



COUNTY COMMISSIONERS

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HEARING EXAMINER

Creating Solutions for Our Future

**BEFORE THE HEARING EXAMINER
FOR THURSTON COUNTY**

In the Matter of the Application of)	Project No. 2016100297
)	
Hui Xia, on behalf of)	
Henderson Shellfish)	
)	
For Approval of a)	
Shoreline Substantial Development Permit)	FINDINGS, CONCLUSIONS,
)	AND DECISION

SUMMARY OF DECISION

The requested shoreline substantial development permit to develop a commercial intertidal geoduck farm on leased tidelands totaling 0.7 acre in front of 9230 Hunter Road NW, Units F and G, on Eld Inlet of Puget Sound is **GRANTED** with conditions.

SUMMARY OF RECORD

Request:

Hui Xia of Henderson Shellfish (Applicant) requested approval of a shoreline substantial development permit to develop a 0.7-acre commercial intertidal geoduck farm on leased tidelands in front of 9230 Hunter Road NW, Units F and G (Tax Parcel Numbers 12903241200 and 12903241100), on Eld Inlet of Puget Sound. The proposed project area is designated as a Rural shoreline environment by the Shoreline Master Program for the Thurston Region.

Hearing Date:

The Thurston County Hearing Examiner held an open record hearing on the request on May 1, 2017. At the conclusion of the hearing, the record was held open until May 4, 2017 to allow the Applicant an opportunity to provide additional information regarding a mitigation measure requested by the National Marine Fisheries Service. The submitted information was entered into the record as Exhibits 5 and 6.

Testimony:

At the hearing the following individuals presented testimony under oath:

Leah Davis, Thurston County Resource Stewardship Department, Associate Planner
Dawn Peebles, Thurston County Environmental Health
Hui Xia, Henderson Shellfish, Applicant Representative

Exhibits:

At the hearing the following exhibits were admitted into the record:

EXHIBIT 1 Resource Stewardship Staff Report, including the following attachments:

- | | |
|--------------|---|
| Attachment a | Notice of Public Hearing |
| Attachment b | Master Application dated January 26, 2016 |
| Attachment c | JARPA Application (with attachments D-L), dated January 26, 2016 |
| Attachment d | SEPA Checklist, dated January 26, 2016 |
| Attachment e | Biological Evaluation, dated August 2015 |
| Attachment f | Cultural Survey, dated September 10, 2015 |
| Attachment g | Notice of Application, dated March 9, 2016 |
| Attachment h | Mitigated Determination of Non-Significance, dated October 13, 2016 |
| Attachment i | Geoduck Aquaculture Research Program, Final Report to the Legislature |
| Attachment j | Memos from WA Department of Ecology, dated Feb. 17, March 29, and Oct. 27, 2016. |
| Attachment k | Comment letter from Nisqually Indian Tribe, dated March 17, 2016 |
| Attachment l | Memo from Thurston County Public Works recommending approval, dated February 29, 2016 |
| Attachment m | Memo from Thurston County Public Health and Social Services recommending approval dated May 3, 2016 |
| Attachment n | Original deed for tidelands to which the surveyor must ensure leasing rights. |

- Attachment o Site photos (2) by staff, August 18, 2016
- Attachment p Geodata aerial photo of geoduck farms in the Hunter Point area
- Attachment q Email questions and answers between Hui Xia and Resource Stewardship staff, dated December 8, 2016
- Attachment r Email question and answer between Staff and WDFW

- EXHIBIT 2 Photos of Posted Notice of Public Hearing (2)
- EXHIBIT 3 Statement of Modification, dated October 17, 2016 (rescinded per Exhibit 6)
- EXHIBIT 4 Applicant's Written Hearing Testimony, dated April 28, 2017
- EXHIBIT 5 Email from Hui Xia, dated May 2, 2017 re: Conversation with Corps, with response from Leah Davis dated May 2, 2017
- EXHIBIT 6 Email from Hui Xia, dated May 2, 2017 on rescinding Exhibit 3

Based on the record developed at hearing, the Hearing Examiner enters the following findings and conclusions:

FINDINGS

Procedural Background and Site Information

1. The Applicant requested approval of a shoreline substantial development permit to develop a 0.7-acre commercial intertidal geoduck farm on leased tidelands in front of 9230 Hunter Road NW, Units F and G (Tax Parcel Numbers 12903241200 and 12903241100), on Eld Inlet of Puget Sound.¹ The proposed project area is designated as a Rural shoreline environment by the Shoreline Master Program for the Thurston Region. *Exhibit 1, pages 1 - 2; Exhibit 1, Attachment C.*
2. Eld Inlet is one of five narrow inlets that make up the southern part of Puget Sound. The subject property is located on the eastern shore of the Steam Boat Island peninsula, between Hunter Point and Edgewater Beach. There are no major river systems or estuaries near the project area. *Exhibit 1, Attachment E, page 9.*
3. An intertidal survey of the project site was conducted during low tide (- 2.0 ft. MLLW) on the morning of May 19, 2015. Consistent with Washington Coastal Atlas mapping

¹ The record is not entirely clear regarding ownership of the tidelands. There was testimony that the tidelands have been separately deeded from the upland portions of each parcel and together, the 0.7 intertidal acres are a separate parcel of land. *Exhibit 1, Attachment N; Leah Davis Testimony.* From the JARPA, it appears the tidelands are owned by Thomas Parke of The Parke LLC, owner of Tax Parcel No. 12903241100. For the record, both Mr. Parke and James Hoerling, owner of Parcel No. 12903241200, signed applications requesting permission for the instant SSDP. *Exhibit 1, Attachments C and N.*

provided by the Department of Ecology, no instances of eelgrass, surfgrass, kelp, saltmarsh, or riparian wetlands were observed in the vicinity. *Exhibit 1, Attachment E, page 9.*

4. Puget Sound beaches with the appropriate shallow slope and soft sediment, including the subject beach, are highly productive for commercial shellfish growing. The Washington State Department of Ecology (DOE) indicates that Puget Sound harbors the highest concentration of geoducks in the contiguous United States, with the most abundant concentrations in southern Puget Sound. Eld Inlet is an historic shellfish growing area. *Exhibit 1, page 4; Exhibit 1, Attachment E, page 9.*
5. The parcels are zoned Rural Residential Resource One Dwelling Unit Per Five Acres (RRR 1/5), and are developed with single-family residences. *Exhibit 1, page 2.* The Thurston County Code includes aquaculture in its definition of agriculture (TCC 20.03.040(3)), and agriculture is a permitted use in the RRR 1/5 zone. The geoduck bed proposed is allowed as an agricultural use without a land use permit. *TCC 20.09A.020.* Resource Stewardship Staff noted, however, that certain potential impacts to adjacent properties must still be mitigated to comply with shoreline regulations, including lighting, glare, noise, and safety for beach users. *Exhibit 1, page 3.*
6. There are existing geoduck farms in close proximity to the subject property, including five to the north of the subject property, four of which are operated by the Applicant. The uplands in the vicinity are developed with single-family residences and vacation homes. The project area is not in a navigation channel, and there are no parks, marinas, or other public recreation facilities in the vicinity. Public access to the shoreline would not be affected by the proposed use. *Exhibit 4; Exhibit 1, Attachment E, page 9.*
7. As intertidal lands in Eld Inlet, the project site is subject to the jurisdiction of the Shoreline Master Program for the Thurston Region (SMPTR). *SMPTR, Section 4, Definitions.* The SMPTR designates the site a Rural shoreline environment. Aquaculture is allowed in this environment. The proposed geoduck operation requires the installation of equipment on the tidelands that constitutes a “structure” and is considered “development” for the purposes of the SMPTR. Non-exempt development in the shoreline jurisdiction that exceeds \$6,412.00 in fair market value requires a shoreline substantial development permit (SSDP). *SMPTR, Section 1.II.A.* The value of the proposed project is greater than that amount. *Exhibit 1, pages 3-4; Exhibit 1, Attachment C.*

The Applicant's Proposal

8. The geoduck farm would be located within the intertidal zone, between +3 to -4 feet mean lower low water (MLLW), which is the average height of the lower low waters over a 19-year period. The project would be developed in five phases. *Exhibit 1, Attachment E, page 4.*
9. Phase 1 would consist of site preparation. The project site would be surveyed before any planting activities to accurately demark tideland boundaries. No work would be

conducted above +3 feet MLLW. Boundary corners would be assigned GPS coordinates during the land survey, and survey stakes would be used to mark the boundary line (stakes would be pushed into the sediment; there would be no use of concrete). Any existing garbage found during the site preparation process would be removed. Aside from the relocation of any sand dollars encountered in the proposed geoduck planting site, no vegetation or marine species would be removed from the site. According to the Applicant, if sand dollar are found during site preparation, they would be picked up by hand and placed outside the boundaries of the aquaculture site. No heavy equipment would be used. *Exhibit 1, Attachment E, page 4; Hui Xia Testimony.*

