my clients' property,  
3 which is this photo, which was Number 5, Number 6, of the  
4 July 6th photos -- my clients' property is all of the  
5 undeveloped property, correct?

6 A That's what the Assessor's information shows.

7 Q Well, you viewed the property, correct?

8 A I have never walked on the upland, ever. I've just been  
9 down on the beach.

10 Q Did you access through the access road?

11 A Always accessed through the State park. At least when Ms.  
12 Cooper and I went out there, I believe we went through the  
13 State park, and that's how I took these photos.

14 Q You went through the State park, walked down the beach?

15 A Correct.

16 Q And the area behind my clients' property has been subject  
17 to development over the years, correct?

18 A It appears so.

19 Q And the area to the north of my clients' property is a  
20 series of, what, 20 homes? 15 homes?

21 A I'm familiar with that stretch of beach and, definitely,  
22 there are homes there.

23 Q And they're developed close together?

24 A They are.

25 Q The County's goal in this property is conservancy and a

1 shoreline water-compatible use, correct?

2 A I didn't understand.

3 MR. BRICKLIN: Your Honor, I think we're --  
4 objection, Your Honor.

5 MR. KIMBALL: I'll withdraw it. I don't have any  
6 further questions, Mr. Booth. Thank you.

7 MR. BRICKLIN: Thank you, Your Honor. I have a  
8 couple. David Bricklin. I have just a couple of questions.

9

10 CROSS-EXAMINATION

11 BY MR. BRICKLIN:

12 Q Mr. Booth, you've testified that the County went through a  
13 process to reach your conclusion regarding the meaning of  
14 this statutory term that's incorporated in the permit  
15 regarding the expiration date. As part of that process,  
16 did the County also consult with the Department of Ecology?

17 A Yes.

18 Q And did the Department of Ecology give you its view of the  
19 meaning of that statutory term?

20 A I believe they did.

21 Q And is it your understanding that the testimony you've  
22 provided here today, regarding the County's position, is  
23 consistent with the Department of Ecology's reading of that  
24 term?

25 A Yes.

1 THE HEARING EXAMINER: Meaning of what term?

2 MR. BRICKLIN: The five-year expiration term.

3 Q And then if I could just briefly have you take a look at  
4 the photographs that you've submitted, and, actually, I  
5 think the 8 1/2-by-11 colors are a little more easy to see  
6 than the ones that were up on the screen today. Do you  
7 have that package in front of you there, by any chance, or  
8 not?

9 A I don't.

10 Q All right. I'll share mine with you. And you've numbered  
11 those, I see?

12 A Yes.

13 MR. BRICKLIN: And, Mr. Examiner, do you have this  
14 color package?

15 THE HEARING EXAMINER: I don't have the color. I  
16 have black and white.

17 MR. BRICKLIN: All right. I think it would be good  
18 for the Examiner to have the color package, so --

19 THE WITNESS: I meant to give the color to the  
20 Examiner.

21 THE HEARING EXAMINER: I feel left out.

22 MR. BRICKLIN: I feel special, like my kids say.

23 THE HEARING EXAMINER: Do you want to trade?

24 MR. BRICKLIN: I will trade. I'd be happy to trade  
25 with him.

1 THE HEARING EXAMINER: No. I made notes on these.

2 MR. BRICKLIN: All right.

3 Q Well, let me, if I may: First of all, on Photograph 14 of  
4 that package -- I believe this is the one you were looking  
5 at on the projector when you said that the homes --

6 THE CLERK: You're not on the microphone.

7 THE HEARING EXAMINER: Oh, you have to be on the  
8 microphone. Can you pick that one up?

9 MR. BRICKLIN: Yeah, I can do that.

10 Q Looking at Photograph 14, I believe this is the one you  
11 were referring to when it was being projected on the  
12 screen, and you said the homes to the north are "up around  
13 the corner." Using this color photograph, can you see that  
14 the homes are actually on the stretch of beach on this side  
15 of the corner, as it were? They're in plain view there,  
16 aren't they?

17 A I would -- yes, they are. There is one home, a blue home,  
18 in plain view on this photo. I would say -- excuse me.  
19 The second one as well, with the brown roof. I would say,  
20 if you're out on the site, it is -- that stretch of homes  
21 is kind of around the corner. There's kind of a cove where  
22 there's a high, eroded bank, and then you kind of walk  
23 around the corner to where the homes are located.

24 MR. BRICKLIN: And, Mr. Examiner, I don't know how  
25 clearly that shows on your black and white version. I will

1 share --

2 THE HEARING EXAMINER: I pick it up.

3 MR. BRICKLIN: Yeah. You can see them, right there  
4 (indicating).

5 THE HEARING EXAMINER: Uh-huh.

6 Q Then my other question regarded Photograph 26 in that  
7 package. Is that rebar in the foreground of that picture?

8 A It appears to be.

9 Q And do you have an understanding as to whether that is part  
10 of the Taylor operation?

11 A My general understanding is, to put the netting down, they  
12 pin it with rebar or some sort of pin system, and that  
13 would be what they showed here. It's consistent with my  
14 understanding. It's not a pointed piece of rebar. It's  
15 kind of a candy-cane-shaped piece of rebar.

16 Q Okay. And finally, you've testified regarding whether this  
17 use constitutes a construction of a structure, and you said  
18 you were doubtful, because it's certainly not a building.  
19 Do you remember that part of your testimony?

20 MR. KISIELIUS: I'm going to object. Mr. Bricklin  
21 is asking the same legal questions on his determination that  
22 he was objecting to when we asked the same questions.

23 MR. BRICKLIN: Well, I haven't yet asked.

24 THE HEARING EXAMINER: He hasn't asked the question  
25 yet.

1                   MR. BRICKLIN: Other than does he recall that part  
2 of his testimony.

3    Q    In developing that part of your testimony, did you consider  
4 whether the facilities here constitute some kind of a  
5 structure other than a building?

6                   MR. KISIELIUS: I'm going to object now. He's  
7 asking Mr. Booth to make the legal conclusion.

8                   THE HEARING EXAMINER: I am going to allow him to  
9 answer. You may answer.

10                  THE WITNESS: I know there was a definition of  
11 "structure" in all of this paper. And I don't recall how  
12 it's defined, but I think it's "separate pieces joined  
13 together." That would probably be a whole other discussion,  
14 whether or not this is a structure. Just looking at the  
15 photo, I wouldn't classify that as a structure, but that  
16 would be a whole other -- probably a whole other hearing.

17    Q    Well, no. I'm not sure about that. So are you saying that  
18 you didn't analyze the structure issue from that  
19 perspective?

20    A    No. I did not get into -- when I was saying it didn't  
21 appear there was a structure, there's not a home, it's -- a  
22 typical thing like you could consider a structure: a  
23 carport, a house, a garage, anything like that.

24                  MR. BRICKLIN: All right. Thank you. That's all I  
25 have.



1 THE HEARING EXAMINER: Okay. Thank you.

2 THE WITNESS: No.

3 Q And going back to 2000, or the permit that was issued in  
4 this case -- I believe it was SD22-00?

5 A Correct.

6 Q Was that decision appealed?

7 A No.

8 MS. GUERNSEY: That was all I had. Thank you.

9 MR. BRICKLIN: We have nothing further.

10 MR. KISIELIUS: No further questions.

11 THE HEARING EXAMINER: No further questions. Thank  
12 you, Mr. Booth. That was a yeoman's job.

13 MS. GUERNSEY: Mr. Examiner, I'd like to call Brad  
14 Murphy out of order, because Ms. Diamond will take more than  
15 15 minutes, and I'm not sure Mr. Murphy will.

16 THE HEARING EXAMINER: Certainly. Mr. Murphy,  
17 report, please.

18

19 BRAD MURPHY, having been first duly sworn  
20 upon oath by the Hearing Examiner, testified as follows:

21

22 THE HEARING EXAMINER: Would you state your full  
23 name for the record, please?

24 THE WITNESS: Brad Murphy, Washington State  
25 Department of Ecology, Southwest Regional Office.



1 Q I'm going to ask you to speak up a little bit. I don't  
2 think you need to move the microphone. I think you just  
3 need to elevate your voice a little bit.

4 A Sure.

5 Q A lot of people. Can you tell us what your job entails,  
6 just basically?

7 A Reviewing permits for both wetland and shoreland issues,  
8 and also providing technical assistance to locals, the  
9 public, and government.

10 Q And when you say reviewing shoreline permits, are you  
11 referring to Shoreline Substantial Development Permits and  
12 other types of shoreline permits?

13 A We do not review Substantial Development Permits. We  
14 essentially file them. We do have review over conditional  
15 use permits and variance permits.

16 Q That would be Shoreline Conditional Use Permits and  
17 Shoreline Variance Permits?

18 A Yes, ma'am.

19 Q Okay. So in this case, do you know if the Department  
20 received the permit that was issued back in 2000 or 2001 on  
21 this project?

22 A I believe we did receive it, yes.

23 Q Okay. Did you have any involvement in this permit?

24 A No, ma'am.

25 Q Have you ever been to the site?

1 A No. I have not.

2 Q Okay. At some point in time, were you asked to take a  
3 position or express your opinion regarding, in general, the  
4 five-year expiration issue?

5 A Yes.

6 Q And who asked you that?

7 A Ty Booth did.

8 Q Had you ever been asked that question before?

9 A No, I had not.

10 Q And did you respond to Mr. Booth?

11 A Yes, by email.

12 Q Okay. And did you respond as your personal opinion, or the  
13 Department's position?

14 A The Department's position.

15 Q And can you just briefly tell us what your response was?

16 A Essentially, that it's -- Pierce County has the authority  
17 to write a permit for whatever length of time they deem  
18 fit, and that -- that, if, in this case, they had already  
19 deemed it as development, that a Substantial Development  
20 Permit could be required.

21 Q What about the expiration issue?

22 A That, yes, if the development has not ceased within the  
23 time frame within the permit, that it would require a new  
24 permit.

25 Q Does your department have a position on whether a Shoreline



1 Q He sent you an email?

2 A Yes.

3 Q And this decision at DOE was made by whom?

4 A It was made by me, after consulting with my supervisor.

5 Q You consulted with one person, and then you made this  
6 decision and told Mr. Booth?

7 A Also, another shoreline peer there, Kim Van Zwalburg.

8 MS. GUERNSEY: why don't you spell it, if you can?

9 THE WITNESS: V-a-n Z-w-a-l-b-u-r-g.

10 Q The Attorney General of the State of Washington represents  
11 the Department of Ecology, correct?

12 A In certain cases, yes.

13 Q In fact, there is a deputy attorney general assigned, and a  
14 staff of assistant attorneys general assigned to the  
15 Department, housed in your department offices, or adjoining  
16 your department offices, correct?

17 A They're offsite, but yes.

18 Q Did you consult with the Attorney General of the State of  
19 Washington before rendering this position on a legal issue?

20 A No.

21 Q Did you consult with the written opinion of the Attorney  
22 General of the State of Washington before DOE issued this  
23 opinion?

24 A I had read the opinion before issuing this decision, yes.

25 Q So your opinion is that your Attorney's opinion as to the

1 law is incorrect?

2 MR. BRICKLIN: Objection, Your Honor. No  
3 foundation.

4 THE HEARING EXAMINER: Sustained.

5 Q You have read the opinion, correct?

6 A Correct.

7 Q The Attorney General represents your department?

8 THE HEARING EXAMINER: Sustained.

9 THE WITNESS: Yes.

10 THE HEARING EXAMINER: which attorney general,  
11 Counsel? Is it the same attorney general, or a different  
12 attorney general? Is it the attorney general assigned to  
13 this department, or an attorney general generally speaking?  
14 I mean, that's why I sustained the objection. I want to  
15 know which one.

16 MR. KIMBALL: Let me try to be more clear,  
17 Mr. Examiner.

18 THE HEARING EXAMINER: Please.

19 Q Rob McKenna is the Attorney General of the State of  
20 Washington, correct?

21 A Correct.

22 Q And when you receive correspondence from his office, it  
23 states, "Rob McKenna," and then signed by a deputy or an  
24 assistant attorney general, correct?

25 A I believe so, yes.

1 Q Okay. Did you notify anyone in the Attorney General's  
2 office that you had issued this opinion to Pierce County on  
3 the five-year legal interpretation?

4 A Yes.

5 Q Who did you notify?

6 A Tom Young.

7 Q Okay. And when you issued this opinion to Pierce County,  
8 in what form did you issue it?

9 THE HEARING EXAMINER: May I ask who Tom Young is?  
10 I'm sorry.

11 Q And who is Tom Young?

12 A Associate attorney general, State of Washington.

13 THE HEARING EXAMINER: For your department?

14 THE WITNESS: Yes, for shoreline issues.

15 Q One of the assistants who works directly with your  
16 department?

17 A Yes.

18 Q The opinion you issued was issued in what form?

19 A Email.

20 Q So you sent an email back to Mr. Booth?

21 A Yes.

22 Q To Mr. Booth?

23 A Yes.

24 Q Did you copy Mr. Young?

25 A I can -- (peruses documents). I don't believe I did.

1 MR. KIMBALL: Thank you, Mr. Murphy.

2 THE HEARING EXAMINER: Anything further?

3 MR. BRICKLIN: Yes. This is David Bricklin.

4

5 CROSS-EXAMINATION

6 BY MR. BRICKLIN:

7 Q Do you have a copy of that email with you?

8 A Yes, I do.

9 Q May I see that for a second, please?

10 MR. BRICKLIN: Has that been marked as an exhibit?

11 MS. GUERNSEY: I don't think so.

12 Q May I see that, please?

13 A It has notes on it. Is that -- (produces to Mr. Bricklin).

14 MR. KISIELIUS: If Counsel could also have an  
15 opportunity to review the -- (document produced to Mr.  
16 Kisielius). Thank you, Mr. Bricklin.

17 (Discussion off the record.)

18 MS. GUERNSEY: We'll get a clean copy. Mr. Booth  
19 will go get a clean copy of it.

20 MR. KISIELIUS: We would be comfortable actually  
21 offering this particular email into the record as an  
22 exhibit. It's here.

23 MS. GUERNSEY: Not the one with the handwritten  
24 notes, though. Let's get a clean copy.

25 MR. KISIELIUS: Again, if there's -- he's brought

1           the one with the handwritten notes. They speak to his  
2           understanding of what was going on, and it seems to be  
3           relevant.

4                   THE WITNESS: No. These are notes from the meeting  
5           in-house.

6                   MR. KISIELIUS: A meeting on the subject of the  
7           email; is that correct?

8                   THE WITNESS: Not particularly, no.

9                   MR. KISIELIUS: Mr. Examiner, these notes appear to  
10          be in relation to the specific questions that Mr. Murphy was  
11          addressing. Therefore, it seems relevant to the issue  
12          that's before the Examiner.

13                  MR. BRICKLIN: I don't believe so, Your Honor. No  
14          one has offered --

15                  THE CLERK: I can't hear you.

16                  MS. GUERNSEY: What's the date on that email,  
17          please?

18                  THE WITNESS: I believe it's June 20th.

19                  MS. GUERNSEY: 2007?

20                  THE WITNESS: 2007, yes.

21    Q          Could you just read the first paragraph of the email,  
22          please?

23                  MR. KISIELIUS: Mr. Examiner, are we offering this  
24          exhibit as evidence?

25                  MR. BRICKLIN: I didn't offer it. I just asked him

1 to read the first paragraph.

2 MR. KISIELIUS: I would ask that the entire email  
3 be offered as evidence if we're going to be relying on it in  
4 his testimony.

5 THE HEARING EXAMINER: I don't know what the notes  
6 say one way or the other, so I don't know whether that's --  
7 I can't rule on it, because I don't know.

8 MR. BRICKLIN: It's my witness right now, Your  
9 Honor, and I haven't offered this exhibit, so if he wants to  
10 recall him, he can --

11 THE HEARING EXAMINER: Well, I'm sorry if we lost  
12 track of it. You're out of order (indicating to Mr.  
13 Kisielius), so we can bring this up later.

14 MR. BRICKLIN: Thank you.

15 Q Can you read the first paragraph, please?

16 A "Sorry for the delay. I reviewed this but wanted to  
17 double-check with Perry and Kim. If the development  
18 described and permit is going to continue past the typical  
19 time frame for a permit, e.g., five years, then they should  
20 be coming back in for a new/updated permit. The County has  
21 the ability to issue permits for a longer period of time,  
22 provided the proponent can give good reason why the time  
23 frame for the permit needs to be extended," and I cite WAC  
24 173.27.090.

25 Q Is that the WAC, Administrative Code, provision that allows

1 for a one-year extension if good cause is shown?

2 A I believe that's --

3 THE HEARING EXAMINER: What is the citation again?  
4 WAC what? 123?

5 THE WITNESS: 173.27.090.

6 THE HEARING EXAMINER: Thank you.

7 Q And in that email and in your earlier testimony, you talked  
8 about consulting with your supervisor. Is that Perry, the  
9 person you referred to in that email?

10 A Perry Lund, yes.

11 Q And what's his position?

12 A He's our section supervisor.

13 Q And the section being...?

14 A The SEA program in the Southwest Regional Office.

15 Q What program?

16 A The SEA program, the Shoreline Environmental Assistance  
17 program.

18 Q Are you aware of whether the five-year term for shoreline  
19 permits is specified in the Shoreline Management Act  
20 itself, that this is derived from?

21 A The 090 citation?

22 Q No. That's the WAC. The RCW, 90.58.43. RCW 90.58.43.

23 Let me just show it to you. I'm going to read you the

24 first sentence of that: RCW 90.58.43(3). "Authorization

25 to conduct construction activities shall terminate five

1           years after the effective date of the Substantial  
2           Development Permit." Do you see that?

3    A       Yes.

4    Q       Is that the statutory provision that you understand is  
5           carried over into these permits on a general basis?

6    A       Yes.

7                       MR. BRICKLIN: And were we just handed --

8                       MS. GUERNSEY: Uh-huh.

9                       MR. BRICKLIN: Okay. And then, could I get this  
10           marked with the next exhibit number? How do we do that?

11                      THE HEARING EXAMINER: Well, these books indicate  
12           the last exhibit number is 148. Is that correct?

