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Reply to: Seattle Office

M E M O R A N D U M

TO: Hearing Examiner Sharon Rice

FROM: David A. Bricklin

DATE: January 12, 2024

RE: Taylor Shellfish Geoduck Farm, Project No. 2022103702

Pursuant to the Examiner's request for documentation of the legal authority reference during my comments during the hearing, I provide the following information:

1. Regarding the County's failure to obtain important information before deciding on permit conditions:

> Any governmental action on public or private proposals that are not exempt may be conditioned or denied under SEPA to mitigate the environmental impact subject to the following limitations . . .

WAC 197-11-660 (1).

> (1) If information on significant adverse impacts essential to a reasoned choice among alternatives is not known, and the costs of obtaining it are not exorbitant, agencies shall obtain and include the information in their environmental documents.
> (2) When there are gaps in relevant information or scientific uncertainty concerning significant impacts, agencies shall make clear that such information is lacking or that substantial uncertainty exists.
> (3) Agencies may proceed in the absence of vital information as follows:
> (a) If information relevant to adverse impacts is essential to a reasoned choice among alternatives, but is not known, and the costs of obtaining it are exorbitant; or
> (b) If information relevant to adverse impacts is important to the decision and the means to obtain it are speculative or not known;

> Then the agency shall weigh the need for the action with the severity of possible adverse impacts which would occur if the agency were to decide to proceed in the face of uncertainty. If the agency proceeds, it shall generally indicate in the appropriate environmental documents its worst case analysis and the likelihood of occurrence, to the extent this information can reasonably be developed.
> (4) Agencies may rely upon applicants to provide information as allowed in WAC 197-11-100.

WAC 197-11-660 (1).[1]

Issues staff acknowledged it lacked information:

- Genetic impact of hatchery geoducks on native geoduck population.
- Current eelgrass survey.
- Impacts of plastic pollution.
- Staff: "I'm not familiar with the site."

2. Thurston County cannot ignore its own permitting responsibilities simply because other agencies may address similar issues:

Thurston County has the duty to assure compliance with the SMP regardless of whether other agencies may have overlapping permit requirements. The SMA allows a substantial development permit to be issued "only when the development proposed is consistent with the applicable master program and this chapter [the SMA]." RCW 90.58.140(2)(a). Thurston County's 1990 SMP repeats this mandate: "State law provides that permits shall be granted only when the development proposed is consistent with the policy of the Shoreline Management Act, the state shoreline regulations (WACs) and the local Master Program (refer to WAC 173-14)." Thurston County 1990 SMP at 2. There is no allowance for issuing a substantial development permit without this determination of consistency. There is no allowance for the county to avoid a consistency determination by stating that some other agency in some other process will be addressing similar issues.

3. SEPA requirements and permitting requirements are distinct obligations:

Even though a DNS was issued, in the context of permitting, a county may impose conditions to address other regulatory requirements. *Quality Rock Products v. Thurston Cy.*, 139 Wn. App. 125 (2007); *Bellevue Farm Owners Ass'n v. State of Washington Shorelines Hearings Bd.*, 100 Wn. App. 341, 354–55 & n.29 (2000).

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[1] *See also, 36 Wash. Prac., Washington Land Use § 9:9, Distinction between mitigation imposed under WAC 197-11-350 and WAC 197-11-660* ("a locality may also impose conditions to mitigate adverse environmental impacts, not necessarily "significant" adverse environmental impacts sufficient to warrant a DS).

4. The county's reference to prior county decisions regarding permits and SEPA determinations for other geoduck projects are irrelevant and should draw the response: "So what?"

> The Board concluded that the Matthewses' proposed lot sizes were consistent with other subdivisions previously approved outside the IUGA. But legally the response is—so what? The question is whether the Matthewses' subdivision is urban [whether it is legal]. Not, have we done this before?

Citizens for Responsible & Organized Planning (CROP) v. Chelan Cnty., 105 Wn. App. 753, 760 (2001).

5. The staff report's focus on aquaculture policies (*i.e.,* that aquaculture is a "preferred use") ignored the SMA's and the SMP's environmental protection policies, including the SMA's and the SMP's "no net loss" policy and gave undue weight to aquaculture's "preferred use" status.

a. No Net Loss

"No net loss" is an important concept. It is more stringent than "mitigate to the extent reasonably possible." The latter allows degradation; "no net loss" allows no degradation at the ecosystem level. The no net loss policy reflects a determination that we already have lost too much. Further ecosystem degradation is no longer acceptable.

DOE acknowledges that the no net loss concept is embodied in the SMA:

> "(2) The **guidelines are intended to reflect the policy goals of the act**, . . ."
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> "(8) **Through numerous references to and emphasis on the maintenance, protection, restoration, and preservation of 'fragile' shoreline 'natural resources,' 'public health,' 'the land and its vegetation and wildlife,' 'the waters and their aquatic life,' 'ecology,' and 'environment,' <u>the act</u> makes protection of the shoreline environment an essential statewide policy goal consistent with the other policy goals of the act**. It is recognized that shoreline ecological functions may be impaired not only by shoreline development subject to the substantial development permit requirement of the act but also by past actions, unregulated activities, and development that is exempt from the act's permit requirements. **The principle regarding protecting shoreline ecological systems is accomplished by these guidelines in several ways, and in the context of related principles. These include**:
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> (b) Local master programs shall include **policies and regulations designed to achieve no net loss of those ecological functions.**

> (i) Local master programs shall include **regulations and mitigation standards ensuring that each permitted development will not cause a net loss of ecological functions of the shoreline**; local **government** shall design and implement such regulations and mitigation standards in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property.