10. No gravel fill would be needed for shellfish bed preparation on the subject site, because the site substrate has a high percentage of gravel. *Exhibit 1, Attachment Q; Exhibit 4; Hui Xia Testimony.*
11. Phase 2 would consist of seed planting. First, a herring spawn survey would be conducted by a professional consultant; if spawn are detected, planting would be delayed until they have departed the tidelands. After the survey and site cleaning, 10-inch lengths of 6-inch diameter customized gray PVC pipes, pre-marked with company name and contact information, would be placed on end and buried in the tideland substrate with two to three inches exposed. The tubes would be placed in straight rows at a density of one tube per square foot. A total of 30,000 tubes would be used.² The majority of the planted area would be underwater 80 percent of the time that the tubes are in place. The juvenile geoducks would be seeded by hand and placed in the tubes at a density of three per tube. To protect the juvenile geoduck clams from predators, the tubes would be covered with area netting after seeding. The Army Corps of Engineers supports the use of area nets (as opposed to nets on individual tubes) for this project. The area netting would be made of 40-foot by 40-foot sections of half-inch durable polyethylene mesh. Area netting would be staked with rebar every ten feet to ensure that the nets stay anchored due to wave action, and to prevent any loose tubes from being washed into Eld Inlet. Pieces of rebar shaped like the letter U would be pushed into the substrate, both ends buried, to keep nets taut and securely fastened to the substrate. There would be four to six workers involved in the seed planting phase. The projected length of time to complete this work would be eight six-hour periods during low-tide cycles. *Exhibit 1, Attachment E, page 4; Exhibit 5; Hui Xia Testimony.*
12. Phase 3 would consist of tube and netting removal. After eighteen months, the tubes and area netting would be removed, leaving the farm invisible for three to five years until harvest. This work would be completed by hand within one working day using between four and six workers. No equipment would be used for netting removal. Native organisms found, such as clamshells and algae, would be relocated outside the planting area on the project site. Garbage would be picked up by hand and disposed of at a local waste center. *Exhibit 1, Attachment E, page 5.*

² The Biological Evaluation (Exhibit 1, Attachment E) describes the project area as two adjacent 0.35-acre sites, each with 15,000 tubes. *Exhibit 1, Attachment E, pages 1, 4, and 38.*

13. Phase 4 would consist of bed maintenance, including monitoring growth and mortality. There would be no temporary vessel moorage during the first few years. *Exhibit 1, Attachment E, page 5.* Per the conditions of the mitigated determination of non-significance (MDNS), the Applicant/operator would be required to conduct at least two site visits per month, including after severe storm events, during the time that the nets are installed. During these visits the nets would be inspected for entangled fish and wildlife, loose nets and tubes would be secured, and debris would be removed. *Exhibit 1, Attachment H.* Due to the extent of the Applicant's other operations in Eld Inlet, the Applicant expects to be in the project area during all low tide days, and can monitor the beds at the required schedule. *Exhibit 1, Attachment Q; Exhibit 4; Hui Xia Testimony.*
14. Phase 5 would consist of geoduck harvest. Harvest would occur above the water level by hand with the aid of a pressurized hose and nozzle system designed to loosen the clams from the sand on the exposed beach during low tide cycles. The inside tip diameter of the nozzle would be 5/8 inch or less, per Washington Administrative Code requirements. The nozzle pressure would be limited to approximately 100 psi measured at the pump. The water intake lines on the pumps would be fitted with screens that meet National Marine Fishery Service (NMFS) screening criteria to prevent entrapment of fish or other species. During the harvest process, a small eight- by eight-foot wooden barge (no propulsion), mounted with harvest equipment, would be occasionally moored on site, near +1 MLLW. The wood barge may be grounded for a maximum of seven days. Pumps for harvest would be run by a small combustion engine mounted on the wood barge. The engine and the pump would be fitted with a muffler and kept inside an insulated box to minimize sound. The harvest would be accomplished by six workers during 30 six-hour periods "in the dry" during low-tide cycles when the geoduck bed is exposed. No dive harvest would be required. *Exhibit 1, Attachment E, pages 5-6.*
15. The Applicant proposed the following (paraphrased) measures to protect habitat and reduce impacts to the neighborhood:
 - Installing pipe and predator exclusion devices in straight rows, using devices colored to blend in visually with the backdrop;
 - Avoiding individual tube netting, instead employing area netting;
 - Removing all unsecured and excess tubing and netting from the beach prior to next incoming tide, to reduce gear escape;
 - Maintaining a record of all animals observed in area nets and release of live entangled animals;
 - No seeding or other operations would be done on biologically sensitive areas of the beach during times when herring or smelt spawn are present;
 - Maintain the farm in an orderly fashion, removing all gear not in use;
 - Refraining from use of heavy equipment on the beach;
 - Providing noise muffling for times when pumps and other mechanical equipment is in use;
 - Providing appropriate sanitary services to employees, who will not use the beach or adjacent uplands for personal sanitation; and

- Labeling all gear placed below ordinary high water mark with contact information.