13                      MR. BRICKLIN: Is that right?

14                      MR. PLAUCHE: That's right.

15                      MR. KISIELIUS: That's correct.

16                      THE HEARING EXAMINER: So this will be 149. It  
17           will be marked and admitted into evidence, unless -- is  
18           there an objection from anybody?

19                      MR. KISIELIUS: None.

20                      MR. KIMBALL: Not on behalf of the Interveners.

21                      MS. GUERNSEY: There should be an extra copy there  
22           for you.

23                      MR. BRICKLIN: Thank you. Can I show it to the  
24           witness, please?

25    Q       Mr. Murphy, I'm handing you what's been marked for

1 identification and may be admitted now as Exhibit 149. Is  
2 this the email that you were reading from a minute ago?

3 A Yes, it is.

4 MR. BRICKLIN: Thank you. I have nothing further,  
5 Your Honor.

6 THE HEARING EXAMINER: Thank you.

7 MS. GUERNSEY: Nothing.

8 MR. KISIELIUS: If I might, just a couple of  
9 questions about this exhibit, now that it's been introduced.

10

11 CROSS-EXAMINATION

12 BY MR. KISIELIUS:

13 Q Mr. Murphy, I'm wondering, have you heard of SB2220?

14 A Yes.

15 Q Could you tell us a little bit about what that is? The  
16 Shellfish Committee.

17 A Yes. It's a committee that's been convened to look at  
18 shellfish issues here in Washington State.

19 Q And when you were considering this question of the permit-  
20 expiration and development issue, did you take into  
21 consideration SB2220, the stakeholders' committee, and its  
22 role in deciding these questions?

23 A Right now, that's on a different track than what -- we have  
24 to make decisions on a daily basis, so there are certain  
25 levels of review going on. So I was giving a technical-

1 assistance answer based on the question that I received.

2 Q Understood, but what is your understanding of the role of  
3 SB22, that stakeholder's committee, was going to play in  
4 deciding these issues, from the Department of Ecology's  
5 standpoint?

6 A As far as I know, it's an advisory committee that we are  
7 working with to come up with answers to aquaculture and  
8 shellfish issues.

9 MR. KISIELIUS: Thank you.

10 THE HEARING EXAMINER: Could you give me the name  
11 of that committee again, please?

12 MR. KISIELIUS: SB2220.

13 THE HEARING EXAMINER: SB2220? That sounds like  
14 a --

15 MR. PLAUCHE: SHB.

16 MR. KISIELIUS: SHB2220.

17 MR. PLAUCHE: It's the House bill. That's the bill  
18 that formed the committee, and I think it's termed the SARC,  
19 Shellfish Aquaculture Regulatory Committee.

20 THE HEARING EXAMINER: Okay, thank you. Shellfish  
21 Aquaculture. Anything further?

22 We will be in recess. But before we go, you seem to  
23 think I made a ruling that was incorrect with reference to  
24 Mr. Booth's testimony. Now, what do you think I ruled that  
25 was inconsistent? What was the question you asked,

1 specifically, that you think I made an incorrect ruling?

2 MR. KISIELIUS: I was asking Mr. Booth, I think, on  
3 a couple of occasions, to explain his interpretation of the  
4 activity and whether it constituted development and his  
5 analysis of the activities in relation to the County Code,  
6 and I was --

7 THE HEARING EXAMINER: Do you have the exact  
8 question? You may step down. Thank you, sir (indicating to  
9 Mr. Murphy).

10 MR. KISIELIUS: Not immediately in front of me,  
11 that I could--

12 THE HEARING EXAMINER: why don't you take a look at  
13 it and let me know what it was. We'll be in recess till 1  
14 o'clock.

15 (Lunch recess taken from 11:59 a.m. to 1:05  
16 p.m.)

17 THE HEARING EXAMINER: Good afternoon. The hearing  
18 on AA16-07 will be reconvened. I understand that, when we  
19 opened the hearing this morning, I used the wrong number.  
20 So it's AA16-07, and I'm amending my opening statement.  
21 Please, please, turn off your cell phones. It's imperative  
22 that you do so.

23 And, once again, I want to remind you: If you want a  
24 copy of the decision when it's published, please make sure  
25 you sign in at this time.

1           And you had a question for me.

2           MR. KISIELIUS: Yes, and I don't know whether we  
3           need to call Mr. Booth again. I think the issue for us was  
4           just that there was some confusion on our part. When we  
5           asked Mr. Booth to testify to legal conclusions based on his  
6           interpretation of the Code, Mr. Bricklin objected, and that  
7           objection was sustained.

8           When Mr. Murphy came up, also a layperson, a staff  
9           person, on behalf of the Department of Ecology, and  
10          testified as to a legal conclusion and we raised the  
11          objection, the objection was overruled. And so just some  
12          clarity in terms of the extent to which staff people and  
13          laypeople will be allowed to --

14          THE HEARING EXAMINER: You raised an objection  
15          before he opened his mouth. I mean, before he got on the  
16          stand. And the other thing is, my understanding was he was  
17          not testifying as to his personal legal decision. He was  
18          testifying to the Department's. That's a distinction I  
19          made.

20          But anyway, I don't know the specific question you  
21          asked. That's why I was wondering, because it may have been  
22          the format. I don't know what it was that caused me to  
23          sustain the objection. But I will watch in the future,  
24          okay?

25          MR. KISIELIUS: Appreciate it. Thank you.

1 THE HEARING EXAMINER: And let's get on with this  
2 now.

3 MS. GUERNSEY: We'd like to call Vicki Diamond.  
4 And while she's going up front, I'd just like to say that,  
5 during the break, before we started, we inserted and gave  
6 everyone copies of the first two pages of the December 28th,  
7 2000 Hearing Examiner Decision, which, in the binders, is  
8 Tab 58. And I think --

9 THE HEARING EXAMINER: I've already inserted mine.  
10 Thank you.

11 MS. GUERNSEY: Okay. And the parties all have that  
12 too. And also, a full copy of all of the pages of that same  
13 decision was Exhibit 1F to Ty Booth's Staff Report, and I  
14 gave everyone copies of that as well.

15 THE HEARING EXAMINER: Thank you.

16 MS. GUERNSEY: Okay.

17 THE HEARING EXAMINER: I appreciate that.

18

19 VICKI DIAMOND, having been first duly sworn  
20 upon oath by the Hearing Examiner, testified as follows:

21

22 THE HEARING EXAMINER: State your name for the  
23 record, please.

24 THE WITNESS: Vicki Diamond, v-i-c-k-i,  
25 D-i-a-m-o-n-d. I'm supervisor of Pierce County Current

1           **Planning.**

2

3

**DIRECT EXAMINATION**

4   **BY MS. GUERNSEY:**

5   **Q     Ms. Diamond, Jill Guernsey, for the record. Can you just**  
6           **tell us, please, a little bit about your job as supervisor**  
7           **of the Current Planning Division of the Planning and Land**  
8           **Services Department?**

9   **A     I manage the Current Planning section, which is responsible**  
10          **for subdivisions, administrative decisions -- or land**  
11          **divisions, administrative decisions, any case that would go**  
12          **before the Pierce County Hearing Examiner. Also technical**  
13          **planning, technical support, who offers support and**  
14          **technical advice down at the Pierce County Development**  
15          **Center.**

16   **Q     Thank you. And how long have you been with the Planning**  
17          **Department?**

18   **A     Since '93, 1993.**

19   **Q     Is Mr. Booth one of the employees that you supervise?**

20   **A     Yes, he is.**

21   **Q     About how many employees do you supervise altogether?**

22   **A     24.**

23   **Q     Okay. And the issue in this case involves the Shoreline**  
24          **Substantial Development Permit issued to Taylor Shellfish**  
25          **back in the year 2000. Are you familiar with that permit?**

1 A I'm familiar, on the peripheral, with that permit, yes. I  
2 did not process the permit.

3 Q Mr. Booth processed the permit; is that correct?

4 A Correct.

5 Q Okay. And do you recall that the question of expiration of  
6 that permit came up recently?

7 A Yes.

8 Q And what is your recollection of when this issue first came  
9 up, timewise?

10 A There was a lot of discussion on the expiration of  
11 aquaculture over the period of, probably, the last year and  
12 a half. There was discussion, among staff, of it, of the  
13 expiration of aquaculture. And also, we had input,  
14 recently, from attorneys, offering their opinions on what  
15 the interpretation was, of the law.

16 Q Okay. First of all, did your department issue an official  
17 determination on this issue?

18 A After reviewing all the documentation and our legal counsel  
19 coming up with an opinion, an Administrative Determination  
20 for the Department was issued on August 8th of 2007.

21 Q And that was issued in this case, correct?

22 A Correct.

23 Q Okay. And did you review that opinion before it was  
24 issued?

25 A Yes, I did.

1 Q And does that opinion accurately express your  
2 determination, the Department's determination?

3 A That's correct, it does.

4 Q Was there any official Administrative Determination issued  
5 prior to that?

6 A No, there was not.

7 Q Did you have an opinion about the issue prior to that  
8 official Administrative Determination?

9 A Yes.

10 Q And did you put your opinion in writing?

11 A I most certainly did.

12 Q Okay. I can't remember the number. I think I have to look  
13 again.

14 MR. KISIELIUS: 66, I think.

15 Q (Produces document to witness.) Ms. Diamond, I've handed  
16 you Exhibit 66, from the white binder, that was admitted  
17 previously, during Mr. Booth's testimony. Are you familiar  
18 with that document?

19 A Yes, I am.

20 Q Can you describe for us what it is?

21 A It's an email that was sent to me by a citizen, questioning  
22 -- or asking some questions with regards to the geoduck  
23 use. And this email was sent to me in May of '06, and I  
24 responded to her questions.

25 Q What date did you respond?

1 A May -- May 22nd of 2006.

2 Q And that email was on the issue of expirations of permits?

3 A Correct.

4 Q Shoreline Substantial Development Permits for geoduck  
5 operations; was it not?

6 A Correct.

7 Q And was that your personal opinion, or an official  
8 Department position on it?

9 A That was my personal opinion.

10 Q And just for the sake of argument, what was your personal  
11 opinion?

12 A That there was no expiration once the use was initiated and  
13 established.

14 Q Okay. Now, can you tell us, in your own words, how it is  
15 that your personal opinion and the Department's official  
16 position are different?

17 A To my recall, there was a lot of discussion. I think it  
18 was said here that we were kind of all over the place, and  
19 I would say that that probably is true. There was  
20 different opinions, by staff. In our numerous discussions  
21 on this, we didn't -- it was a new use. We really didn't  
22 know how to deal with it.

23 It was something that we were learning, basically,  
24 along the way, of how to deal with geoduck harvesting and  
25 aquaculture. So initially, there was a feeling that: Did

1           they have an expiration? Not sure. We didn't -- I did not  
2           believe that there was. However, after further delving  
3           into the issue, getting legal counsel to offer an opinion  
4           on it, then a decision came out from the Department, which  
5           was August 8th of 2007, with relationship to Taylor  
6           Shellfish on the Foss property.

7                       MS. GUERNSEY: Thank you. I don't have any other  
8           questions at this time.

9                       MR. KISIELIUS: We just have a few questions for  
10          you.

11

12

CROSS-EXAMINATION

13   BY MR. KISIELIUS:

14   Q       Just to be clear, so the record is clear, you said "you're  
15           not sure." Were you referring to you, or to the Department  
16           generally?

17   A       The section that -- staff that deal with shorelines. We  
18           were not sure, as a group.

19   Q       And when did that lack of clarity become apparent to you?  
20           And let me specify. Was it before, or after, you sent that  
21           email, the email that's Exhibit Number 66?

22   A       After.

23   Q       And did you know of any sort of competing view among  
24           Planning staff prior to sending this message?

25   A       Could you repeat that?

1 Q Were you aware of the fact that there was any confusion or  
2 uncertainty prior to sending this message?

3 A Yes, there was some -- there was confusion prior to me  
4 sending the email. I sent the email, and then it became  
5 more clear, as we delved into the use and the State law  
6 and, obviously, the opinion from our counsel.

7 Q One more question. You had mentioned that you were  
8 familiar with the permit but that you were not responsible  
9 for processing it, and who, in your staff, was responsible  
10 for processing the permit?

11 A That particular permit?

12 Q Yes.

13 A Ty Booth.

14 Q And would it be your understanding that, if there were  
15 questions about the particular permit, the applicants or  
16 people could approach Ty Booth to answer that question?

17 THE HEARING EXAMINER: I'm sorry. I can't hear the  
18 question.

19 MR. KISIELIUS: I'm sorry. I'll try to lean into  
20 the microphone here.

21 Q Would you expect, the way that your department works, for  
22 questions on the permit and interpretations of the permit  
23 to be addressed to Mr. Booth?

24 A Usually.

25 MR. KISIELIUS: Thank you. No further questions.

1 CROSS-EXAMINATION

2 BY MR. KIMBALL:

3 Q Good afternoon, Ms. Diamond. I'm Jerry Kimball. I  
4 represent the property owners here, of the property on  
5 which this aquaculture occurs.

6 The email that is, I believe, Exhibit 66, May 22,  
7 2006, approximately 4 o'clock in the afternoon -- was that  
8 an email sent from your Pierce County email address?

9 A Yes.

10 Q This was not something that you processed on a private  
11 email address that you may or may not have?

12 A No.

13 Q I note that in --

14 THE HEARING EXAMINER: Excuse me, Counsel, but  
15 we've had a request from the people in the back for all of  
16 us to please speak up quite a bit louder. They can't hear.

17 MR. KIMBALL: I will try to do that. Thank you.

18 Q Question Number 1 was: Once these geoduck permits were  
19 issued, how long do they run? And you stated, in response  
20 -- you've got it in front you, correct?

21 A Correct.

22 Q Your first sentence is: "we have not placed any  
23 expirations of this particular activity for several  
24 reasons," correct?

25 A Correct.

1 Q And you were speaking in the plural, just as you were  
2 earlier in your testimony when you were talking about the  
3 opinion of the Department?

4 A I'm talking about the opinion of the section, which is not  
5 necessarily the opinion of the Department.

6 Q You were speaking, using your Pierce County email, in your  
7 official capacity as the supervisor of this section of the  
8 Planning Department?

9 A Correct.

10 Q You indicated that the Department had relied on the legal  
11 opinion. Was that opinion obtained for purposes of  
12 formulating policy, or in response to any existing lawsuit  
13 or threatened lawsuit?

14 A It was requested -- the Department requested a legal  
15 opinion based upon that we had to come to a conclusion to  
16 respond to a citizen who had filed a compliant with  
17 relationship to the expiration of a shoreline permit.

18 Q And the legal opinion was requested of the Pierce County  
19 Prosecutor's Office?

20 A Correct.

21 Q And is that legal opinion reflected in any policy statement  
22 or decision of the -- when I say "reflected," is it  
23 referenced or attached, as a source of authority, to any  
24 decision that has been issued by your department or section  
25 of the department?

1 A That information was used to formulate the Administrative  
2 Determination that was issued up by the Department, by the  
3 assistant director.

4 Q That would be 8/8/07, this case?

5 A Correct.

6 Q Has that legal opinion been released yet, outside of the  
7 Department?

8 A Not to my knowledge. I believe the legal opinion was for  
9 the use of -- internal use, to make -- to be used as a tool  
10 to make our determination.

11 MR. KIMBALL: Thank you. That was what I wanted to  
12 know. Thank you very much.

13 MR. BRICKLIN: I have nothing.

14 THE HEARING EXAMINER: May this witness be excused?  
15 Thank you.

16 MS. GUERNSEY: Yes. That's the last witness we  
17 have.

18 THE HEARING EXAMINER: I'll hear from the  
19 Appellants.

20 MR. PLAUCHE: Thank you, Mr. Examiner. And if I  
21 may, I'd like to spend just -- I don't know if I need to be  
22 sworn in for this, but I'd like to spend just a few minutes  
23 at the front end here.

24 SAMUEL W. PLAUCHE, IV, having been first  
25 duly sworn upon oath by the Hearing Examiner, testified as

1 follows:

2

3 THE HEARING EXAMINER: We've taken care of that.

4 MR. PLAUCHE: Thank you. I would like to spend  
5 just a few minutes here, at the front end, talking a little  
6 bit about our case and our points, to put in context some of  
7 the testimony that you're going to be hearing over the next  
8 couple of witnesses.

9 MR. BRICKLIN: Excuse me, Your Honor. Sorry to do  
10 this, but, normally, the attorneys don't testify. And I  
11 don't mind Counsel making an opening statement, as he just  
12 said, to preview his testimony that will be presented.

13 THE HEARING EXAMINER: Actually, in hearings in  
14 this jurisdiction, attorneys frequently testify and are  
15 frequently sworn in.

16 MR. BRICKLIN: So then he's going to be subject to  
17 cross-examination?

18 THE HEARING EXAMINER: If he wants to put anything  
19 in the form of a sworn testimony, he will be, yes.

20 MR. BRICKLIN: All right.

21 THE HEARING EXAMINER: If he's going to do it as  
22 argument, no.

23 MR. BRICKLIN: Thank you.

24 MR. PLAUCHE: And just for purposes of clarity, Mr.  
25 Bricklin, I don't intend to testify, just do an opening

1 statement.

2 MR. BRICKLIN: All right. Thank you.

3 MR. PLAUCHE: Sure.

4 THE HEARING EXAMINER: Good point.

5 MR. BRICKLIN: Glad we clarified that.

6 MR. PLAUCHE: I don't want you to cross-examine me.

7 So I would like to just spend a few minutes talking  
8 about our legal theories, to put this in context. First of  
9 all, as you've heard the testimony, the first issue, I  
10 think, that is before you is whether or not the Substantial  
11 Development Permit that was issued to Taylor expired after  
12 five years.

13 And just to be clear, the question is not whether the  
14 County could have put a five-year expiration on the permit  
15 or whether they should have put a five-year expiration on  
16 the permit. The question is whether they did put a  
17 five-year expiration on the permit. And I think it just  
18 requires interpretation of that permit language.

19 And we've addressed this quite a bit in our brief, that  
20 our interpretation is consistent with the County staff  
21 people that have testified today: Their previous  
22 interpretation that the five-year language in the permit  
23 required that the farm be installed within five years, but  
24 the farm would continue operating in perpetuity, and that  
25 was clear from the exhibits and the Staff Report and the

1 information that was provided to the Examiner at the time of  
2 that permit.