WAC 173-26-186 (emphases supplied).

To justify this guideline's use of the no net loss policy when reviewing new SMPs, DOE quotes (in subsection 8, above) words and concepts from the original SMA (1971). Those words and concepts are identical to the words and concepts in Thurston County's 1990 SMP:

> The local governments of Thurston County recognize that the Shorelines of the State and the region are among the most valuable and fragile of our natural resources.

Thurston County 1990 SMP at 19.

> The goal of this Master Program is to preserve to the fullest possible extent the scenic, aesthetic and ecological qualities of the Shorelines of the Thurston Region in harmony with those uses which are deemed essential to the life and well-being of its citizens.

Thurston County 1990 SMP at 19.

> It shall be the policy of the local governments of Thurston County to provide for the management of the Shorelines of the State and Region by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the State and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.
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> To implement this document, the public's opportunity to enjoy the physical and aesthetic qualities of natural Shorelines of the State and Region shall be preserved to the greatest extent feasible consistent with the overall best interest of the people generally. To this end, uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment or are unique to or dependent upon use of the State's

> shoreline. Alterations of the natural condition of the shorelines, in those limited instances when authorized, shall be given priority for single-family residences, ports, shoreline recreational uses including but not limited to parks, marinas, piers and other improvements facilitating public access to shorelines of the Region; industrial and commercial developments which are particularly dependent on their location on, or use of, the shorelines of the Region; and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the Region. Permitted uses of the Shorelines of the State and Region shall be designed and conducted in a manner to minimize, to the extent feasible, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.

Thurston County 1990 SMP at 20 (emphasis supplied).

There are 33 references to "preservation" in the Thurston County 1990 SMP.

In sum, the concept of no net loss is inherent in the original SMA and Thurston County's 1990 SMP. The policy applies to this application.

b. Overblown Reliance on Aquaculture's "Preferred Use" Status

As noted earlier, staff was so fixated on aquaculture's preferred use status, that it ignored the SMA's and SMP's environmental protection policies. Staff has it backwards. The SMA's preferred uses may have priority over non-water related uses, but they remain subservient to the Act's primary goal and policies for environmental protection:

> [C]ontrary to the appellant's claims that RCW 90.58.020 states a policy of protecting private property rights, ... private property rights are 'secondary to the SMA's primary purpose, which is to protect the state shorelines as fully as possible.'"

Samson v. City of Bainbridge Island 149 Wn. App. 33, 49 (2009) (upholding **a complete ban** on single family docks—despite "preferred" status of single family uses).

> *Samson* refutes the general idea that the SMA must always prioritize private property rights.

Olympic Stewardship Found. v. Growth Mgmt. Hearings Bd., 199 Wn. App. 668, 690 (2017).

> [E]ven though single-family homes are one of the priority uses under the SMA, the County may still restrict structures or uses on residential property in furtherance of ecological protection goals. In fact, reasonable and appropriate uses should be allowed on the shorelines only if they will result in no net loss of shoreline

ecological functions and systems. *See* RCW 90.58.020; WAC 173-27-241(3)(j).

Olympic Stewardship, supra.[2]

6 At the end of the hearing on January 9, 2024, the Examiner asked: "The public is essentially asking that I conclude that the entire body of science on which all the previous geoduck SSDPs have been issued be found to be faulty and too flawed to be relied upon. What is the correct legal standard for considering that argument?"

The decisions in prior SSDP cases are basically irrelevant. They have no legal authority here. Multiple grounds support that conclusion.

One, the record in earlier cases is not the same as the record in this case. The Examiner in this case is required to make her findings based on the record in this case, not some other cases. "[T]here must be a sufficient quantum of evidence **in the record** to persuade a reasonable person that the declared premise is true." *Wenatchee Sportsmen Ass'n v. Chelan Cnty.*, 141 Wn.2d 169, 176 (2000) (emphasis supplied).

Two, scientific knowledge changes over time. The neighbors have provided evidence that simply was not presented or even available during prior proceedings, *e.g.*, new critiques of old studies; genetic threats to native stocks; previously unknown pathways for aquaculture plastics to pollute the water column and biota; ingestion of forage fish larvae by planted geoducks; and new studies indicating forage fish at 1% of historic populations.

Three, to put that in more legalistic terms, if the applicant seeks to bind the Examiner to earlier determinations, the applicant would need to establish that the principles of collateral estoppel or res judicata apply. The applicant has made no such effort and for good reason; those principles obviously have no applicability here. Res judicata prevents relitigation of the same claim where, among other things, the cause of action is the same and the parties are the same. *Harley H. Hoppe & Associates, Inc. v. King Cnty.*, 162 Wn. App. 40, 51(2011). "Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent **proceeding involving the same parties."** *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 306 (2004) (emphasis supplied). The "cause of action"—the permit at issue—is different and the parties (notably the neighbors) are different. The ability of *these neighbors* to make their case should not be compromised in any way by the outcome of prior proceedings. *Id.*

[2] This case cites both the SMA and DOE's current guidelines for the no net loss proposition. As discussed above, even though DOE's current guidelines for new SMPs do not apply in this case, the SMA does, both directly and because those SMA policies are repeated in Thurston County's 1990 SMP.