Exhibit 1, Attachment C, page 9.

16. With no structures taller than three inches, the project would not obstruct shoreline views from upland properties. *Exhibit 1, page 5; Exhibit 4.*
17. The proposal requires authorization from the US Army Corps of Engineers (ACOE). Federal agencies are required to confirm that actions they authorize comply with the Endangered Species Act (ESA), which prohibits actions that jeopardize the continued existence of endangered or threatened species or destroy/adversely modify critical habitat of listed species. The Applicant commissioned a professionally prepared Biological Evaluation (BE, August 2015) to support its request for ACOE authorization. The BE identified the following ESA-listed species: Puget Sound Chinook salmon (threatened), Puget Sound steelhead (threatened), coastal Puget Sound bull trout (threatened), Bocaccio (endangered), canary rockfish (threatened), yelloweye rockfish (threatened), eulachon (threatened), green sturgeon (threatened), southern resident orca (endangered), humpback whale (endangered), marbled murrelet (threatened), and bald eagle (no longer listed under ESA, but still protected under the federal Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Plan). *Exhibit 1, Attachment E.*
18. The BE evaluated anticipated project effects in terms of short-term impacts (those localized pulse impacts associated with planting or harvesting) and long-term impacts (associated with the full seven year grow out phase). The report concluded as follows:

Chinook salmon, bull trout, and steelhead: Overall there may be minimal temporary effects on salmonids but no lasting effects. The project "may affect, but is not likely to adversely affect" Chinook salmon, steelhead, or bull trout. In addition, the project "may affect, but is not likely to adversely affect" Chinook salmon and steelhead critical habitat.

Bocaccio, yelloweye rockfish, and canary rockfish: There is low likelihood of species presence in the project area. The project "may affect, but is not likely to adversely affect" these species.

Pacific eulachon: These are not documented in any southern Puget Sound watersheds, so are highly unlikely to enter the project area. The project will have "no effect" on the eulachon.

Green sturgeon: This species is rarely seen east of Port Townsend and is highly unlikely to enter the project vicinity. The project will have "no effect" on green sturgeon.

Southern resident orca: It is unlikely that the orca will be present during project activities. Impacts from noise are not anticipated because noise levels would not be significantly greater than background levels. The project "may affect, but is

not likely to adversely affect" southern resident orca whale and its critical habitat.

Humpback whale: The presence of the humpback whale during project activities is extremely unlikely. The potential for noise disturbance is expected to be insignificant because the whale would detect the vessel and move away. The project "may affect, but is not likely to adversely affect" humpback whale.

Marbled Murrelet: The murrelet is unlikely to occur in the project area. The use of large area nets, kept taut, would minimize bird entanglement. The project "may affect, but is not likely to adversely affect" the marbled murrelet.

Bald eagle: Bald eagles are acclimated to human activity and are unlikely to be present during project activities. They also have large feeding territories. The project is "not likely to disturb" the bald eagle.

Exhibit 1, Attachment E.

19. The BE contains proposed conservation measures, compliance with which would satisfy applicable Federal requirements. The measures are listed on pages 21 through 22 of the BE. These measures were incorporated into the mitigation required in the MDNS as well as in Staff's recommended conditions of SSDP approval. *Exhibit 1, Attachment E; Exhibit 1, Attachment H; Exhibit 1, page 11.*
20. Forage fish, such as the sand lance, are an important prey base for marine species. According to Washington Department of Fish and Wildlife (WDFW) priority habitats and species (PHS) database, sand lance and surf smelt have been documented breeding on intertidal beaches at +7 feet MLLW within the action area. According to the BE, the geoduck bed would be placed from +3 MLLW to -4 MLLW and would not impact sand lance spawning areas. *Exhibit 1, Attachment E, page 17.*
21. Studies reviewed by Resource Stewardship Department staff do not indicate that geoduck operations such as the one proposed cause extensive erosion or accretion. While sand may accumulate between the tubes, the accreted sand is dispersed by tides throughout the drift cells. *Exhibit 1, page 6.*

County Review

22. Pursuant to RCW 15.85.010,

The legislature finds that many areas of the state of Washington are scientifically and biologically suitable for aquaculture development, and therefore the legislature encourages promotion of aquacultural activities, programs, and development with the same status as other agricultural activities, programs, and development within the state.