3 There's several analogies that have been battered around  
4 in the briefing. I guess the analogy that we would cite to  
5 as the best analogy is perhaps to a marina, where a marina  
6 will get a permit. That permit will require that the marina  
7 be constructed within five years, but there are going to be  
8 ongoing operations at that marina after five years. The  
9 operations will continue.

10 And that's how we interpret that five-year permit. It  
11 requires that this farm go in, but the record was clear that  
12 there were going to be ongoing operations as part of that  
13 farming operation.

14 It's different than, say, dredge disposal, which is one  
15 of the analogies that the County has pointed to, where you  
16 essentially have a dredge disposal site that is continuing  
17 to develop. It's getting bigger and bigger and bigger as  
18 more dredge disposal is added.

19 Here, once this farm is established, after five years,  
20 the operations don't expand, footprint-wise. They just  
21 continue in that same footprint.

22 So that's just our interpretation on the five-year  
23 issue. And again, I do agree that it's mostly a legal  
24 issue. I do think the County's previous interpretation,  
25 staff members' previous interpretation, is irrelevant.

1           The second issue: If you determine that the permit did  
2           expire, I think the next issue that you need to grapple with  
3           is whether or not -- what the County has said is that the  
4           operations -- they need to get a new permit to continue  
5           their operations.

6           And I think, at that point, you need to make a  
7           determination as to whether or not the operations they  
8           perform constitute development, as defined under the  
9           Shoreline Management Act and under Pierce County Code. And  
10          Mr. Booth talked just a little bit about this.

11          As you've heard reference to, and I think we provided to  
12          you, there is an Attorney General opinion on this issue that  
13          interprets the Washington Shellfish case, a case I know  
14          you're familiar with, because you were the Hearing Examiner  
15          on that case, as the Washington Shellfish case is an example  
16          of a geoduck farm that substantially interfered with the  
17          public use of water and was certainly developed. And that's  
18          what the Attorney General opined as to.

19          The Attorney General also opined that determining  
20          whether other farms are regulated and are development  
21          requiring a permit is a case-by-case analysis, that you need  
22          look at the facts of each of the cases.

23          And we are going to put on testimony here that harkens  
24          back to some of what was going on in Washington Shellfish  
25          and demonstrate that the farming operations at Taylor are

1 significantly different -- at the Foss farm are  
2 significantly different than the operations that were at  
3 issue, in terms of substantial interference, at the  
4 Washington Shellfish case.

5 Now, the Attorney General opinion also goes on to  
6 analyze all of the other aspects of development that  
7 Mr. Booth addressed: dredge, removal of materials,  
8 drilling, obstruction, filling. The Attorney General  
9 opinion looked at each of those items. And the Attorney  
10 General opined that, as to each of those items, a shellfish  
11 farm on private tidelands, at least, where there's not  
12 public use of those tidelands -- a shellfish farm on private  
13 tidelands does not meet -- or geoduck farm, does not meet  
14 those other triggers for development.

15 Now, Mr. Bricklin has disagreed with that Attorney  
16 General opinion, and he's argued that you should reject  
17 that. We would put forth that the Attorney General got it  
18 right and that those issues have been decided.

19 That said, we will also be putting on testimony as to  
20 those issues: drilling, obstruction, removal of materials,  
21 dredging, those activities, just to make the record clear  
22 that the Foss farm, in accordance with the Attorney General  
23 opinion, does not trigger any of those other -- or is not  
24 consistent with any of those other development triggers.

25 Then I also just wanted to comment on the number of

1 binders that you've got up there and the number of exhibits  
2 that -- or potential exhibits, I should say, that are before  
3 you.

4 Part of that is related to the fact that there are  
5 environmental issues that have been alluded to in the  
6 proceedings and in some of the exhibits, and we have made  
7 sure that we included, as potential exhibits, a number of  
8 documents that address those environmental issues. And  
9 we've included a number of potential witnesses that address  
10 those environmental issues.

11 we would agree with Mr. Booth, that those environmental  
12 issues aren't relevant to the two legal issues that you've  
13 got before you. But we want to make clear that we're not  
14 running away from those environmental issues and, should  
15 they come in, we would like an opportunity to rebut those  
16 issues so that we can make the record clear as to any of the  
17 environmental concerns that are raised.

18 And just the final point I want to make is just to kind  
19 of emphasize the significance of this issue to the shellfish  
20 farming community generally. The County here has determined  
21 that geoduck farming requires a Substantial Development  
22 Permit and that those permits expire after five years. If  
23 that interpretation is accepted generally, it could mean  
24 that shellfish farming generally may require a Substantial  
25 Development Permit, and those permits would expire after

1 five years. And the County's interpretation, I think, is  
2 that they have to expire in five years.

3 That would put all of the existing farms in Washington  
4 at some risk. And I just want to emphasize that that's why  
5 you see so many representatives of the shellfish community  
6 here in the audience. We've got growers, you've got friends  
7 of growers. A lot of the shellfish community is sort of  
8 packed into this hearing, because this is a significant  
9 issue for the shellfish-growing community. I just wanted to  
10 bring that to your attention as well.

11 And with that, I think I'll turn it over to Mr.  
12 Kisielius to continue with the examination of witnesses,  
13 unless you have questions on any of those.

14 THE HEARING EXAMINER: Well, you mentioned  
15 "development," but Mr. Booth's testimony referred to "use."  
16 Now, is there a distinction?

17 MR. PLAUCHE: I think there is, and I think, if  
18 they're regulating this as a use -- if they view it as a  
19 conditional use or as a use permit. But the question for  
20 whether or not a Substantial Development Permit is required  
21 is whether or not the activity is development.

22 THE HEARING EXAMINER: Doesn't it say "development  
23 or use" in the statute?

24 MR. PLAUCHE: I think the statute on Substantial  
25 Development Permits refers to "development."

1 THE HEARING EXAMINER: Okay. Okay.

2 MR. PLAUCHE: I'll pull that citation for you.

3 THE HEARING EXAMINER: You know, I don't have the  
4 language in front of me, because -- I've got my notes on his  
5 testimony, and I didn't look at the ordinance. Go ahead  
6 with your case, though, please.

7 MR. KISIELIUS: As our first witness, we'd like to  
8 call Diane Cooper.

9  
10 DIANE COOPER, having been first duly sworn  
11 upon oath by the Hearing Examiner, testified as follows:

12  
13 THE HEARING EXAMINER: And your name for the  
14 record, please?

15 THE WITNESS: My name is Diane Cooper.

16  
17 DIRECT EXAMINATION

18 BY MR. KISIELIUS:

19 Q Ms. Cooper, do you work for Taylor Shellfish?

20 A I do.

21 Q And in what capacity do you work for Taylor?

22 A I am -- I represent Taylor Shellfish on regulatory-  
23 compliance issues. I'm kind of the liaison between the  
24 company and the regulatory agencies.

25 Q And how long have you been in this position?

1 A I've been doing -- working for Taylor for approximately 12  
2 years in that position.

3 Q what do you do? Tell me a little bit about your job.

4 A well, I ensure that Taylor is complying with all the  
5 regulatory requirements necessary for their operations of  
6 some 9,000 acres. I also represent the company, as well as  
7 the industry, on a variety of advisory committees.

8 Q And a little bit more on that, in terms of representing the  
9 industry on advisory committees. Have you been involved in  
10 any advisory committees related to the Shoreline Management  
11 Act?

12 A I have. I represented the shellfish industry on a group  
13 that the Department of Ecology formed that looked at the  
14 shoreline guidelines, Washington Administrative Code, and  
15 represented the shellfish industry interests on that  
16 committee.

17 Q were you the only shellfish industry representative?

18 A I was.

19 Q And generally speaking, what time frame was that?

20 A It was 1998 to year 2000, after which the Department of  
21 Ecology promulgated new rules.

22 Q And what did you do before you worked for Taylor?

23 A I worked for the Department of Natural Resources for 10  
24 years or so.

25 Q what were you doing for them?

1    **A**       **I did essentially the same thing: regulatory compliance.**  
2               **I worked on upland issues and forestry issues, and I**  
3               **processed approximately -- or reviewed and processed some**  
4               **1,000 forest-practice applications, including environmental**  
5               **checklists, wildlife management plans, eagle management**  
6               **plans.**

7                       **THE HEARING EXAMINER: Ms. Cooper, could you**  
8               **address me, please?**

9                       **THE WITNESS: I'm sorry.**

10                      **THE HEARING EXAMINER: You seem to be addressing**  
11              **the audience.**

12                      **THE WITNESS: I don't know where I'm talking.**

13                      **THE HEARING EXAMINER: I'd appreciate that.**

14    **Q**       **I want to ask you a couple of questions about the Foss farm**  
15               **that's the subject of this appeal, and so I'm going to ask**  
16               **you to take a look at Exhibit Number 54.**

17                      **MR. KISIELIUS: For illustrative purposes, I'm**  
18               **going to put up an enlargement of this exhibit on the easel**  
19               **back there behind Ms. Cooper.**

20                      **THE HEARING EXAMINER: Exhibit 54 will be admitted**  
21               **into evidence.**

22    **Q**       **Ms. Cooper, will you please identify what we're looking at**  
23               **here?**

24    **A**       **Yes. This is a picture, or aerial photograph, of the area**  
25               **of the Foss farm.**

1 Q Okay. I'm also going to hand you -- sorry. These exhibits  
2 are sticky -- Exhibit Number 50.

3 THE HEARING EXAMINER: Exhibit 50 will be admitted  
4 into evidence.

5 Q And could you identify what we're looking at there? And in  
6 particular, I'm interested in just the first page.

7 A Yes. It appears to be a Metzger map that shows the  
8 boundaries of the Foss farm, upland and tideland.

9 Q And how long have you been involved with the Foss property  
10 here and the Foss farm?

11 A Since we signed an agreement with the Foss family, in 1999/  
12 2000, to lease their tidelands for geoduck farming.

13 Q And in terms of coming up with that lease and negotiating,  
14 how often did you visit the site?

15 A I visited the site many times in order to prepare the  
16 documents necessary to assess the site. Several times.

17 Q And did you prepare the application materials for the  
18 Shoreline Substantial Development Permit?

19 A I did.

20 Q I want to ask you a question about the approach that you  
21 bring, as a representative of Taylor, to permit  
22 applications, generally. Do you have a philosophy that you  
23 bring when you're approaching a particular site, in terms  
24 of how you're going to procure approvals?

25 A I do. It is our -- well, it's my personal and

1 professional, and, by extension, the Taylor's, then,  
2 philosophy, and, really, our management goals, to work with  
3 the agencies, work with the various people within the  
4 agencies, and find resolutions to some complicated  
5 problems. It depends on the agency and the folks that  
6 we're working with, but we try to resolve the issues and we  
7 work towards that goal.

8 Q And so this is a question, I think, that needs to be asked,  
9 because you applied for the permit in 2000, and yet, now,  
10 we're taking the position that one isn't necessary. Could  
11 you explain how that might be consistent or what your  
12 thought was back in 2000?

13 A Uh-huh. Well, I mean, the philosophy hasn't changed and  
14 it's still consistent with what I just stated. We -- I  
15 knew that Pierce County did not have any Taylor Shellfish  
16 geoduck farms. I knew that they had an experience with  
17 Washington Shellfish.

18 I knew that they were new to geoduck farming. And as  
19 such, I felt it was important for Taylor's, for me, to  
20 approach the County and discuss it with them: How best to  
21 go about dealing with geoduck farming.

22 It was also important to us that we vet it through --  
23 internally, with an agency, to send it out for public  
24 review, to have the regulatory agencies look at it, to go  
25 through an environmental review and go through that process

1           so that everybody had an opportunity to get -- to provide  
2           input. It was more of a -- not so much as getting a permit  
3           as going through a process.

4    Q       And to your knowledge, do you have a sense of whether or  
5           not Pierce County required permits at the time?

6    A       I did not know. For regular -- for other kinds of  
7           shellfish farming, I did not think they did.

8    Q       So if it was anything other than geoduck, would you have --

9    A       We would not have applied.

10   Q       I'm going to go to the application itself and some of the  
11           discussion about understandings and what was being applied  
12           for. I'm going to enter into the record the application  
13           that you submitted, Exhibit Number 56. I'll hand you a  
14           copy.

15                           THE HEARING EXAMINER: The JARPA form?

16                           MR. KISIELIUS: Correct.

17                           THE HEARING EXAMINER: Admitted into evidence.

18   Q       When you were applying for the permit, what was the  
19           duration of activities that you were applying for?

20   A       Ongoing.

21   Q       And is that indicated on the application?

22   A       It is. Number 8 on the JARPA form.

23   Q       And from your perception, did the County understand that  
24           this was an application for ongoing activities?

25   A       It was my understanding they did.

1 Q I'm going to ask you to take a look at exhibits that have  
2 already been submitted into the record. Exhibit Number 57,  
3 which is a County Staff Report (produces document to  
4 witness). And I'd ask you to look at Page 3. There's a  
5 statement there that begins--and I believe it's  
6 highlighted--"The PVC pipe."

7 THE HEARING EXAMINER: I'm sorry. Where you are  
8 now?

9 MR. KISIELIUS: Page 3 of Exhibit Number 57.

10 THE HEARING EXAMINER: 57 will be admitted into  
11 evidence.

12 THE CLERK: It already was.

13 THE HEARING EXAMINER: It already was. Okay. Go  
14 ahead. Page 3.

15 THE WITNESS: I'm sorry. Which one?

16 Q Go ahead and read the one that begins "The PVC pipe will be  
17 removed." I'm sorry. I gave you mine. If you -- can you  
18 see it there? Page 3.

19 A Right.

20 Q I've lost my reference to the number, but I'll look at it  
21 again and let you know. There you go. It's at the very  
22 bottom of the page, the paragraph that says "comment."

23 A Oh, okay.

24 Q Could you read that sentence?

25 A Page 3?

1 Q Yes.

2 A Go ahead and read it?

3 Q Yes, please.

4 A "Comment: The only structures involved with the proposal  
5 would be PVC pipe. The pipe would stick out a few inches  
6 from the surface of the beach. The pipe would be removed  
7 approximately one year after the geoduck are planted. The  
8 pipe would not be reinstalled" -- "would not be reinstalled  
9 on the beach for approximately four years, at the time when  
10 new geoduck were planted."

11 Q That statement -- does that reflect what you were applying  
12 for, in terms of ongoing activities?

13 A It is.

14 Q And you already heard Mr. Booth and Ms. Diamond testify on  
15 the expiration issue. Is Mr. Booth's characterization of  
16 the conversations you had accurate in terms of what was  
17 conveyed to you?

18 A Yes.

19 Q The question was asked, by County's counsel, whether the  
20 permit was ever appealed. Given what you were told that  
21 condition meant, that the permit did not expire, would you  
22 have any reason to have appealed the permit?

23 A I wouldn't have appealed it. There was nothing wrong with  
24 the condition per se, because I understood it to mean we  
25 install a farm and then we continue to farm. There would

1           be no reason for me to appeal it at that time.

2    Q       I want to ask you a little bit about the impact of this new  
3           determination that was issued in August, on the issue of  
4           expiration. I guess, as a preliminary question, what's the  
5           time frame between planting and harvesting, for geoduck,  
6           approximately?

7    A       Four to seven years.

8    Q       And so what would the practical impact be of an expiration  
9           period that would last only five years?

10   A       Well, the practical -- you wouldn't be farming. We  
11           wouldn't -- I would not have applied for a farm had I known  
12           there would have been a five-year restriction. We wouldn't  
13           have been able to farm. It wouldn't have made sense.

14                   THE HEARING EXAMINER: why?

15                   THE WITNESS: Because the harvest and planting on  
16           this kind of beach -- on a beach takes place over several  
17           years. It's an ongoing process. And once we have geoduck  
18           in the ground, to have it expire after five years and leave  
19           that harvestable amount -- leave it harvestable, any amount  
20           still in the ground, would be untenable for us.

21   Q       Ms. Cooper, could you -- and maybe this will get to the  
22           answer. Could you articulate the risk that you're exposed  
23           to with an expiration of the permit in five years, if you  
24           haven't already yet harvested what's in the ground?

25   A       Well, the risk would be, to have an expiration date like

1           that -- the rules could change, interpretations such as  
2           this could change, and we would end up with a geoduck in  
3           the ground that we couldn't harvest.

4    Q       I'm going to ask you just a few questions more, and I'd  
5           like to enter in, as evidence, Exhibit Number 79 (produces  
6           document to witness).

7                           THE HEARING EXAMINER: 79 will be admitted into  
8           evidence.

9    Q       And actually, as a preliminary question, are you familiar  
10           with the Attorney General's opinion of 2007?

11   A       I am.

12   Q       Are you familiar with agency response? Have you been  
13           tracking any agency response to the Attorney General  
14           opinion?

15   A       Pretty much, yes.

16   Q       Have you seen this email before?

17   A       I have seen it.

18   Q       Can you describe this email?

19   A       It's an email from -- it's an internal email, actually,  
20           within DNR, Department of Natural Resources, to various  
21           other State agencies. It was the State stakeholder group  
22           that had been convening on the issue of shellfish farming.

23   Q       And the author of the email, the first one?

24   A       Sarah Dzimal.

25   Q       And which agency is she associated with?

1 A She is with Department of Natural Resources.

2 Q And can you describe what Ms. Dzimal's reacting to in that  
3 email?

4 A Essentially, she is indicating that the Attorney General  
5 has issued an opinion and that -- which describes  
6 "development," which describes "structures," and which  
7 describes "substantial development," and that the agencies  
8 need to go no further than that.

9 Q And specifically, was she responding to any specific  
10 proposal? When she was presenting the Attorney General's  
11 opinion, was she responding to anything specific?

12 A (No audible response given.)

13 Q Let me rephrase. Who is the message directed to?

14 A It was directed to --

15 Q Which --

16 A It was directed to the Department of Ecology.

17 Q Okay. And what was Ecology considering at that point, that  
18 she was responding to?

19 A Department of Ecology was considering development and  
20 expiration dates on geoduck farming.

21 Q And so her response, again, was that --

22 A That the AG has made a decision, or has an opinion on that,  
23 and that it is no -- it did not behoove the State agencies  
24 to go any further with that determination.

25 Q Do you know, then, what happened, from that point forward,

1 with the Department of Ecology? Did they ever adopt what  
2 was proposed in that email?

3 A They did not.

4 Q what ended up happening from that point forward, on the  
5 regulatory front?

6 A On the regulatory front, we now have a shellfish  
7 stakeholder group that will be looking at the issues.

8 Q Keeping in line with the questions of this issue of  
9 development and with interference with public use of the  
10 surface waters, as far as you know, at the Foss farm, have  
11 there been any complaints about equipment, the geoduck  
12 equipment, netting, any sort of debris washing up?

13 A There have been.

14 Q when was that happening?

15 A Initially, it was in the first few years of our farming  
16 activities. We used tubes and individual nets, and we had  
17 some of those -- some of that debris that left the farm,  
18 and we were -- we cleaned it up.

19 Q And then did Taylor take any measures to correct that  
20 issue?

21 A Absolutely. We took it seriously, for one. And we had --  
22 we contacted the homeowners who contacted us. We tried to  
23 work with those folks. We had beach patrols. But more  
24 importantly, we changed our methods in response to the  
25 debris issue. And we believe we resolved the problem.

1 I've not received any complaints in the last several years.

2 Q And as far as you know, have there been any complaints or  
3 reports of any sort of injuries, incidents, anything like  
4 that, happening at the Foss farm?

5 A No.

6 Q I'm going to ask you, now, a couple questions about the  
7 Washington Shellfish site. My binder has fallen apart  
8 here. I'd like to enter Exhibit 48 into the record. I'm  
9 asking you to look at the first page there.

10 MS. GUERNSEY: I'm sorry. What exhibit number was  
11 that?

12 MR. KISIELIUS: 48.

13 MS. GUERNSEY: Thank you.

14 Q On that first page -- I'm sorry.

15 THE HEARING EXAMINER: Exhibit 48 will be admitted  
16 into evidence.

17 Q Can you describe that first page? What are we looking at  
18 there?

19 A This is a map showing the view for the vicinity of the Foss  
20 farm as well as the vicinity of the Washington Shellfish  
21 farm.

22 Q Let me ask about the Washington Shellfish farm. You are  
23 familiar with the site that was at issue in that case?

24 A I am somewhat familiar.

25 Q Have you been to that site?

1 A I have. I have.

2 MR. KISIELIUS: Excuse me. Bear with me. Exhibit  
3 Number 55.

4 THE HEARING EXAMINER: It's not been admitted  
5 already?

6 THE CLERK: No.

7 THE WITNESS: This photo, right there.

8 THE HEARING EXAMINER: Oh, okay.

9 MR. KISIELIUS: For illustrative purposes as well,  
10 I'm going to put up a --

11 THE HEARING EXAMINER: 55 will be admitted.

12 MR. KISIELIUS: Thank you.

13 Q As he puts that up, can you describe what we're seeing in  
14 that aerial photograph?

15 A Yes. This is the area of Washington Shellfish, just south  
16 of the Purdy Bridge, or Highway 302.

17 Q And you said you had some experience with the Washington  
18 Shellfish site. Can you elaborate on that?

19 A Well, I had -- I've had experience, both in conversations  
20 with Washington Shellfish owner Doug McRay -- initially,  
21 they contacted Taylor Shellfish, and me personally, to get  
22 advice on how to resolve some of their issues. And so we  
23 had discussions about the situation.

24 He described the operations as well as where it was  
25 at. I wasn't familiar with it before that. And I

1 suggested that he work with the County and get a shoreline  
2 permit.

3 Q And on what did you base that opinion?

4 A Well, a couple of reasons. One, the fact that working with  
5 the County is probably always the best way to go. But,  
6 also, this area is very developed. There were areas that  
7 he was leasing, both public and private tidelands, that did  
8 not adjoin the uplands. In other words, people who lived  
9 on the uplands did not have those tidelands. So there was  
10 potential conflict there.

11 Additionally, it was just south of a major bridge for  
12 folks that live around there. It also has a windsurfing  
13 boat ramp, or site, that folks use for windsurfing. And  
14 his operation was right adjacent to that area. So there  
15 was potential for all sorts of conflict, and I suggested  
16 that he resolve that through some sort of process.

17 Q Tell me a little bit about the type of assessment you made  
18 for Mr. McRay, when you said, initially, you went out to  
19 the Foss site to make an assessment. What was your  
20 conclusion in the assessment of the Foss farm?

21 A Well, they're entirely different kinds of beaches. They  
22 are different upland situations. They are different in  
23 terms of the area around them and the potential for  
24 conflict.

25 Q Okay. Was that your last interaction with Washington

1 Shellfish?

2 A No. A few years ago, we had been -- we were notified, by  
3 some beach walkers and some organizations, that there were  
4 tubes being washed up on the beaches. And so we organized  
5 and received permission from the County to go out and begin  
6 cleanup of the site.

7 We did that. Seattle Shellfish and Taylor Shellfish  
8 met. We were out there diving the site, to clean it up.  
9 And Doug McRay did come down to the beach and called the  
10 Sheriff on us, and that was our last experience.

11 Q And so you left after that?

12 A I have not gone back, yes.

13 Q As you know, the Intervener neighborhood associations have  
14 made the argument that geoduck operations constitute some  
15 of the listed activities in the definition of  
16 "development." I'm going to ask you some questions related  
17 to that. But before I do, I wanted to ask the Examiner --

18 MR. KISIELIUS: We have, in our brief, relied on a  
19 lot of dictionary definitions. I believe you could take  
20 official notice of those, but I can also have Ms. Cooper  
21 read those definitions into the record, if that's --

22 THE HEARING EXAMINER: Don't bother.

23 Q In the brief, the prehearing brief that the neighborhood  
24 associations -- they present the Army Corps' interpretation  
25 of "structures" as evidence -- as something to be

1           considered in interpreting "structures" for the shoreline  
2           management. Are you familiar with the Army Corps'  
3           jurisdiction over geoduck aquaculture?

4    A       I am.

5    Q       And again, for illustrative purposes, I'm going to put up  
6           two definitions.

7                       THE HEARING EXAMINER: Raise your voice. People  
8           can't hear. People can't hear you.

9                       MR. KISIELIUS: (Putting up display, easel leg  
10          falls off.)

11                      THE HEARING EXAMINER: Just remember, this is the  
12          low bid.

13                               (Laughter.)

14   Q       As Mr. Plauche helps me, I'm going to ask you a couple more  
15           questions, to keep things moving. Can you describe the  
16           Corps' jurisdiction over geoduck operations?

17   A       Well, the Corps regulates geoduck farming -- well, they  
18           regulate shellfish farming under the -- either dredge and  
19           fill, discharge and dredge and fill material, under the  
20           Clean Water Act, Section 404, or work in navigable waters,  
21           under Section 10 of the Rivers and Harbors Act.

22   Q       So what Mr. Plauche is putting up there, for illustrative  
23           purposes, are the WAC 173.27.030(15), which is the  
24           Shoreline Management Act's definition of "structure."

25   A       Yes.

1 Q Could you read that for us, please?

2 THE HEARING EXAMINER: It's not necessary for her  
3 to read it.

4 Q Okay. Then I'll put up, by way of comparison, the 33 CFR,  
5 the 322.2, which is the Corps' definition of "structure,"  
6 under its regulatory program. And it's not necessary to  
7 read them.

8 THE HEARING EXAMINER: Please raise your voice so  
9 people in the back can hear you.

10 Q So with your experience in Corps regulatory issues, would  
11 you say these definitions are different?

12 A They are.

13 Q I'm going to ask you, now, about dredge and fill, because  
14 you had mentioned that those are also regulated by the  
15 Corps. As best as you know, does the Shoreline Management  
16 Act contain a definition of "dredge"?

17 A It does.

18 Q Does the Shoreline Management Act, as best as you know,  
19 contain a definition of "fill"?

20 A Of...?

21 Q Of "fill."

22 A No. I'm sorry --

23 THE HEARING EXAMINER: This whole exchange is not  
24 being picked up.

25 MR. KISIELIUS: I'm sorry.

1 THE HEARING EXAMINER: Start with "dredge" again.

2 THE WITNESS: No.

3 Q And as far as you know, does the Shoreline Management Act  
4 include a definition of "fill," or "filling"?

5 A It does not.

6 Q And these are regulated separately, by the Army Corps?

7 A They are.

8 Q And do you know whether the Army Corps has opined as to  
9 whether or not geoduck operations constitute dredge or  
10 fill?

11 A They have issued a determination on that.

12 MR. KISIELIUS: I'm going to present another letter  
13 into evidence. This is Exhibit Number 81.

14 THE HEARING EXAMINER: Exhibit Number 81 will be  
15 admitted into evidence.

16 Q Could you please turn to Page 3 and read the highlighted  
17 portion?

18 A "Seattle District has determined that normal operations of  
19 geoduck farms do not necessarily result in discharge of  
20 dredge or fill."

21 THE HEARING EXAMINER: Wait a minute. I'm sorry.  
22 This is Exhibit 81. I'm sorry. Please wait. Okay, go  
23 ahead. There's only one page. No. I've got it. Thank  
24 you.

25 Q Actually, Ms. Cooper, before you read that, could you just

1 describe: who is the letter from?

2 A This is the Department of the Army, Seattle District Corps  
3 of Engineers' letter to a Ms. Catherine Townsend, Protect  
4 Our Shoreline, Olympia, Washington, in response, it looks  
5 like, to questions.

6 Q Thank you. Now, could you please turn to Page 3?

7 A "Seattle District has determined that normal operations of  
8 geoduck farms do not necessarily result in a discharge of  
9 dredge or fill material."

10 Q In what situations would a geoduck farm use dredge or fill  
11 activities?

12 A It -- when a farm -- if there were a need to divert a  
13 freshwater stream that perhaps runs through the tidelands  
14 and through the farm, we may need to do that. There may  
15 need to be some dredging associated with that and some  
16 diversion activities, which the Army Corps could have  
17 purview over.

18 MR. KISIELIUS: And I'm done with my questions.  
19 Thank you. You need to stay up there.

20 MS. GUERNSEY: I do have questions. Thank you.

21

22 CROSS-EXAMINATION

23 BY MS. GUERNSEY:

24 Q Ms. Cooper, I'm Jill Guernsey. I'm with Pierce County.

25 I'd like to talk, for a moment, about the project for which

1 Taylor Shellfish obtained a permit in the year 2000. I  
2 believe you indicated--and let me find my exhibit  
3 number--that you were the one that filled out the JARPA  
4 application for that project?

5 A Yes.

6 Q And that's Exhibit 56 in the big binder. Let me hand that  
7 to you. (Produces document to witness.) Can you describe  
8 for us, in that JARPA application, what did you understand  
9 the project to be?

10 A The installation of the geoduck farm.

11 Q Just the installation, not the ongoing operation?

12 A And it does say "ongoing."

13 Q So two parts: Both the installation and the ongoing  
14 operation?

15 A Correct. And Number 7 -- or 6, I guess it is -- the copy  
16 machine took off some of it -- it talks about the operation  
17 itself.

18 Q Okay. So the JARPA application was for both: installation  
19 and ongoing operation?

20 A Uh-huh.

21 Q Now, the case, as it went to the Hearing Examiner. Did you  
22 understand that that was for both the installation of the  
23 farm, I'll say, and the operation?

24 A The installation of the farm, in my interpretation, would  
25 be the same. I mean, the installation of the farm is to

1           conduct farming activities, or there would be no other

2           reason to install a farm, such a farm.

3    Q       well, you've kind of split -- as I understand the argument  
4           that you're making here -- or that your counsel is making  
5           here today, it's that there are basically two types of  
6           things, installation and operation, and that you don't need  
7           a permit for the ongoing operation after the installation.  
8           Am I misunderstanding your position?

9    A       I believe so.

10   Q       Please clarify.

11   A       Okay. We install a farm within the five years, and that's  
12           -- for which we got the Shoreline Substantial Development  
13           Permit: Is for installation of a geoduck farm. The  
14           activities associated with that installation, that farm,  
15           are part of that permit.

16   Q       Is it your position that you need a Shoreline Substantial  
17           Development Permit for the ongoing operation once the farm  
18           is installed?

19   A       Do we need an additional permit? I'm not sure I  
20           understand.

21   Q       A permit.

22   A       A permit. Actually, no. No.

23   Q       No? So you just need the permit to put the stuff in?

24   A       At this point -- well, we don't believe we needed a permit  
25           to begin with. We went through -- as I stated previously

1           in my testimony, we believe that we wanted -- well, we  
2           wanted to go through a process, development of a farm, and  
3           nowhere else did we have to get a Substantial Development  
4           Permit for a farm.

5    Q       Okay. But just so I'm clear with what you applied for  
6           here --

7    A       Uh-huh.

8                       THE HEARING EXAMINER: In no other county, you have  
9           to get one?

10                      THE WITNESS: We don't get shoreline permits for  
11           geoduck farming in other counties.

12                      THE HEARING EXAMINER: You don't in Kitsap County?

13                      THE WITNESS: We don't farm in Kitsap County.

14                      THE HEARING EXAMINER: But they do require it  
15           there, though, don't they?

16                      THE WITNESS: We don't farm there.

17    Q       Okay. Let me back up. I want to make sure I understand,  
18           so if I'm understanding incorrectly, please correct me,  
19           okay?

20    A       Okay.

21    Q       In 2000, when you applied for this permit, you were  
22           applying for both the installation of the farm and the  
23           ongoing farming operations?

24    A       Correct.

25    Q       But your belief, at the time, was that you didn't need a

1 shoreline permit for the ongoing operation?

2 A We believed that it was covered under -- when we install a  
3 farm -- and I don't know that I'm splitting it as finely as  
4 you, in my mind, so it's difficult for me to answer that  
5 question. We applied to install a farm, and that included,  
6 as part of that activity, farming.

7 Q But if I understood your testimony here today, you didn't  
8 believe you needed a Shoreline Substantial Development  
9 Permit for just the farming aspect of it.

10 A In order to have a farming aspect, we have to install the  
11 farm.

12 Q Okay. I'm going to try this again.

13 A Okay. Sorry.

14 Q You applied for the permit to install the farm.

15 A Uh-huh.

16 Q Planting the tubes and the seeds and the netting.

17 A Correct.

18 Q And then it was your intent, after the farm was installed,  
19 that you would continue to operate the farm.

20 A Correct.

21 Q Grow the geoducks.

22 A Correct.

23 Q Okay. Was it your belief, at the time, that you needed a  
24 Shoreline Substantial Permit for both of those activities:  
25 Installing the farm and continuing to farm them after the

1 tubes were put in, pulled out, whatever they were?

2 A I'm still not clear, Ms. Guernsey. But we did get a permit  
3 to install a farm.

4 Q And didn't you also get a permit to operate the farm after  
5 you installed the farm?

6 A Yes, absolutely.

7 Q Did you ever --

8 THE CLERK: would you not talk over each other?

9 THE WITNESS: I'm sorry.

10 Q I'm sorry. Did you ever make any comment or statement to  
11 the Examiner, at the time, that you didn't think you needed  
12 a permit to operate the farm?

13 A I don't think so, no.

14 Q So you applied for both. You got the permit for both; is  
15 that correct?

16 A I believe that was what the permit was for, yeah.

17 Q For both installation and the ongoing operation?

18 A Yes.

19 Q Now, Conditions 4 and 5 -- or is it 5 and 6? -- of the  
20 permit -- 5 and 6. Do you have that permit in front of  
21 you?

22 A I do not.

23 Q Okay. Let me hand it to you (produces document to  
24 witness).

25 THE HEARING EXAMINER: Are you talking about the

1 decision?

2 MS. GUERNSEY: I'm sorry. Yes.

3 (Discussion off the record.)

4 THE HEARING EXAMINER: Are you talking about 22-00?

5 MS. GUERNSEY: Yes.

6 THE HEARING EXAMINER: Okay.

7 Q And this is Exhibit 1F, and it is also -- what did we  
8 say? -- Exhibit 58 in the binders. On Page 6 of that  
9 decision, there are conditions. Are you with me?

10 A Okay.

11 Q They start at the top, and they're numbered 1 through 5.

12 A Yes.

13 Q Okay. Condition 4 talks about "construction or substantial  
14 progress toward construction of a project for which a  
15 permit has been granted." And that talks about getting  
16 started within two years; is that correct?

17 A Correct.

18 Q Okay. And condition -- oh, let me back up. You did that,  
19 didn't you?

20 A Correct.

21 Q You complied with that condition, because you started work  
22 and --

23 A We installed the farm, yes, within two years.

24 Q Okay. And Condition 5, which begins, "If a project for  
25 which a permit has been granted pursuant to the Act has not

1           been completed within five years after the approval of the  
2           permit, the local government that granted the permit shall,  
3           at the expiration of the five-year period, review the  
4           permit and, upon a showing of good cause, do either of the  
5           following: extend the permit for one year or terminate the  
6           permit." And then it goes on, okay?

7    A       Uh-huh.

8    Q       Now, you were aware of that condition, were you not?

9    A       I was.

10   Q       what did that condition mean to you?

11   A       That installation of the farm, which included, as I just  
12           stated -- and I don't distinguish between the two,  
13           installation and the operation of the farm -- but  
14           installation of that farm needed to be done within two  
15           years. And if we didn't within five, we needed to go back  
16           to the County and get a renewal.

17   Q       So you understood the Examiner's decision to only refer to  
18           the installation of the farm, not to the ongoing activity  
19           after it was installed?

20   A       In my view, they're really one and the same, and they can't  
21           be divided. Installation of a farm is to farm.

22   Q       Okay. If that's the case, then why don't you think that  
23           the five-year limitation applies?

24   A       Because it's installation of the farm, and then those  
25           activities within that farm can go on in perpetuity.

1 Q So as long as you --

2 A After that farm has been installed.

3 Q So your understanding is that, as long as you install it  
4 within five years, you can operate it indefinitely?

5 A Correct.

6 Q Now, the lands that Taylor leased here, are they covered  
7 with water all or part of the time?

8 A All or -- yes, they are.

9 Q The tide comes in, the tide goes out?

10 A Yes.

11 Q Sometimes the leased properties are under water and  
12 sometimes they're not?

13 A That's correct.

14 Q Okay. And the area where the tubes are -- I'll call it the  
15 "farm area"--

16 A Okay.

17 Q --is that covered with water all or part of the time, based  
18 on the tide?

19 A Correct.

20 Q Washington Shellfish's property. Now, you're familiar with  
21 that, you indicated. That was 11 sites. Are you aware of  
22 that?