Resource Stewardship Staff contended that this declaration by the state legislature is a clear directive to local governments that aquaculture has a preferred status similar to agriculture and is a desirable land use. *Exhibit 1, page 4.*

23. Pursuant to the State Environmental Policy Act (SEPA), Thurston County acted as lead agency for review of the project's impact on the environment. The County considered the following sources of information during its environmental review:
1. Master Applications submitted February 5, 2016
 2. SEPA Environmental Checklist submitted February 5, 2016
 3. JARPA Applications submitted February 5, 2016
 4. Site Plans submitted February 5, 2016
 5. Site visit conducted August 18, 2016
 6. Notice of Application mailed out on January 31, 2107
 7. Biological Evaluation prepared by Heather Layes, received February 5, 2016
 8. Cultural resource Survey Report prepared by Kathleen Hawes and Dale Croes, received February 5, 2016
 9. Comment letter from Jackie Wall, THPO Nisqually Tribe dated February 6, 2017
 10. Sea Grant Washington, Geoduck Aquaculture Research Program, Final Report to the Washington Legislature dated November 2013³

Exhibit 1, Attachments H and I.

24. The County issued a mitigated determination of non-significance (MDNS) for the project on October 13, 2016. The MDNS imposed the following 15 mitigation measures:

³ In 2007, the Washington state legislature passed a law directing Washington Sea Grant to study key uncertainties as to the impacts of geoduck cultivation on the Puget Sound ecosystem and on wild geoduck populations. Sea Grant established six priority objectives to assess:

- 1) The effects of structures commonly used in the aquaculture industry to protect juvenile geoducks from predation;
- 2) The effects of commercial harvesting of geoducks from intertidal geoduck beds, focusing on current prevalent harvesting techniques, including a review of the recovery rates for benthic communities after harvest;
- 3) The extent to which geoducks in standard aquaculture tracts alter the ecological characteristics of overlying waters while the tracts are submerged, including impacts on species diversity and the abundance of other organisms;
- 4) Baseline information regarding naturally existing parasites and diseases in wild and cultured geoducks, including whether and to what extent commercial intertidal geoduck aquaculture practices impact the baseline;
- 5) Genetic interactions between cultured and wild geoducks, including measurement of differences between cultured and wild geoduck in term of genetics and reproductive status; and
- 6) The impact of the use of sterile triploid geoducks and whether triploid animals diminish the genetic interactions between wild and cultured geoducks.

Exhibit 1, Attachment I.

1. The preparation, planting, maintenance and harvesting at the subject sites shall be in compliance with the most current version of the Washington State Geoduck Growers Environmental Codes of Practice for Pacific Coast Shellfish Aquaculture.
2. An unobtrusive but visible sign shall be placed at the aquaculture bed, above OHWM listing the name and contact information for a person designated to immediately address problems associated with the aquaculture bed when discovered by citizens or agency representatives.
3. Prior to any site preparation, the property owners and aquaculture bed operator shall each sign a document to be recorded with the Thurston County Auditor granting access to the site for researchers and officers affiliated with County, State or Federal governments to gather information related to geoduck aquaculture.
4. All tubes, mesh bags, and nets used on the tidelands below the ordinary high water mark (OHWM) shall be clearly, indelibly, and permanently marked to identify the permittee name and contact information (e.g., telephone number, email address and mailing address). On area nets, if used, identification markers will be placed with a minimum of one identification marker for each 100 square feet of net.
5. The applicant / operator shall routinely inspect, document, and report any fish or wildlife found entangled in anti-predator nets or other culturing equipment. At least twice a month during the time the nets are installed, they shall be inspected and a record of observations maintained. Live entangled fish and wildlife shall be released upon observation. During the required bi-monthly site visits the applicant / operator shall remove from the beach or secure any loose nets, tubing or aquaculture related debris. Inspections of tidelands within a half mile of the geoduck farm shall also be conducted. During those patrols, all geoduck debris must be collected regardless of its source. Patrols to search for and collect geoduck debris must also be conducted within a day following a severe storm event.
6. All protective tubes and netting related to the proposed Geoduck aquaculture shall be removed from the shoreline within two (2) years of installation.
7. The applicant / operator must keep a record of all gear—the total number of PVC tubes, canopy nets, etc. — placed on site, and how many of those pieces of geoduck gear they remove through farming practices or collect from beach patrols.
8. Gear that blends into the surrounding environment (e.g., neutral colors or black) shall be used at the greatest extent possible to reduce potential aesthetic impacts.