23 A Yes.

24 Q And you said you knew that some was private and some was  
25 public?

1 A I did, yeah.

2 Q Okay. And that property was also covered all or part of  
3 the time, depending on the tide, with water; is that  
4 correct?

5 A I -- I'm not positive. I believe it was mostly covered by  
6 water most of the time, as opposed to our farm, but yes.

7 Q Okay. Now, how is that different from your farm, the  
8 Washington Shellfish sites, covered all or part of the time  
9 with water?

10 A For several reasons. I don't think that just the water  
11 coverage makes -- or gave me the indication that they were  
12 different. There are several factors that were involved,  
13 and each one of those factors is considered.

14 So there's upland development. There's a lot more  
15 boat activity, because of the dive harvest. As I  
16 indicated, there's mostly water there, so it's a dive  
17 harvest. A lot of rope, a lot of marking around the area  
18 every time -- and large. It was -- and so there was a lot  
19 of activity there.

20 It was right in front of a high recreational-use site,  
21 of which Doug McRay did not own or manage. So it's a  
22 public area and a dive harvest. Those are pretty  
23 significant differences just right there.

24 Q Well, let's scale Washington Shellfish's 11 sites back to  
25 not the upland area, but just the beach. Just as this

1 site, it's covered, all or part of the time, with water,  
2 where the shellfish farm is?

3 A It's my understanding Washington Shellfish used dive  
4 harvests only.

5 Q Well, by that, do you mean they didn't plant tubes?

6 A They put tubes in, but it was all under water.

7 Q All the time?

8 A Most of the time. I believe so. It was -- it was a dive-  
9 harvest activity. Ours is not.

10 Q What are yours?

11 A Ours is very -- very rarely do we dive, and -- only on an  
12 occasional basis do we dive, and it's based on other  
13 factors, not access. So because he had to dive that site,  
14 having divers in the water all the time requires that you  
15 have to exclude a lot of -- exclude, just for the safety of  
16 the divers, everyone else in that area.

17 It requires a lot more appendages to the operation:  
18 Dive boats, air. They left barges out there. They left  
19 rope hanging out there, to exclude other folks. It was --  
20 it's, in a lot of ways, different than what we do.

21 Q Well, if I understand correctly, you're saying that the way  
22 he conducted his operations was different from the way  
23 you're conducting your operations?

24 A Yes. His is dive and ours is primarily not.

25 Q And how they harvested or cultivated the crop is different

1 from how you conduct your operations?

2 A Correct.

3 Q But both of you have tubes in the water with geoduck seed  
4 in the tubes?

5 A Correct.

6 Q I should say tubes in the tidelands.

7 A That's correct.

8 Q And you're both trying to get geoduck clams out of there,  
9 correct?

10 A That's correct.

11 Q And you both plant tubes about the same distance apart?

12 A I'm not sure what Mr. McRay did exactly. I couldn't  
13 testify to that.

14 Q Your operation has hundreds of tubes in the tidelands, with  
15 geoduck seed in them, that are inches from -- the tubes are  
16 inches from each other, all over the beach, as shown by the  
17 pictures?

18 A That's correct.

19 Q And Mr. McCray's operation was like that, too, wasn't it?

20 A Yeah.

21 Q Okay.

22 THE HEARING EXAMINER: The record should reflect  
23 that I'm the Hearing Examiner. I heard that case.

24 Q Oh, just one final question. When the tide's in on this  
25 property, is it your understanding that the public has an

1 opportunity to use the water? Boat, say.

2 A Yes.

3 MS. GUERNSEY: Okay. I don't have anything  
4 further. Thank you.

5 MR. KIMBALL: Just a couple of questions, Ms.  
6 Cooper.

7

8 CROSS-EXAMINATION

9 BY MR. KIMBALL:

10 Q Did I understand you to agree with Ms. Guernsey, that  
11 installation of the farm simply required the placement of  
12 tubes in the beach and planting of the geoducks?

13 A There were -- there was other activities that are  
14 associated with the installation of the farm.

15 Q When you first started this farm, will you tell the Hearing  
16 Examiner the list of activities that were required?

17 A Yes. In order to establish the farm and install it, it  
18 wasn't just a matter of placing tubes and planting  
19 geoducks. We do survey and marking. We do assessments and  
20 -- environmental assessments as well as an upland  
21 assessment. So there is a variety of activities we do  
22 prior to even planting. And so installation is all of  
23 those activities.

24 Q Anything else? Other permits?

25 A And we do also -- yeah. We are -- we notified the treaty

1 tribes in the area that this particular farm -- there were  
2 two tribes that we notified that we were creating a farm.  
3 And that's the terminology that we used, as decided by the  
4 tribes and shellfish growers, is that we have created a new  
5 artificial farm.

6 Q And the importance of that contact and coordination?

7 A And that's -- that's important -- that's important to the  
8 treaty tribes in that it establishes our farm as an  
9 artificial farm. And it's required under the treaties, the  
10 Stevens' Treaties, to be done any time an artificial farm  
11 is created.

12 Q The Stevens Treaty and subsequent interpretations by the  
13 Federal District Court?

14 A That's correct.

15 Q You lease, from my clients, tidelands on which you conduct  
16 this farming operation, correct?

17 A That's correct.

18 Q And what is required to determine the actual, physical  
19 location of the portion that is farmed?

20 A We -- we do an environmental assessment in order to go out  
21 there and determine what area is farmable, plantable, and  
22 usable.

23 Q And do you have to obtain permission from any agency or  
24 register with any agency for the exact --

25 A Farmable.

1 Q -- the location of where you're farming, specific location?

2 A Yes. We do also -- we notify the Department of Fish and  
3 wildlife that we have created an aquatic farm, and that  
4 registration is required by statute any time a new farm is  
5 installed or created.

6 We also are required to be assured, and assure, that  
7 water quality is sufficiently high in standard, and we do  
8 that through the Department of Health for human-health  
9 purposes.

10 Q And all of those steps are involved in this rubric of  
11 installation of the farm?

12 A That's correct.

13 Q Are all of those steps required to continue farming?

14 A That's correct.

15 Q After initially establishing and installing the farm, do  
16 you have to continue to repeat those steps?

17 A Oh, once we get the aquatic farm registration, it is  
18 registered in perpetuity, unless we abandon the farm. The  
19 Department of Health issues a license for that area, and  
20 then that is in perpetuity.

21 The tribal notification is -- once we've notified them  
22 that we've created and installed a new artificial bed, then  
23 that is also in perpetuity.

24 Q So all of those other agencies or official bodies recognize  
25 this as something that is established and then operates in

1           perpetuity?

2    A       That's correct.

3    Q       You talked about a problem of debris, beach debris, at the  
4           beginning of this process. Did my clients evidence concern  
5           about that?

6    A       They did, and, in fact, we had conversations. It was a  
7           concern to us--me personally, but also to Taylor's--that we  
8           had the issue, and we knew we needed to resolve it. We  
9           worked with groups to resolve it. But the Fosses were very  
10          concerned about it. And we -- we assured them that we were  
11          going to resolve it and take all steps to resolve it.

12   Q       Did you?

13   A       We did.

14   Q       Does your agreement with my clients concerning your use of  
15          their tidelands have provisions in it for policing of the  
16          conduct of your operation?

17   A       It does.

18   Q       Are there limitations on how long you can operate?

19   A       No.

20   Q       Are there limitations on noise?

21   A       I don't believe so.

22   Q       Have you reviewed the lease lately?

23   A       Not lately, no.

24   Q       Okay. Do you put hundreds of feet of nylon line floating  
25          on the surface of the water at the Foss farm?

1 A No.

2 Q Have you placed any permanent buckets of cement, to anchor  
3 corners or pipes, sticking up where it's visible above the  
4 waters at high tide?

5 A No.

6 Q You don't moor barges there on a long-term basis?

7 A No.

8 MR. BRICKLIN: Objection; leading.

9 THE COURT REPORTER: I'm sorry. Whose objection  
10 was that? Was that your objection, sir?

11 MR. BRICKLIN: Yes, it was.

12 THE HEARING EXAMINER: I didn't hear the objection.

13 MR. BRICKLIN: I'm sorry. I objected, leading.  
14 This is a friendly witness.

15 THE HEARING EXAMINER: It's done.

16 MR. BRICKLIN: Yes.

17 THE HEARING EXAMINER: It's asked and answered.

18 MR. BRICKLIN: That's fine.

19 MR. KIMBALL: I don't have anything further, Ms.  
20 Cooper. Thank you.

21

22 CROSS-EXAMINATION

23 BY MR. BRICKLIN:

24 Q Ms. Cooper, David Bricklin, representing the Interveners,  
25 the other Interveners. You just indicated that the other

1 leases and permits and certifications on file are perpetual  
2 in nature; is that right?

3 A Yes.

4 Q So that, if the shoreline permit also were to be perpetual,  
5 that would mean there would be no ongoing review of the  
6 issues associated with this project, right?

7 A Regulatory review, that's correct. There is internal  
8 review.

9 Q You said, at this site, the Foss site, you don't use  
10 buckets of cement, but you do use rebar to hold the nets in  
11 place, don't you?

12 A That's correct. That's correct, we don't use buckets of  
13 cement.

14 Q But you use --

15 A We use rebar.

16 Q You said that you don't use a dive-harvest technique at  
17 this site as often as it was used at the Washington  
18 Shellfish site, but you do use it on some occasions; is  
19 that right?

20 A That's correct.

21 Q What are the circumstances that prompt you to use the dive-  
22 harvest technique?

23 A I'm not a harvest -- one of the harvest managers, so I  
24 don't know what -- what the circumstances would be. I know  
25 it's a rarity.

1 Q Okay. When you do use a dive-harvest technique at this  
2 site, you would be using the same sort of operation as  
3 Washington Shellfish used, in terms of needing to rope off  
4 the area and exclude recreational boaters and so forth,  
5 right?

6 A No, not necessarily. Our operation -- our dive operations  
7 are significantly less than Washington Shellfish. We don't  
8 use floating line. We don't use floating rope. We have  
9 weighted rope that the divers use to guide along the  
10 bottom.

11 We have one dive barge and then one barge for the  
12 harvest equipment and product, a limited number of workers.  
13 It's significantly different than Washington Shellfish's  
14 operations.

15 Q Don't you flag the area?

16 A We do flag the area, because that's -- that's County  
17 ordinance.

18 Q Right, to keep --

19 A For diving.

20 Q That's to keep boaters out of that area, right?

21 A That's correct. For any recreational diving, that would be  
22 the case.

23 Q You said that, as part of the installation, you do  
24 environmental assessments, which I think you then specified  
25 was to determine the farmable areas of the leased lands.

1           Is that right?

2    A       That's correct.

3    Q       You don't do other environmental assessments? Like, you  
4           haven't done an environmental impact statement pursuant to  
5           the State Environmental Policy Act, have you?

6    A       We've done -- we haven't done a full environmental impact  
7           statement.

8    Q       Right. In terms of the installation, you mentioned putting  
9           in the tubes, planting the seeds. It also could include  
10          covering the tubes with a net, an area-wide net; is that  
11          right?

12   A       Correct.

13   Q       And then staking that down?

14   A       Correct.

15   Q       Are you familiar with the progression of that installation  
16          process along these leased lands at this particular site?

17   A       At...?

18   Q       At the Foss site.

19   A       At the Foss site. Am I familiar with the process?

20   Q       Well, the sequence. I mean, as I understand it, there's 12  
21          acres there. Is that right, give or take?

22   A       That's correct. I am familiar with the process. Exactly  
23          the particular -- the specific boundaries of each phase,  
24          I'm not.

25   Q       Okay. Fair to say that all 12 acres weren't planted at the

1 same time, right?

2 A Correct.

3 Q And some of the planting didn't take place within the first  
4 five years, did it?

5 A It was all planted at one point. I believe it was all --  
6 not necessarily planted but all installed. We marked out  
7 the entire area and established that farm area, and then  
8 the planting just occurred as we were able to plant the  
9 farmable area.

10 Q You said the installation constituted the installation of  
11 the tubes, the planting of the seeds, and then covering  
12 that array with a net, right?

13 A Yes. And then, as I -- in my earlier testimony, we had  
14 other associated activities that are part of that  
15 installation process.

16 Q Right. And there were certain parts of the leased land  
17 where that installation process wasn't completed within the  
18 five years, was it?

19 A I don't believe so, no.

20 Q You think all parts of the leased lands were--

21 A Installed.

22 Q --installed within the first five years?

23 A Yes.

24 Q You mentioned that the Department of Health does a  
25 water-quality assessment. And that's in terms of making

1           sure the water is fit for the growing of geoducks; is that  
2           right?

3    A       For human-health purposes.

4    Q       Human-health purposes. They're not doing a water-quality  
5           assessment for other purposes, are they?

6    A       No, they are not.

7    Q       Your counsel had you take a look at the federal definition,  
8           the Army Corps definition, of "structure"--

9    A       Uh-huh.

10   Q       --and had you note that that definition was different than  
11           the definition of "structure" in the State regulations. Do  
12           you recall that?

13   A       Yes.

14   Q       And do you recall that the lead-up to that question was  
15           because there was an Army Corps statement that geoduck  
16           aquaculture involved the placement of a structure? Do you  
17           remember that?

18   A       Correct.

19   Q       Now, I'd like to explore what part of the definition of  
20           "structure" might have caught the Army Corps' attention  
21           when they characterized geoduck aquaculture as a structure.  
22           There's a long list here. It certainly doesn't amount to a  
23           pier, does it?

24                           MR. KISIELIUS: Objection. He's asking our witness  
25           to guess what the Army Corps' rationale was in issuing its

1 decision.

2 MR. BRICKLIN: I'm not.

3 Q I'm just asking whether a geoduck operation, in your mind,  
4 involves a pier. Does the one at Foss involve a pier?

5 A Does our...?

6 Q Are you installing a pier?

7 A We are not.

8 Q Right. Are you installing a boat dock?

9 A No.

10 Q A boat ramp?

11 A No.

12 THE CLERK: Speak up, please. I can't hear you.

13 MR. BRICKLIN: They've all been noes so far.

14 Q A wharf?

15 A No.

16 Q A dolphin?

17 A No.

18 Q I weir?

19 A No.

20 Q A boom?

21 A No.

22 Q A breakwater?

23 A No.

24 Q A bulkhead?

25 A No.

1 Q Do you see the rest of the list, all the way down through--

2 A I do.

3 Q --"aid to navigation"? You do none of those items, are you  
4 (sic)?

5 A That's correct.

6 Q That leaves "or any other obstacle or obstruction," right?

7 A Correct.

8 Q And that's, under the Shoreline Act, a separate basis for  
9 characterizing something as a development, isn't it? If  
10 you are an obstruction?

11 MR. KISIELIUS: I'm going to object to that as  
12 well. This is asking the witness to make decisions about  
13 the Shoreline Management Act and whether or not they're the  
14 same. It's a legal conclusion.

15 THE HEARING EXAMINER: I don't think it was, but go  
16 ahead. You may respond if you can.

17 THE WITNESS: Rephrase the question.

18 Q Are you aware that the Shoreline Act definition of a  
19 "development" includes obstruction?

20 A Obstruction. I am aware.

21 Q Thank you. You said there was a debris problem at the Foss  
22 site in the first years, but then you changed your methods.  
23 Could you explain how you changed your methods?

24 A We had initially used individual netting for each tube.

25 That included a -- a net over the top of the tube, which I

1 know you're (indicating to Hearing Examiner) familiar with;  
2 and a rubber band, and that, I guess, precipitated the  
3 debris issue. And we have, since then, used a large net,  
4 very secured -- secured into the substrate, and that's  
5 resolved the problem.

6 THE HEARING EXAMINER: At this point, staff has  
7 asked for a break, and so we'll be taking a 15-minute break.  
8 Sorry, but I just didn't see a convenient time to interrupt.

9 (Recess taken from 2:29 p.m. to 2:43 p.m.)

10 THE HEARING EXAMINER: Good afternoon. The hearing  
11 on AA16-07 will be reconvened. You're still on the stand  
12 (indicating to Ms. Cooper).

13

14 CROSS-EXAMINATION - (continuing)

15 BY MR. BRICKLIN:

16 Q Welcome back, Ms. Cooper. As I understand it, you were  
17 distinguishing the operation, here at Foss, from the  
18 operation at Seattle (sic) Shellfish because of the  
19 recognition that the operation at Seattle Shellfish did  
20 constitute development requiring a permit, right?

21 A Correct.

22 Q And so you described one of the differences being that they  
23 do more dives and a different kind of dives and have  
24 different kinds of netting.

25 A Correct.

1 Q Right? Now, if you don't have a permit here, what would  
2 stop you, at the Foss site, from changing your operations  
3 over time?

4 A If our operations changed over time, then we'd make -- I  
5 guess you're assuming that -- if we did not have a permit  
6 at all --

7 Q Right.

8 A Okay. What would prompt us to get a permit would be the  
9 change in the operation. That's not unusual, and it's  
10 incumbent upon me, representing Taylor's, to recognize,  
11 when that change occurs, that we need to get -- that we  
12 would have to get a permit if it interferes with the public  
13 use of the water. I think it would be evident.

14 Q Or if it constituted an obstruction or met any of the other  
15 standards, right?

16 A (Witness nods head affirmatively.)

17 Q Okay. You testified about the -- and I think this is what  
18 we were talking about right before the break -- that the  
19 response to the debris problem was to cover the entire  
20 array of tubes with this area-wide net, correct?

21 A Correct.

22 Q And so that net served the purpose, in part, of keeping  
23 predators out, right?

24 A Correct.

25 Q But then it also served the purpose of securing the tubes

1 in that location and not letting them drift away, right?

2 A Correct.

3 Q And is it your understanding that that change in operations  
4 has eliminated the litter problem there?

5 A It is my understanding it has.

6 Q Do you have any personal knowledge of that, or have you  
7 walked the beach subsequent to that change in operations?

8 A I have.

9 Q So it's been your observation there's not a remaining  
10 litter problem there?

11 A That's correct. My personal observations have been that  
12 the litter problem has been reduced significantly. I  
13 cannot testify that there has not been, ever, a piece of  
14 debris on the beach.

15 Q But nothing significant, in your --

16 A In my opinion, no.

17 Q You testified that, if the permit expires after five years  
18 and then, even with the one-year extension, six years, that  
19 it would be untenable to maintain this operation, right?

20 A Correct.

21 Q And that was because, it was your testimony, that the  
22 harvesting occurs more than six years after the initial  
23 planting?

24 A It can.

25 Q It can? Isn't it expected to occur in less time than that?

1 A It can occur between four and seven years.

2 Q Isn't it typical for it to occur in four or five years?

3 A It depends on the area. In this particular area, it is  
4 closer to four or five years, but you don't get every  
5 single duck every time you harvest. You need to go back  
6 and continue with your harvest.

7 Q So the primary harvesting, you would agree, occurs within  
8 four to five years?

9 A It can occur within five, if it was -- yeah. Absolutely.

10 Q And since it occurs within five years, then that would be  
11 within the term of a five-year permit, wouldn't it?

12 A That would only be the case if you presumed that we planted  
13 all of it within the first year.

14 Q And if it were a six-year permit, with a one-year  
15 extension, you would have two years to do the original  
16 planting, right?

17 A Correct. And these are approximate, of course.

18 Q Right.

19 THE HEARING EXAMINER: Except you're not facing me.

20 THE WITNESS: Pardon?

21 THE HEARING EXAMINER: You're addressing the  
22 audience.

23 Q Now, you were trying to explain why it was you applied for  
24 this permit in 2000, even though it's your current position  
25 that you don't need a permit.

1 A Correct.

2 Q And your explanation was that you wanted to have some kind  
3 of process, and so you applied for a permit you didn't need  
4 in order to have a public process?

5 A I don't -- when we go through -- or have a new operation,  
6 it is always -- well, it's my experience and it certainly  
7 is my intention to go to the agencies first and discuss a  
8 best approach of how we vet the issue and whether a permit  
9 may be required. Is that the best approach? How should we  
10 deal with it? That's just what we do.

11 I was not necessarily looking for a permit, per se,  
12 but an opportunity to go through a process that allowed the  
13 County to address issues, because I did not think about, at  
14 the time, in terms of: Do I need a permit? Is this permit  
15 going to come back in five years and make it so we can't  
16 harvest the geoducks we planted? I wouldn't have applied.

17 Q So the answer to my question is: You applied for this  
18 permit even though, at the time, you thought you didn't  
19 need a permit?

20 A I didn't make that --

21 Q Is that your testimony?

22 A I didn't make the assessment whether -- a legal assessment.  
23 Let me answer it that way.

24 MR. BRICKLIN: All right. That's all I have for  
25 this witness. Thank you.



1 nothing in the description of geoduck aquaculture  
2 necessitates such interference. The PVC pipes protrude  
3 only inches and have no more interference with the use of  
4 the surface waters than bags of oysters, clam nets, or  
5 small rock on the shoreline. The markers, floats, barges,  
6 and entanglements affecting the surface in Washington  
7 Shellfish may not exist at every geoduck farm. The  
8 neighboring public park appears to trigger the interference  
9 with public use of the surface waters."

10 Q And to your knowledge, the Washington Shellfish operation  
11 -- did they lease public tidelands?

12 A I believe they did.

13 Q And the sites that were the remaining ones, were they  
14 adjacent to the public tidelands?

15 A They were.

16 Q And are the tidelands that you lease at the Foss farm  
17 public tidelands?

18 A They are not.

19 Q Mr. Bricklin had asked you some questions about diving and  
20 dive harvests and whether or not you put up flags. Do you  
21 dive recreationally?

22 A I do.

23 Q And when you dive recreationally, do you put up flags?

24 A We do.

25 Q And what's the purpose of that?

1 A It is to notify other boaters that there's a diver under.

2 Q Do you, for recreational-dive purposes, get a Shoreline  
3 Substantial Development Permit?

4 A We do that.

5 Q Another question Mr. Bricklin asked twice was, whether or  
6 not it was a situation that you did not need a permit,  
7 would there be any mechanism by which you would -- if this  
8 did not expire, would there be any mechanism by which,  
9 these issues, you'd have a chance to revise and revisit  
10 some of the issues and the conditions (sic).

11 In your experience in working with Taylor on some of  
12 the geoduck operations and the permits, has the Examiner  
13 imposed conditions that would create an ongoing process,  
14 regardless of a permit expiration?

15 A He has.

16 Q I'm going to --

17 THE HEARING EXAMINER: He has. I have.

18 (Laughter.)

19 MR. KISIELIUS: I'm going to enter into evidence  
20 Exhibit Number 69.

21 THE HEARING EXAMINER: No objection? I mean, that  
22 is admitted. I thought I had already done that. I'm sorry.  
23 Sometimes I forget which side of the bench I'm on.

24 Q Could you turn to Page 3, please?

25 THE HEARING EXAMINER: Of what?

1 MR. KISIELIUS: Of Exhibit Number 69.

2 THE HEARING EXAMINER: I had read it.

3 MR. KISIELIUS: Okay. I'd enter, then, also  
4 without having Ms. Cooper read it, Exhibit Number 70, which  
5 is the permit itself.

6 THE HEARING EXAMINER: Very good.

7 Q One more question.

8 MR. KISIELIUS: I'm sorry. Excuse me.

9 THE HEARING EXAMINER: Did you just want the entire  
10 70? Is there anything you want to draw my attention to in  
11 that?

12 MR. KISIELIUS: I was going to. I heard you say  
13 that "I had read it," and I didn't -- I'll have Ms. Cooper  
14 then --

15 THE HEARING EXAMINER: I wrote this one, but go  
16 ahead.

17 MR. KISIELIUS: Okay.

18 Q Ms. Cooper, could you turn, on Exhibit 69, to Page 3 and  
19 read the final paragraph on Page 3?

20 A Last paragraph of Page 3?

21 Q Yes.

22 A "Staff requests that Examiner reconsider Condition 24. In  
23 Condition 24, the Examiner suggested that he review this  
24 matter after three years, because this is a new type of  
25 operation, and after three years, it will have completed a

1 geoduck harvest cycle. Examiner was of the opinion that,  
2 at the completion of the cycle, both the Applicant and the  
3 County would like to refine conditions herein. The  
4 Examiner attempted to use the provisions for revisions to  
5 provide for the review. Given the fact that both the  
6 County and the Applicants object to review in three years,  
7 revision will be stricken. This matter will be reviewed in  
8 five years. Condition 24 will be revised to read" --

9 Q You can stop there. That was the pertinent part. So that  
10 was an example of the mechanism in place?

11 A Correct.

12 MR. KISIELIUS: I'd also like to add into evidence  
13 Exhibit Number 74.

14 THE HEARING EXAMINER: 74 will be admitted into  
15 evidence.

16 Q Mr. Bricklin was asking you questions about what did you do  
17 to establish the farm in that first year. Could you look  
18 at the attachment to Exhibit 74? I believe it's on the  
19 fourth page.

20 A (Witness complies.)

21 Q Are you familiar with that?

22 A I am.

23 Q Can you describe what that is, please?

24 A This is a notification, to the Puyallup Tribe, that we are  
25 creating an artificial shellfish bed.

1 Q Earlier, in response to Mr. Kimball's question, is this  
2 the --

3 A It is.

4 THE CLERK: You didn't really finish the question.

5 Q Could you explain what that is, I'm sorry, in relation to  
6 Mr. Kimball's question?

7 A I believe Mr. Kimball asked me about the types of  
8 activities or what we did to install the farm, and this was  
9 an example of a notification, to a tribe, that we were  
10 creating an artificial bed. This is required under  
11 implementation of the shellfish proviso, and we do it on  
12 all artificial shellfish beds.

13 MR. KISIELIUS: Thanks, Ms. Cooper. I have no more  
14 questions.

15 MS. GUERNSEY: I have a couple of questions, if I  
16 may.

17

18 RE-CROSS-EXAMINATION

19 BY MS. GUERNSEY:

20 Q Ms. Cooper, what kind of netting do you have at this time  
21 in conjunction with this farm?

22 A We have a large net that covers the tube area.

23 Q Okay. Isn't that what Washington Shellfish had: a large  
24 net that covered --

25 A I don't know--

1 Q --a large area?

2 A --if they had a canopy net.

3 Q I'm sorry?

4 A I don't know if they had a canopy net, like we do.

5 Q So you don't know if it's similar?

6 A I don't know the specifics about the net, no.

7 Q Okay. If I understood your testimony, it was if you'd  
8 known that the Shoreline Substantial Development Permit  
9 would expire, you would not have gotten one? You wouldn't  
10 have obtained a Shoreline Substantial Development Permit?

11 A I would have -- at that time, I would have worked with Ty  
12 and the County, and we would have resolved that issue at  
13 that time.

14 Q what do you mean?

15 A If it was my understanding that there was a five-year  
16 expiration of a permit for a geoduck farm, we either would  
17 not farm in Pierce County, or I would have worked with the  
18 County to resolve that conflict.

19 Q And what do you mean by "resolve that conflict"?

20 A The issue of a five-year limitation on a shoreline permit.

21 Q well, if you had known, up front, that there was a five-  
22 year limitation--

23 A we would not --

24 Q --you either would have -- let me see if I've got this  
25 straight. You either wouldn't have elected to obtain a

1 permit to do your operation in Pierce County -- is that  
2 correct?

3 A Yes.

4 Q Or -- okay. Or you would have what?

5 A If I knew what I know now--

6 Q Okay.

7 A --we would not have applied for a geoduck farm. We would  
8 not be farming. If we could not resolve the issue with the  
9 County on a limitation condition, I would not have applied  
10 -- we would not pursue farming in Pierce County.

11 We simply could not have a five-year limitation on a  
12 farm -- on activities that would exceed that limitation.  
13 The investment is too great.

14 Q Now, if I understood your operation, your letter to  
15 Mr. Booth, Exhibit 74 -- can I see your copy? I want to  
16 show that --

17 MR. KISIELIUS: She's actually got it.

18 Q You have Exhibit 74?

19 MR. KISIELIUS: That's the letter with the tribal  
20 letter attachment.

21 THE WITNESS: Oh, okay.

22 Q June 26th, 2007 letter. On Page 3. I may be on the wrong  
23 page. Just a moment. I'm sorry. Page 4, talking about  
24 the cycle for geoduck farming.

25 A Yes.

1 Q If I understand--and correct me if I'm wrong--one-sixth of  
2 the farm area was planted in 2001. Is that correct? This  
3 starts down under "seed," the paragraph "in addition."

4 A Correct.

5 Q Okay. Whose decision was it only to plant one-sixth of the  
6 farm in 2001?

7 A It -- the farming practice is dependent on a lot of things,  
8 one of which is seed availability: How much seed do we  
9 have to be able to plant. Another is on the environmental  
10 conditions. What other farms do we have that we need to  
11 plant? Seed is so limited that we need to be able to  
12 assess, for business purposes, which farms can we plant at  
13 this point.

14 Q Did you have enough seed to plant more than one-sixth of  
15 the farm in 2001?

16 A I don't know.

17 Q Did the County tell you that you could only plant one-sixth  
18 of the farm -- or not more than one-sixth of the farm in  
19 2001?

20 A No.

21 Q There was no limitation in the Examiner's decision, was  
22 there, in terms of how much you could plant for the first  
23 five years?

24 A No.

25 Q Okay. So the decision, then, to plant part or all of the

1            farm after the approval was obtained from the Examiner was  
2            Taylor Shellfish's decision, was it not?

3    A        That's correct.

4    Q        So is it possible that Taylor Shellfish could have planted  
5            all of it in 2001?

6    A        No.

7    Q        No. Why not?

8    A        We didn't have the seed.

9    Q        Okay. If you had had the seed, could you have planted it  
10           all in 2001?

11   A        If everything -- yes. If everything went perfectly, yes,  
12           we could plant it.

13   Q        Sorry. I didn't mean to talk over you. Okay. If  
14           everything had gone perfectly, you could have done it?

15   A        And we had the seed.

16   Q        And if you planted it all in 2001, you could have harvested  
17           it within five or six years?

18   A        Correct.

19                    MS. GUERNSEY: Okay. I don't have any further  
20                    questions. Thank you.

21                    MR. BRICKLIN: We're almost done.

22                    THE WITNESS: I'm tough.

23            ///

24            ///

25            ///



1           that one, SD53-05, and this one? Any other ones?

2    A       We do. I don't know the number. It's -- we do have  
3           another farm permitted.

4    Q       And who did that decision? Was it myself, or  
5           Mr. Causseaux?

6    A       Mr. Causseaux.

7    Q       Okay. And how long has that been under operation?

8    A       That has been -- we've done the notification and some of  
9           those activities at that farm. We don't have the seed  
10          available to plant as yet.

11   Q       So you typically apply for permits before you have any  
12          ability to use them?

13   A       Well, the seed -- the seed is tricky, and there's only two  
14          hatcheries in the state of Washington that produce seed,  
15          Taylor's being one of them. And every year, we're having,  
16          you know -- if -- there are difficulties that arise in a  
17          hatchery/laboratory setting that make it -- sometimes  
18          little seed is produced. Sometimes we have ample seed and  
19          we can sell it. But it is -- it's -- we are kind of  
20          dependent upon the success of our hatcheries to produce  
21          seed for almost all of our geoduck farming.

22   Q       Your initial request was, what, for the operation of a --  
23          your JARPA request -- what was that for?

24   A       Installation of a geoduck farm and operation.

25   Q       Okay. Tell me exactly. What is the installation process,

1 the complete installation process, beginning to end?

2 A Beginning to end. We -- we do an environmental assessment.  
3 We go out and actually survey the boundaries.

4 Q Is that before, or after, you get the permit?

5 A That's before.

6 Q That would be before you get the permit. Okay. Give me  
7 everything you do before you get the permit.

8 A We make a general assessment before the permit.

9 Q Uh-huh.

10 A And we -- and it may be concurrent, Mr. Examiner. I mean,  
11 I don't -- these things take time and effort, and I don't  
12 have a sequence that I adhere to necessarily. We just want  
13 to get it all done or, you know, resolve any issues.

14 Q Well, the best you can, give me what you do before you get  
15 the permit, okay? Survey?

16 A Uh-huh.

17 Q Before the permit.

18 A And the boundary lines. We do an environmental assessment  
19 of the site. We certainly have to do a lease with the  
20 upland owner. I do an assessment of the upland uses and  
21 shoreline designations and environmental conditions of the  
22 upland or shoreline area.

23 I -- at some point during there, I contact the County,  
24 the local governments, as well as other regulatory  
25 agencies, to just discuss the project with them and get

1           some initial feedback. So that kind of takes place at the  
2           same time.

3                    We notify the tribes that we're creating an artificial  
4           bed.

5    Q        Do you do that before you get a permit?

6    A        We do that -- I normally do it after we get the permit --  
7            after we get the lease, let's say, yeah.

8    Q        After you get the lease but before you get the permit?

9    A        And then it's -- sometimes it's concurrent with -- at the  
10           same time, but it may be different at each permit, yeah.

11   Q        And then you get the Substantial Development Permit; is  
12           that correct?

13   A        Right. Well, we're applying for it.

14   Q        And then, assuming it's granted, what do you do after it's  
15           granted?

16   A        After it's granted, we complete the creation of the bed  
17           through the tribal notification, which requires, usually,  
18           an onsite survey with the tribes. We won't go through that  
19           effort or drag the tribes out there if we don't have a  
20           permit.

21   Q        Sure.

22   A        So we do a biological survey and determine what --

23   Q        You don't do a biological survey before you have applied?

24   A        A biological survey of the existing shellfish is required  
25           by the tribes. They want to see what commercial species

1 are out there.

2 Q Sure.

3 A That kind of biological survey. And then we -- so we've  
4 done the surveys. We've done the permitting. We've done  
5 the creation of the bed to the tribes. We -- at some point  
6 in that initial start of the application process, we've  
7 notified the Department of Health.

8 Q Uh-huh.

9 A We've notified the Department and registered the farm as an  
10 aquatic farm with Department of Fish and wildlife.

11 Q And this is done after you get the permit?

12 A Yes.

13 Q And you notify the Department of Health after you get your  
14 permit?

15 A We notify Department of Health -- we usually know most  
16 areas. We know whether the water quality is sufficient, or  
17 we wouldn't put an investment in, obviously, if we didn't.  
18 And so, we -- yes. We -- sometimes the area may require  
19 additional sampling if there wasn't sufficient commercial  
20 activity in the area. And so we'll conduct that sampling,  
21 water sampling, in the area. And then we begin -- we put  
22 it on the calendar of planting, and we put in --

23 Q What's a "calendar of planting"?

24 A Well, we decide where that bed is going to fall in line and  
25 sequence with the rest of the beds that we have.

1 Q You mean for getting fish? For getting seed?

2 A For planting with seed, correct.

3 Q And do you know, normally, when you apply for permits --  
4 you plant all your seed in one year, or do you plant the  
5 whole thing in one year? Or after you get your Shoreline  
6 Development Permit, do you normally plant the whole area in  
7 one year?

8 A Not large areas, no. Very small, little parcel, perhaps we  
9 may be able to plant it all in one year, sure.

10 Q So this is basically done -- so within the first year,  
11 then, you start your planting; is that correct?

12 A Correct.

13 Q And that involves inserting tubes and putting four -- three  
14 or four in tubes?

15 A Three to four per tube.

16 Q Uh-huh. And then four years later from that date, you  
17 start your harvest; is that correct?

18 A We -- after the planting, the initial planting, we net the  
19 area. We cover it with net.

20 Q Net the area, uh-huh.

21 A And then after -- depending on the area, we will remove the  
22 tubes and the net.

23 Q When do you remove the tubes?

24 A After a year.

25 Q A year?

1 A Two years, depending on the area.

2 Q So after two years, you remove the tubes. Okay.

3 A And at that -- two years is the maximum. It's usually  
4 somewhere between six months and 18 months. And so then  
5 that's removed. And then the geoduck grow. And then  
6 they'll do some trial digs, to see what the size is, and  
7 assess the size of the geoducks that are growing. And then  
8 we'll harvest after four to six years.