9. Shellfish culturing shall not be placed above the tidal elevation of +3 MLLW in order to minimize potential impacts to forage fish habitat. If herring spawn is observed, then those areas shall be avoided until the eggs have hatched.
10. Land vehicles and equipment shall not be washed, stored, fueled, or maintained within 150 feet of any waterbody. All vehicles will be inspected for fluid leaks daily within 150 feet of any waterbody.
11. Permanent lighting of the aquaculture beds shall not be permitted. Any temporary lighting shall be directed such that off-site glare is minimized to the extent possible. When tides force nighttime operations, crews shall only use headlamps, and shall be trained to limit light pollution.
12. Noise impacts shall be minimized by using fully-enclosed and insulated motors with approved muffled exhaust systems.
13. If archaeological artifacts are observed during any phase of the aquaculture operation, all work shall be immediately halted. The State Department of Archaeology and Historic Preservation, the Thurston County Resource Stewardship Department and affected Tribes shall be contacted to assess the situation prior to resumption of work.
14. Only washed gravel shall be used for shellfish bed preparation. Unsuitable material (e.g., trash, debris, concrete, asphalt, tires) shall not be discharged or used as fill (e.g., to secure nets, create berms or provide nurseries).
15. No physical work on the beds shall be initiated until the applicant provides evidence that required State and Federal permits and approvals have been granted. A listing of the known State and Federal requirements is provided in the Notes "A" and "B" below.

Exhibit 1, Attachment H.

25. A cultural resources survey was conducted on the subject property by Pacific Northwest Archaeological Services. While the statewide predictive model provided by the Washington State Department of Archaeology and Historic Preservation indicates a high to very high risk of encountering cultural materials in the project are due to close proximity to Squaxin Island, the on-site survey found that the site does not contain significant archaeological materials. *Exhibit 1, Attachment F, page 15.*
26. The Thurston County Environmental Health Division and the Public Works Department recommended approval of the application. *Exhibit 1, Attachments L and M.*
27. Upon completing review of the application, Resource Stewardship Staff concluded that with conditions, the proposal would comply with SSDP criteria. Among other conditions

of approval, Staff recommended condition number 8 (Exhibit 1, page 10) requiring a new SSDP for subsequent placement of tubes or netting occurring five years after the effective date of approval, or before a second geoduck crop is planted, to provide an opportunity to reassess the use in light of then-current biological research in this relatively recent field. Staff contended that its recommendation for re-review prior to replanting is supported by WAC 173-27-090(3), which states: "Authorization to conduct development activities shall terminate five years after the effective date of a substantial development permit." Because the Department interprets "development activity" to include placement of structures (tubes and netting) on the beach, that each planting cycle would essentially require new review and authorization. Staff argued that according to the WAC, permission to conduct development activity terminates after five years, with a potential one-year extension upon application. Staff characterized its primary recommendation as requiring a perpetual five year review and renewal. In the latter half of the recommended condition, Staff recommends that if the new review of geoduck operations after each cycle is not adopted, that there be at least one re-review through a new SSDP application before a second cycle of geoduck is planted, in order to provide an opportunity for comment from neighbors who will have lived near to the operation and in order to allow more years of development in geoduck science. At this alternative one-time review, the hearing examiner could consider whether to make the rev-review prior to replanting a perpetual requirement. *Exhibit 1, pages 6 and 10; Leah Davis Testimony.*

28. After seeking clarification on when Staff recommended condition 8 would require reapplication for SSDP (after harvest), the Applicant requested no other clarification and raised no objection to the recommended conditions of approval. *Hui Xia Testimony.*
29. Notice of the public hearing was sent to owners of property within 500 feet of the site on April 18, 2017, and published in The Olympian on April 21, 2017. The site was posted with hearing notice on April 20, 2017. *Exhibit 1, page 2; Exhibit 2; Exhibit 1, Attachment A.* No public comment was submitted on the application. *Leah Davis Testimony.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has jurisdiction to decide substantial shoreline development applications pursuant to TCC 2.06.010(C), RCW Chapter 36.70, WAC 173-27, and Section One, Part V of the Thurston County Shoreline Master Program.

Criteria for Review

Shoreline Substantial Development Permit

Pursuant to WAC 173-27-150, in order to be approved by the Hearing Examiner, an SSDP application must demonstrate compliance with the following:

1. The policies and procedures of the Shoreline Management Act;
2. The provisions of applicable regulations; and
3. The Shoreline Master Program for the Thurston Region.