9 Q But in here, on your application, you said "four." Let me  
10 ask you something, then. After four years, do you start  
11 putting the geoduck tubes back in again?

12 A We will plant -- replant new areas, as well as plant areas  
13 that are harvested almost immediately.

14 Q Almost immediately?

15 A Yeah.

16 Q So about every four years in the cycle?

17 A But different parts of the beach are done at different  
18 times, so we have a market flow as well.

19 Q Are you telling me you think it's not in the best interest  
20 of the industry to have any type of regulation?

21 A No.

22 Q You're not telling me that?

23 A I'm not saying that we shouldn't have any kind of  
24 regulation.

25 Q What kind of regulation do you think you need, then?

1 A We have -- we have a very robust Army Corps review. It not  
2 only looks at the -- all the things that we're talking  
3 about here today. It also goes through a very robust  
4 environmental and biological assessment for impacts on  
5 endangered species. This is an Army Corps process.

6 Q Any other process? Without the Substantial Development  
7 Permit, what other process would you have?

8 A And then we have the aquatic farm registration, and that's  
9 it.

10 Q And would that process have eliminated the problems at  
11 Washington Shellfish?

12 A The Army Corps process? I believe it would have. I don't  
13 know that --

14 Q Why didn't it? Why was it necessary for the County to --

15 A The Army Corps just recently issued a nationwide permit  
16 that covers geoduck farming. At that time, of Washington  
17 Shellfish, it didn't have that coverage.

18 Q And had it not been for the County and the Shoreline  
19 Substantial Development Permit, that nuisance would have  
20 continued to operate; isn't that correct?

21 A I don't know that that's true, because, one, he abandoned  
22 the site, and we would -- yeah. And regardless of the  
23 permit requirements and regardless of the regulation  
24 required of an industry, you're going to have bad players,  
25 or you're going -- and you're going to have good players.



1 A I believe that the Army Corps Nationwide Permit 48 has been  
2 robust.

3 Q And under that process, you have to file a notification  
4 that you have an operation in existence there, right?

5 A That's correct.

6 Q Okay. And it doesn't go through an individual permitting  
7 process, does it?

8 A It doesn't.

9 Q And there's no environmental impact statement, is there?

10 A There's a biological assessment.

11 Q Under the ESA?

12 A Correct.

13 Q No general environmental review?

14 A A general environmental review, yes.

15 Q There's no environmental impact statement, right?

16 A That's correct.

17 Q No consideration of issues that would arise under the  
18 Shoreline Management Act, like compatibility with adjacent  
19 land uses, right? That's not considered in the Army Corps  
20 process, is it?

21 A No, it is not. It's considered under the Shoreline  
22 Management Act.

23 Q Right.

24 A Correct.

25 Q But if you're not getting a Shoreline Permit, that's not

1 going to be addressed by the Corps, is it?

2 A I don't agree.

3 Q You don't agree with that?

4 A I think that compliance with the Shoreline Management Act  
5 doesn't necessitate having a permit. I think there are  
6 activities that are conducted under the Shoreline  
7 Management Act that still require compliance with the Act  
8 and be consistent with the Act and not necessarily  
9 necessitate having a special permit for it.

10 Q You mentioned another regulatory process that you would be  
11 held to was the aquatic farm registration. There's no  
12 scrutiny of Shoreline Management program issues in that  
13 process, is there?

14 A No, there's not.

15 MR. BRICKLIN: That's all I have. Thank you.

16 THE HEARING EXAMINER: Anything further? You may  
17 step down. Thank you.

18 Call your next witness. You know, Weyerhaeuser says  
19 "brief," and I think we're overdoing this. So let's keep  
20 that in mind.

21 MR. KISIELIUS: We'd like to call Brian Phipps.

22 THE HEARING EXAMINER: Brian?

23 MR. KISIELIUS: Brian Phipps.

24

25 BRIAN PHIPPS, having been first duly sworn



1 going to ask to enter into evidence Exhibit Number 51.

2 THE HEARING EXAMINER: Exhibit Number 51 will be  
3 admitted into evidence.

4 Q Could you describe what you have there as Exhibit 51?

5 A This is a geoduck Environmental Code of Practice.

6 Q And is that what you were referring to, in terms of your  
7 responsibilities?

8 A Yes, sir, it is.

9 Q You had mentioned you have responsibilities over all of  
10 Taylor's geoduck operations. How many farms are there,  
11 approximately?

12 A There's approximately 56 leased and Taylor-owned farms.

13 Q And this is in -- what area are we talking about?

14 A South Puget Sound; and there was one farm, and I don't know  
15 if we released it, in Hood Canal.

16 Q What did you do for Taylor before you became the geoduck  
17 manager?

18 A I worked in the clam side of the company. I spread Manila  
19 clam seed, I laid netting, I spread gravel, and I started  
20 cleaning the plant in 1985.

21 Q And so you've been working for Taylor since about 1985?

22 A Yes, sir.

23 Q Are you familiar with the Foss farm that's the subject of  
24 this Administrative Determination?

25 A Yes, sir, I am.

1 Q Can you describe, a little bit, your involvement with the  
2 farm?

3 A I started -- Diane applied for the permits, and I surveyed  
4 the farm. I believe it was in 2000. And then we started  
5 planting in 2001. And it's been ongoing ever since.

6 Q And about how often are you personally down at that farm?

7 A Personally, myself, I try to -- I visit the farm two times  
8 a month. Or -- yeah, two times a month, correct.

9 Q Then from Taylor generally, how often is somebody from  
10 Taylor at that farm?

11 A I have three managers underneath me and three separate  
12 crews. I have a maintenance crew, a harvest crew, and a  
13 planting crew. And out of the 20 days a month that we can  
14 work, when the tides are out, we're there at least between  
15 14 and 16 days out of the month.

16 Q There's been some question or confusion about the amount  
17 that's been planted and harvested. Could you, first of  
18 all, on the aerial photograph that's up there, show us the  
19 approximate boundaries of the property lines first?

20 A Okay. The Foss property boundary starts -- the south end  
21 is right here, beside Joemma State Park. And the north  
22 boundary is right here, where the houses start.

23 Q It's right by the State park, did you say?

24 A Yes, the property boundary -- the property boundary is by  
25 the State park.

1 THE HEARING EXAMINER: Is by the State park?

2 THE WITNESS: Yes, sir.

3 Q And now could you show us where the farmed portion of the  
4 property is located?

5 A The south end of the farm starts roughly -- this high bluff  
6 here, the feeder bluff, it starts right in this area. And  
7 then the north end of the farm is just close to the north  
8 boundary of the property line.

9 THE HEARING EXAMINER: Uh-huh. Is that a spit  
10 there?

11 THE WITNESS: Yeah. Yes, sir, it is. Sorry.

12 THE HEARING EXAMINER: Thank you.

13 Q And to be clear, did you farm the entire property at once?

14 A No, sir, we have not.

15 Q And so how many portions, approximately, have you planted?

16 A I have five different age classes on the Foss farm.

17 Q So describe the age classes. Are those planted yearly, or  
18 how does that work?

19 A Yearly, yeah. We started in 2001. But right now, on the  
20 farm, we have from 2002 planting through 2006 planting on  
21 the farm.

22 Q This question was asked to Ms. Cooper, but I'd like to ask  
23 you. The question is: If you had enough seed, would you  
24 or could you have planted the entire property?

25 A I could have, but I wouldn't have.

1 Q And why not?

2 A For the -- if you get PSP sample or PSP problems in a  
3 certain body of water, it kind of puts all your eggs in one  
4 basket. Plus we have 56 other lessors that we have to  
5 accommodate with our -- just a limited amount of seed we  
6 have.

7 THE HEARING EXAMINER: What is "PSP"?

8 THE WITNESS: Paralytic shellfish poisoning. I  
9 think that's correct.

10 Q And to clarify some other issues that have come up, I want  
11 to ask you some very brief questions. I won't repeat what  
12 Ms. Cooper has already testified to. But in terms of the  
13 process of raising and farming geoduck, the time there  
14 between planting and harvesting -- could you testify as to  
15 how many years that is, approximately?

16 A Between four to seven years.

17 Q And what drives that time frame?

18 A Food and growth.

19 Q So can you elaborate on that? With the growth, how does  
20 that signify when you need to harvest?

21 A A geoduck -- the market likes a two-pound geoduck, so we  
22 like to get the animals to up to two pounds.

23 Q And that varies, then, depending on how long it takes?

24 A Correct.

25 THE HEARING EXAMINER: Is that about four years, on

1 an average, then?

2 THE WITNESS: I would say, on an average, five.

3 THE HEARING EXAMINER: Five? Okay.

4 THE WITNESS: Correct.

5 Q I want to ask you, briefly, about the harvesting activities  
6 on that site. So you've already testified that you planted  
7 in it segments. How many years of harvest have you had?

8 A We've harvested three years.

9 Q And how many -- I forget the term you used to describe the  
10 different classes, the different segments of the farm.

11 A Age classes.

12 Q Have you looked at how many age classes are currently in  
13 the ground at the Foss farm?

14 A Yes, sir.

15 Q And you can testify to that: how many are there?

16 A 2003 through 2006.

17 Q Okay. And do you know approximately how many animals were  
18 planted at the time?

19 A Roughly 900,000 animals are planted on all of those farm  
20 sites, or farms.

21 THE HEARING EXAMINER: All the cycles?

22 THE WITNESS: Yes.

23 Q To be clear, that's what's left in the ground that hasn't  
24 been harvested?

25 A Correct. That's what's left in the ground right now, that

1 has not been harvested.

2 Q You had mentioned earlier that they grow to about two  
3 pounds before you harvest them. Can you estimate, just in  
4 terms of value, what that is?

5 A There's probably 1.3 million pounds on the Foss farm, and  
6 estimated value between \$15 and 20 million.

7 Q Very briefly, if you could just describe -- because Diane  
8 touched on some of this, but in terms of the phases of each  
9 one of those segments, the steps that you take from  
10 planting to harvest.

11 A Okay. We start with inserting the tubes in the ground, and  
12 then a crew will come through and put the seed in and the  
13 canopy netting over the top. And then eight, six -- six  
14 months to 18 months later, we'll remove the tubes. More on  
15 -- more towards the 18 months on the Foss farm.

16 And then, after that, it lays -- there's nothing on  
17 the farm except for the beach and the geoducks. And then  
18 we'll come through in five years and harvest the product.

19 Q Any markers on the property at all?

20 A We do mark the corners of the beds with PVC pipe, little  
21 half-inch PVC pipe, that's, I don't know -- eight inches --  
22 sticks up out of the ground eight inches.

23 THE HEARING EXAMINER: The PVC pipe that you put  
24 the geoducks in -- how far does that project out of the  
25 ground after you've inserted it?

1 THE WITNESS: Two to three inches.

2 THE HEARING EXAMINER: Uh-huh.

3 MR. KISIELIUS: I'm going to ask to enter into  
4 evidence Exhibit Number 52.

5 THE HEARING EXAMINER: 50 what?

6 MR. KISIELIUS: 52.

7 THE HEARING EXAMINER: It will be admitted into  
8 evidence.

9 Q Very briefly, in terms of the location -- or the distance  
10 from the boundaries of the farm, would you explain what  
11 we're looking at in the first photograph, which is marked  
12 as "A," "52A"?

13 A The first photograph that you're looking at, with the  
14 person standing there, the person is standing at the edge  
15 of the farm, the south edge of the Foss farm. And I was  
16 approximately 200 yards away and took this picture; which  
17 would be towards -- I was towards the south, towards the  
18 park.

19 Q For purposes -- could you show us approximately where that  
20 is on the aerial photograph? Both points: where the  
21 person is standing and where you're standing, taking the  
22 picture?

23 A The person was standing here, and I'm standing here  
24 (indicating).

25 THE HEARING EXAMINER: Okay.

1 Q And you just finished describing the tubes as you planted  
2 them. In terms of the next step that occurs, is there any  
3 other object that's there to protect the tubes and the  
4 animals?

5 A The net.

6 Q Can you describe that a little bit?

7 A Yeah. It's a -- they're 50-by-50 predator nets, and  
8 they're one-inch stretch, which means half-inch squares,  
9 and they're staked into the ground.

10 Q 50-by-50. Is that 50 feet?

11 A Yeah. 50 feet by 50 feet.

12 Q Can you just take a look at Exhibits -- the same exhibit,  
13 52, and Photographs B, C, and D?

14 A (Witness complies.)

15 Q Are those the nets you're describing at the Foss farm?

16 A Yes, sir, they are.

17 Q Could you describe what we're looking at in Exhibits E and  
18 F?

19 A We had a photographer out on the Foss farm, taking pictures  
20 of the different stages of the farming activities, and we  
21 took pictures of a crab over top of the net and a crab  
22 coming up from underneath the net.

23 Q I want to ask you a little bit about the mechanism that you  
24 used to secure the netting to the ground. Could you  
25 describe how that happens?

1 A We take and we -- every six feet, we put a -- we call it a  
2 "J staple." We staple the rebar into the ground and push  
3 it all the way flat with the ground.

4 Q Is that what we're looking at in the photo that's marked  
5 "G" out of Exhibit 52?

6 A Yes, sir, it is.

7 MR. KISIELIUS: I'd like to also add Exhibit Number  
8 76 into the report.

9 THE HEARING EXAMINER: So ordered.

10 Q For frame of reference, these are the same photographs that  
11 Mr. Booth had used earlier. It's just the colored set. On  
12 the bottom, there's a notation of each picture, a number,  
13 and I was hoping you could take a look at Number 9.

14 THE HEARING EXAMINER: Is this 76 you're talking  
15 about?

16 MR. KISIELIUS: Yes. Excuse me. The one in front  
17 of me doesn't have a notation. I'm just going to take a  
18 look at that again. I apologize. I apologize. Notation is  
19 not on the copy that I've got here.

20 Q Would you describe what we're looking at there?

21 A It's a roll of --

22 THE HEARING EXAMINER: Show me the picture that  
23 you're looking at. I don't think I'm looking at the same  
24 thing, am I? No, I'm not. You said 76?

25 MR. KISIELIUS: That is correct.

1 THE HEARING EXAMINER: That's not my 76.

2 MR. KIMBALL: Number 9?

3 THE WITNESS: 76-40?

4 THE HEARING EXAMINER: Just a second. Is that  
5 Exhibit 40, maybe?

6 MR. KISIELIUS: No, the two sets that Mr. Booth  
7 took are Exhibits Number 75 and 76. And I apologize. My  
8 binder has just fallen apart, so I'm...

9 (Discussion off the record.)

10 MR. KISIELIUS: The copies that you have should  
11 include -- and for these purposes, if it would speed things  
12 along, the black and white photograph that Mr. Booth  
13 provided --

14 THE HEARING EXAMINER: Was that it? No. That's  
15 41. Just a second. That's it. Got it.

16 MR. KISIELIUS: I apologize.

17 MS. GUERNSEY: What number are we at?

18 THE HEARING EXAMINER: It's 76, Number 40.

19 MS. GUERNSEY: Thank you.

20 Q Could you describe what we're looking at there?

21 A It's two -- that's the edge of the tube farm field, with  
22 some rebar stakes sticking up.

23 Q Now, are you aware of what was happening at the time that  
24 this photograph was taken?

25 A Yes. My crew was up pulling net, and they stick -- they

1 stick the rebar in the ground so they don't lose it. They  
2 kind of keep it sticking straight up so they know where to  
3 find it when it's time to leave, or time to lay the net  
4 back down.

5 Q So for the purposes of a regular operation, they would not  
6 be protruding like that? Is that --

7 A No, sir, they would not.

8 Q And what would happen at the end of the day, after they're  
9 done with their work?

10 A They will walk around and make sure that it's either stuck  
11 in the ground or picked up.

12 Q And then, if I could refer you to Exhibit Number 75. The  
13 photograph should be marked Number 27.

14 A I gave that back.

15 Q So you gave it back. This is a different one, actually.

16 THE HEARING EXAMINER: 75 will be admitted into  
17 evidence.

18 THE CLERK: It already is.

19 THE HEARING EXAMINER: It already is.

20 THE CLERK: Oh, wait.

21 THE WITNESS: 27. Actually, Number 27.

22 THE HEARING EXAMINER: It is now.

23 Q Can you describe what we're looking at there?

24 A That's the corner of the net with the J staple pushed down.

25 Q So when the nets are secured, this is what -- they set the

1 rebar -- that would be shown?

2 A Correct.

3 Q Ms. Cooper testified to some debris problems that were  
4 happening down at the farm with the earlier version. Could  
5 you describe that a little bit more?

6 A In the early years of farming, we used -- like Ms. Cooper  
7 said, we used individual canopies with some rubber bands.  
8 It didn't work very well, and we lost some individual tops,  
9 and they carried down the shoreline.

10 Q So since switching to the 50-by-50 canopies, have you had  
11 any similar problems about nets washing up?

12 A No, sir, we have not.

13 Q Has any of your crew reported any incidences of nets  
14 washing up?

15 A No, sir, they have not.

16 Q How would you know? The crew -- I think you testified they  
17 were down there about 14 days a month. How would you know  
18 whether or not any nets had come loose and washed up?

19 A If you lose a 50-by-50 net off of a farm, you're going to  
20 know. I mean -- or we would get phone calls if we had  
21 individual nets floating up.

22 Q And when you say "you would know," what exactly do you  
23 mean? What would you see when you came down?

24 A It would just be bare tubes.

25 Q Have you made any other alterations to the mechanism by

1           which you secure the netting to the ground?

2    A       We used to use, like, a "T" stake, that was sharp on each  
3           edge. So we made a -- the J staple so that no one could  
4           protrude (sic) themselves on there. And we actually put  
5           our rebar quite a bit closer, six-foot apart, to hold the  
6           net down.

7    Q       And why did you make that change?

8    A       Just for security purposes, to secure the net.

9    Q       And so, again, to be clear, have you had any problems,  
10           since you've made those changes, with the nets coming loose  
11           and washing up?

12   A       Not that I know of, no.

13   Q       I want to talk to you just a little bit about the  
14           harvesting, because it's the next step. How many people  
15           are typically involved in the harvesting crew for Taylor?