(a) Shoreline Management Act

Chapter 90.58 RCW, the Washington State Shoreline Management Act (SMA) of 1971, establishes a cooperative program of shoreline management between the local and state governments with local government having the primary responsibility for initiating the planning required by the chapter and administering the regulatory program consistent with the Act. The Thurston County Shoreline Master Program (SMPTR) provides goals, policies and regulatory standards for ensuring that development within the shorelines of the state is consistent the policies and provisions of Chapter 90.58 RCW.

The intent of the policies of RCW 90.58.020 is to foster “all reasonable and appropriate uses” and to protect against adverse effects to the public health, the land, and its vegetation and wildlife. The SMA mandates that local governments adopt shoreline management programs that give preference to uses that (in the following order of preference): recognize and protect the statewide interest over local interest; preserve the natural character of the shoreline; result in long term over short term benefit; protect the resources and ecology of the shoreline; increase public access to publicly owned areas of the shorelines; and increase recreational opportunities for the public in the shoreline. The public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state is to be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses that 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, are to be given preference.

(b) Applicable regulations from the Washington Administrative Code

WAC 173-27-140 Review criteria for all development.

- (1) No authorization to undertake use or development on shorelines of the state shall be granted by the local government unless upon review the use or development is determined to be consistent with the policy and provisions of the Shoreline Management Act and the master program.
- (2) No permit shall be issued for any new or expanded building or structure of more than thirty-five feet above average grade level on shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served.

WAC 173-27-150

- (2) Local government may attach conditions to the approval of permits as necessary to assure consistency of the project with the act and the local master program.

WAC 173-27-190 Permits for substantial development, conditional use, or variance.

- (1) Each permit for a substantial development, conditional use or variance, issued by local government shall contain a provision that construction pursuant to the permit shall not begin and is not authorized until twenty-one days from the date of filing as defined in RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within

twenty-one days from the date of such filing have been terminated; except as provided in RCW 90.58.140 (5)(a) and (b).

(c) Shoreline Master Program for the Thurston Region

SMPTR Section Two, V, Regional Criteria

- A. Public access to the shorelines shall be permitted only in a manner which preserves or enhances the characteristics of the shoreline which existing prior to establishment of public access.
- B. Protection of water quality and aquatic habitat is recognized as a primary goal. All applications for development of shorelines and use of public waters shall be closely analyzed for their effect on the aquatic environment. Of particular concern will be the preservation of the larger ecological system when a change is proposed to a lesser part of the system, like a marshland or tideland.
- C. Future water-dependent or water-related industrial uses shall be
- D. Residential development shall be undertaken in a manner that will maintain existing public access....
- E. Governmental units shall be bound by the same requirements as private interests.
- F. Applicants for permits shall have the burden of proving a proposed substantial development is consistent with the criteria which must be met before a permit is granted. In any review of the granting or denial of an application for a permit as provided in RCW 90.58.18.180(1), the person requesting the review shall have the burden of proof.
- G. Shorelines of this Region which are notable for their aesthetic, scenic, historic, or ecological qualities shall be preserved. Any private or public development which would degrade such shoreline qualities shall be discouraged. Inappropriate shoreline uses and poor quality shoreline conditions shall be eliminated when a new shoreline development or activity is authorized.
- H. Protection of public health is recognized as a primary goal. All applications for development of use of shorelines shall be closely analyzed for their effect on the public health.

SMPTR Section Three, II, Aquacultural Activities

A. Scope and Definition

Aquaculture involves the culture and farming of food fish, shellfish, and other aquatic plants and animals in lakes, streams, inlets, bays and estuaries. Aquacultural practices include the hatching, cultivating, planting, feeding, raising, harvesting and processing of aquatic plants and animals, and the maintenance and construction of necessary equipment, buildings and growing areas. Methods of aquaculture include but are not limited to fish hatcheries, fish pens, shellfish rafts, racks and longlines, seaweed floats and the culture of clams and oysters on tidelands and subtidal areas.

B. Policies

- 1. The Region should strengthen and diversify the local economy by encouraging aquacultural uses.
- 2. Aquacultural use of areas with high aquacultural potential should be encouraged.
- 3. Flexibility to experiment with new aquaculture techniques should be allowed.