16   A       On a typical harvest crew, there's five people; three to  
17           five people.

18   Q       And how many hours does that activity take?

19   A       Per day, as long as the tide's out, four; four hours a day.

20   Q       And how many days are typically involved in the harvest?

21   A       A run of tides usually lasts nine -- nine days, minus  
22           tides, that we can harvest.

23   Q       There's some testimony about the beach versus the subtidal  
24           harvest. Which process do you use at the Foss farm?

25   A       We use both.

1 Q And about what frequency do you use both?

2 A We beach-harvest, I would say, 75 percent of the time; with  
3 a dive harvest, 25 percent.

4 Q And when would you use the dive harvest?

5 A In between runs of tides. If your tide cycle ends -- the  
6 minus tide ends, like, on, say, a Sunday, and there's four  
7 days where we can't work, we'll have the dive crew out  
8 there for four days. And then, when the tide cycle comes  
9 back around, we'll have our beach harvesters back out.

10 Q What kind of equipment do you use during your harvest?

11 A We have a stinger, hoses, and a pump.

12 Q Could you describe -- what do you mean by "stinger"?

13 A It's a five-eighths piece of pipe, and the water comes out,  
14 and it's kind of, like, a metal wand, two feet long.

15 THE HEARING EXAMINER: Uh-huh.

16 Q What's the purpose of the hose, the wand, and the stinger?

17 A It actually goes down in, and you go beside the duck and  
18 push down, and it breaks the syphon -- or it breaks the  
19 suction, and then you pull the animal out.

20 MR. KISIELIUS: I'd like to enter into evidence  
21 Exhibit Number 53.

22 THE HEARING EXAMINER: Exhibit Number 53 will be  
23 admitted into evidence.

24 Q Are these photographs representative of what you find at  
25 the Foss farm?

1 A Yes, they are.

2 Q Are they taken at the Foss farm?

3 A No, sir, they're not.

4 Q If you could, I'd like to just walk through them. And  
5 again, those are marked, in the bottom corner, with an "A,"  
6 "B," "C," and "D." Could you identify some of the  
7 equipment that you just described?

8 A The yellow thing in the foreground is our hose. The white  
9 thing in front of the harvester is the stinger. And the  
10 orange trays on the back are trays with geoducks in them.  
11 And the boat in the back is our dive boat.

12 THE HEARING EXAMINER: Is this hose connected to  
13 something on the boat?

14 THE WITNESS: Yes. There's a pump on the boat.

15 THE HEARING EXAMINER: There's a pump on the boat  
16 that --

17 THE WITNESS: Correct.

18 Q And can you describe, with the harvest, the mechanics of  
19 how that happens, in terms of the area you cover? Because  
20 as I understand it, you have a bed. How does one go about  
21 harvesting that bed?

22 A We'll start making sure they're the proper size. And then  
23 we'll come through, and we will come in and hook up our  
24 hoses to the pump. And as soon as the tide drops, we'll  
25 start pulling the geoducks out, and we'll work up -- as we

1 go up, we'll pull the animals out and just keep working up.

2 And then, as the tide drops back down, we drop back a  
3 little bit and go -- connect our digs together.

4 Q And there's some indication, in the brief, about the holes  
5 that are created being waist-sized holes. Were you ever up  
6 to your waist when you were harvesting geoduck?

7 A Most of the time, you're sitting with your feet dangling in  
8 the hole.

9 Q And so looking at Exhibit B --

10 A Correct. There -- the harvester here is working forward,  
11 pulling the ducks out as he's going forward. And he's  
12 actually on the substrate, and the back is where he has  
13 already harvested.

14 Q And then just looking at Exhibits D and E -- excuse me,  
15 Exhibit 53, Pictures D and E -- is that about  
16 representative in terms of the number --

17 THE HEARING EXAMINER: Wait a second. 53?

18 MR. KISIELIUS: It's the same exhibit we were  
19 looking at, just the --

20 THE HEARING EXAMINER: All right. Go ahead.

21 Q Are those two photographs about the amount of people and  
22 equipment that you'd find?

23 A Yes, they are.

24 Q Just real briefly, touch on the differences. What are the  
25 differences between the subtidal harvest and the beach

1 harvest, in terms of the equipment used and the number of  
2 people?

3 A The dive -- we'll start with the dive harvest. The dive  
4 harvest has two divers down and a deckhand on the boat.  
5 The equipment is generally the same. You have a pump on  
6 the boat. The difference -- like, on the dive harvest, you  
7 have an umbilical cord that takes the air down, and you  
8 have a compressor on the boat. The wands and the stingers  
9 and hoses are the same.

10 And the beach harvest -- and you do that while the  
11 tide is in. And then, on the beach harvest, it's the same,  
12 except for when the tide is out.

13 Q And coming back to the beach harvest, I want to talk a  
14 little bit about the post-harvest state of the beach. Does  
15 the Code of Practice that you have up there, ECOP, Exhibit  
16 Number 51, I believe -- is that -- did you give it back?

17 A Yes. (Witness retrieves exhibit.) Sorry.

18 Q Do you know whether that document speaks to the post-  
19 harvest landscape?

20 A Yes. It actually says that the substrate drops, I believe,  
21 one to two inches.

22 Q And what does that mean, in terms of your experience? You  
23 just described how people kind of go up from the water and  
24 kind of harvest in rows. Does that mean the entire bed  
25 that you've harvested drops one to two inches?

1 A No. The only place that drops one to two inches is where  
2 you get out of your harvest hole, or your harvest divot,  
3 where they last left off. If they're digging and then they  
4 step out of the hole, that's the only spot that's one to  
5 two inches deeper or a deeper-than-normal substrate.

6 Q So going back to those photographs that were showing the  
7 harvest, can you pick one that shows, potentially, that  
8 divot that you're describing?

9 A A, 53A. The lower left-hand corner, you can kind of see  
10 where the water is built up on the edge of the substrate.

11 Q You said there's the divot at the end of your row; the rest  
12 that remains behind you -- is the condition changed at all  
13 there?

14 A It's softer. When we go through, it is softer. But you're  
15 able to walk on it within a few minutes.

16 Q And about how long does it take to return to normal  
17 condition?

18 A The whole beach, or just right behind us?

19 Q Just where you've harvested.

20 A One to two tidal cycles, it will be relatively flat.

21 Q Okay. Let's talk, just real briefly, about the pressure  
22 that's used in the hose, to loosen the geoduck. Does ECOP  
23 speak to what pressure you use?

24 A ECOP says we use 100 PSI.

25 Q Is that consistent with what you typically use?

1 A Well, our pump -- our pump PSI is 50.

2 Q So from that pump, how many hoses do you have?

3 A Usually, three. We can run seven, but we run three.

4 Q So not being very familiar with PSI, in comparison -- did  
5 you test a hose?

6 A Yes. I tested the garden hose at our shop in Shelton, and  
7 our garden hose is 78 PSI.

8 Q I'm going to ask you -- actually, before I do that, I'm  
9 going to refer back to the photographs that were admitted.  
10 This is Exhibit Number 52. Could you please flip to --

11 A I have 53.

12 THE HEARING EXAMINER: That's been admitted  
13 already.

14 Q Could you describe what we're looking at in Photograph H?

15 A That is a harvest on the farm. Sorry.

16 THE HEARING EXAMINER: This is what?

17 THE WITNESS: That's a harvest on the Foss farm.

18 THE HEARING EXAMINER: Uh-huh.

19 Q Is that you in the picture there?

20 A Yes, sir, it is.

21 Q Can you describe where you're standing?

22 A I'm standing in a hole. We just extracted the geoduck  
23 right before the picture was taken. You can kind of see  
24 holes, looking back to where I was standing.

25 Q So those holes are representative of the end of each row,

1           that the --

2    A       Yes, they are.

3    Q       would you flip, now, to the next photograph, I? That,  
4           right there.

5    A       Okay.

6    Q       Can you describe what we're looking at there?

7    A       I'm -- that's me walking down the Foss farm, and I hit a  
8           ghost-shrimp bed.

9    Q       So that's not an area that you've harvested?

10   A       No, that's not an area of harvested or planted.

11   Q       And the ghost-shrimp bed -- is that a naturally occurring  
12           event?

13   A       Yes, sir, it is.

14                        THE HEARING EXAMINER:  What is it?

15                        THE WITNESS:  They're just, like, a sand -- just  
16           those little sand ghost shrimp.  They're clear, and that's  
17           kind of where they live.

18   Q       I'm going to ask some questions about the issue of:  Does  
19           this constitute development and interference with normal  
20           public use of the surface waters.  And Diane testified to  
21           this, but do you have any personal knowledge of any  
22           accidents or injuries or reports of any sort of mishap that  
23           happened at the Foss farm?

24   A       No, sir, I don't.

25   Q       And has any of your crew reported anything like that?

1 A No, sir.

2 Q Are you familiar with the Washington Shellfish site?

3 A A little bit.

4 Q Could you describe your familiarity with that site?

5 A I've walked the beach a couple times, picking up debris. I  
6 was out on a dive cleanup with Ms. Cooper, and I drove over  
7 -- drove over it the other day -- over the highway the  
8 other day. So I've been out there a couple times.

9 Q I'm going to ask you to read from a couple of exhibits.  
10 Given your familiarity, I just want to have you read some  
11 descriptions of what was happening at the Washington  
12 Shellfish farm for purposes of comparison.

13 As we've already -- and this will not require any  
14 reading, but, as we've already talked about, the Washington  
15 Shellfish farm was near a park?

16 A Correct.

17 Q When you're down there, in terms of public uses on that  
18 beach, are there public uses that come from the uplands  
19 down towards the water?

20 A On the Washington Shellfish site?

21 Q No, I'm sorry. I'm switching now to Foss farm.

22 A There's a public access here (indicating), but not over top  
23 of the farm.

24 Q And what are you pointing to there?

25 A This is the Joemma State Park boat ramp and dock.

1 Q I'm going to ask you to read from Exhibit Number 60. First  
2 I need to ask to admit Exhibit Number 60 into evidence.

3 THE HEARING EXAMINER: Exhibit Number 60 will be  
4 admitted into evidence.

5 Q Could you read, starting on the first page, Line 25,  
6 continuing to the second page, the first two lines?

7 A "Outside the Columbia River, Purdy is the most popular  
8 windsurfing spot in Washington and has been for 20 years.  
9 It has a unique set of conditions unmatched in Puget  
10 Sound." How far did you want me to -- I'm sorry.

11 Q That's perfect.

12 MR. KISIELIUS: And if we could also admit into  
13 evidence Exhibit Number 62.

14 THE HEARING EXAMINER: So ordered.

15 MR. BRICKLIN: Your Honor, this is a hundred-and-  
16 some-page transcript that I would -- 200-and-some-page  
17 transcript. And I would suggest that it can't possibly all  
18 be relevant or material, and it's inappropriate to just dump  
19 a whole transcript in like this.

20 THE HEARING EXAMINER: Well, I agree with you, but,  
21 if that's what they want to do, I will allow it. It's not  
22 helpful, but...

23 Q would you flip -- you'll notice that this transcript  
24 divides into four pages each, and the page numbers are  
25 marked in the upper right-hand corner. would you flip to

1 Page 119?

2 A (Witness complies.)

3 Q And down at the bottom of that page, Line 23, there is an  
4 answer there. Could you read just that first couple lines?

5 THE HEARING EXAMINER: 100 and what?

6 MR. KISIELIUS: 19.

7 THE WITNESS: Down on the corner (indicating to  
8 Hearing Examiner).

9 THE HEARING EXAMINER: 119?

10 THE WITNESS: Yes.

11 THE HEARING EXAMINER: Okay, go ahead.

12 THE WITNESS: I'm sorry. Line 23?

13 Q Correct.

14 A "Well, most of the time, I'm a windsurfer, and so we launch  
15 right out of the old post office and typically sail back  
16 and forth, and I've spent, like, I said, so many days out  
17 there that I've observed most of the activities."

18 Q So do you know where the location of the old post office  
19 is, approximately, on the Washington Shellfish site?

20 A I think so, yes.

21 Q Can you point us to that?

22 A It's right in this area (indicating).

23 Q Okay. And where are the tubes? Where were the Washington  
24 Shellfish farmed areas in relation to that?

25 A I think there was a private lease here, and then the

1 County's leases are out here (indicating). Then there's  
2 some private, this way.

3 Q And so the public access point there, for the beach, the  
4 windsurfers, where was it in relation to the tubes?

5 A It was right over top -- right over top of the tubes.

6 Q So we've got a description here of the best windsurfing  
7 spot in Washington. With Foss, have you ever seen a  
8 windsurfer there?

9 A No, sir, I have not.

10 Q Have you ever seen a windsurfer in Joemma State Park?

11 A No, sir, I have not.

12 Q I'm going to talk a little bit about the use of boats  
13 again.

14 MR. KISIELIUS: I'd ask to admit Exhibit 58.

15 THE HEARING EXAMINER: It's already been admitted.

16 MR. KISIELIUS: I apologize.

17 THE WITNESS: Do you want this one back?

18 Q Yeah. I'm sorry. Thank you, Brian. Exhibit Number 64.  
19 Could you please turn to --

20 MR. KISIELIUS: This has not been admitted into  
21 evidence.

22 THE HEARING EXAMINER: 64 will be admitted into  
23 evidence.

24 Q Could you please turn to Page 20?

25 A (Witness complies.)

1 Q And you'll see just the third full paragraph, beginning  
2 with "Appearing is Robert Paradise."

3 A Okay.

4 Q Could you read, on the second line -- excuse me -- about  
5 midway through that paragraph -- there's no numbers, and so  
6 perhaps if I can just give you an indication. But why  
7 don't you just read the whole paragraph?

8 A "Appearing was Robert Paradise, who was a windsurfer. He  
9 described the harassment that had been taking place."

10 THE HEARING EXAMINER: Counsel, I don't find this  
11 helpful. I wrote this.

12 MR. KISIELIUS: I understand, Mr. Examiner. These  
13 are issues that pertain to the finding in Washington  
14 Shellfish and the issues that were significant in the  
15 determination that it interfered with --

16 THE HEARING EXAMINER: I'll tell you I don't find  
17 it helpful to have readbacks to me of what I've written.

18 MR. KISIELIUS: Okay.

19 Q To your knowledge, do you ever leave your boats moored  
20 anywhere near the beach?

21 A Not on the Foss farm, we don't.

22 Q And to your knowledge, how long are the boats out there  
23 when you're working?

24 A Four hours.

25 Q And are they ever located in proximity to the boat launch

1 down at Joemma State Park?

2 A No. The closest property boundary to the Joemma State Park  
3 is 800 yards.

4 Q In terms of the rope -- there's been some testimony to this  
5 already. In what capacity do you use rope at the Foss  
6 property?

7 A We'll use rope for two marker buoys and a lane to keep our  
8 divers down on the bottom of the beach.

9 Q And what kind of rope do you use?

10 A Sinkable rope.

11 Q So does it float?

12 A No.

13 Q And do you leave it in the water when you're finished with  
14 your dive harvests?

15 A No. When we're done dive-harvesting the farm, we pull the  
16 rope.

17 Q And do you use that type of rope in the beach harvest?

18 A No, we don't.

19 Q Do you use any sort of a rope in the beach activities when  
20 the tide is out?

21 A Yes. We use a twine to keep our lines straight on our  
22 tubes, to keep the tubes in a straight row.

23 MR. KISIELIUS: I'd like to add another exhibit  
24 into evidence. Exhibit Number 61.

25 THE HEARING EXAMINER: Exhibit Number 61 will be

1 entered into evidence.

2 Q Do you have the binder there? Can you look towards the  
3 back of that declaration? There are some photographs  
4 attached. And in particular, I'm going to ask you to take  
5 a look at the first two photographs.

6 A Okay.

7 Q Have you ever installed a sign like that at your farm?

8 A No, sir, we have not.

9 Q Have you ever used cement-filled garbage cans as markers of  
10 your beds?

11 A No, sir, we have not.

12 Q In terms of the people recreating on the beach, I  
13 understand it's a private beach. Do you ever see people  
14 using the beach there?

15 A Yes. There are -- people do recreate on the Foss farm.

16 Q And what types of things do you see?

17 A They harvest shellfish, they kayak. They Boy Scout camp  
18 canoes down, and they go up on the high bluffs and write  
19 their names in the sand.

20 Q And referring back to Exhibit Number 52, I'll just refer  
21 you to Photographs K and L, as well as Photograph J.

22 A Okay.

23 Q Is that representative of the type of activities you see at  
24 the farm?

25 A Yes, it is.

1 Q And especially in L, was that -- the part where the kayak  
2 is located, is that in proximity to any of the geoduck beds  
3 that you farm at Foss?

4 A Yes. There's a net right in front of the kayak, at the top  
5 of the geoduck bed.

6 Q I'd like you to look at Photographs M and N, please.

7 A Okay.

8 Q Is that also at Foss farm?

9 A Yes, it is.

10 Q And where are boats in relation to the bed there?

11 A The first picture, M, is on the southern boundary of the  
12 farm, over top of the geoduck bed, taken as the tide's in.  
13 And Letter N is on the high bluff as you're driving down  
14 the access road, over top of the geoduck bed when the  
15 tide's in.

16 Q I've only got one more question for you. I'd like to refer  
17 to the Intervener's exhibit. This is Intervener's Exhibit  
18 Number 36. You might even have a copy of that (indicating  
19 to witness).

20 MS. GUERNSEY: I don't think the Examiner has this  
21 book in front of him.

22 THE HEARING EXAMINER: I don't. This would be a  
23 good time for us to call it an evening, right? Counsel,  
24 you're coming from Seattle; is that correct?

25 MR. KISIELIUS: That is correct.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**CERTIFICATE**

**STATE OF WASHINGTON )**

**)**

**COUNTY OF KING )**

I, LINDA M. GROTEFENDT, a Certified Shorthand Reporter and Notary Public in and for King County, Washington, do hereby certify that I reported in machine shorthand the above hearing; that the foregoing transcript was prepared under my personal supervision and constitutes a true record of the hearing.

I further certify that I am not an attorney or counsel of any parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

WITNESS my hand and seal in Renton, County of King, State of Washington, this 9th day of November, 2007.

\_\_\_\_\_  
Notary public in and for the State of Washington, residing at Renton.

My commission expires 3-10-08.