4. Aquacultural enterprises should be operated in a manner that allows navigational access of shoreline owners and commercial traffic.
5. Aquacultural development should consider and minimize the detrimental impact it might have on views from upland property.
6. Proposed surface installations should be reviewed for conflicts with other uses in areas that are utilized for moorage, recreational boating, sport fishing, commercial fishing or commercial navigation. Such surface installations should incorporate features to reduce use conflicts. Unlimited recreational boating should not be construed as normal public use.
7. Areas with high potential for aquacultural activities should be protected from degradation by other types of uses which may locate on the adjacent upland.
8. Proposed aquacultural activities should be reviewed for impacts on the existing plants, animals and physical characteristics of the shorelines.
9. Proposed uses located adjacent to existing aquaculture areas which are found to be incompatible should not be allowed.

C. General Regulations

1. Aquaculture development shall not cause extensive erosion or accretion along adjacent shorelines.
2. Aquacultural structures and activities that are not shoreline dependent (e.g., warehouses for storage of products, parking lots) shall be located to minimize the detrimental impact to the shoreline.
3. Proposed aquaculture processing plants shall provide adequate buffers to screen operations from adjacent residential uses.
4. Proposed residential and other developments in the vicinity of aquaculture operations shall install drainage and waste water treatment facilities to prevent any adverse water quality impacts to aquaculture operations.
5. Land clearing in the vicinity of aquaculture operations shall not result in offsite erosion, siltation or other reductions in water quality.

Conclusions Based on Findings

1. As conditioned, the proposal is consistent with the policies and procedures of the Shoreline Management Act. The proposal is consistent with the state's interest in encouraging aquacultural activities, as described in RCW 15.85.010. The conservation measures identified in the Biological Evaluation and incorporated into the conditions of approval would protect the ecology of the shoreline. Public use of the shoreline would not be affected. *Findings 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23.*
2. As conditioned, the proposal complies with applicable regulations in the Washington Administrative Code. No structure over 35 feet in height is proposed. Compliance with the SMPTR is addressed below. *Findings 11, 12, and 15.*

3. As conditioned, the proposed aquaculture activities would comply with all applicable policies and regulations of the SMPTR.
 - A. With regard to regional criteria, the project would not hinder existing nor create new public access to shorelines, as the site is comprised of privately owned tidelands and there are no public facilities nearby. A site-specific study reviewed the proposal in light of the specific characteristics of the subject property and proposed farming methods and concluded that the project is not likely to adversely impact ESA-listed species or critical habitat for ESA-listed species. No evidence in the record suggests the proposal would result in any adverse effects to public health. *Findings 3, 6, 16, 17, 18, 19, and 25.*
 - B. Approval of the requested permit would support the SMPTR's stated policy of encouraging aquacultural uses for the sake of strengthening the local economy. The record demonstrates that the site is an area with high aquaculture potential. The project would not interfere with navigation of shoreline owners or commercial traffic. As proposed and conditioned, the project would minimize visual impacts to surrounding properties through the use of grey PVC tubes, area nets, regular monitoring of equipment to collect escaped gear or other debris, and because the use would only be above the waterline 20% of the time while gear is in place. The upland area is already developed with residences, and both upland owners signed off on the application. The proposal was reviewed in a site-specific study that considered impacts to endangered and threatened species and critical habitats. The use would be compatible with existing aquaculture areas. *Findings 4, 6, 11, 13, 16, 17, and 18.*
 - C. With respect to the general regulations, none of the evidence in the record suggests that the project would cause extensive erosion or accretion. No upland structures or processing plants are proposed. Parcels in the vicinity are already developed. No land clearing is proposed. *Findings 6, 8, 9, 10, 11, 12, 13, 14, 17, and 20.*
4. With respect to recommended condition 8, Resource Stewardship Staff's argument that the five-year limit established in WAC 173-27-090(3) should be applied the permit's duration of authorization is not persuasive in the case of a geoduck operation, due both to the cyclic nature of the proposed use and aquaculture's preferred land use status. Geoduck science has advanced since earlier geoduck SSDP reviews in Thurston County, during which the type of perpetual review now recommended by Staff was routinely required. Likely due to the publication of the final Washington Sea Grant study (Exhibit 1, Attachment I), in more recent geoduck SSDP permit reviews, Staff has ceased recommending re-review in five years/after initial permit approval. However, each land use application is reviewed at the hearing examiner level on its own merits, without treating previously issued permit decisions as precedent. Staff's intention of allowing owners of land surrounding the subject property another opportunity to comment on a subsequent SSDP application after they will have had the chance to experience the impacts of the operation is noted. Also noted is Applicant's lack of objection to this recommended requirement. A one-time (not perpetual) re-application will be implemented in the instant approval. A condition will require the Applicant to apply for

a new SSDP after harvest of the first crop, and that application shall go through all standard processes for notice and public comment. If the Applicant does apply, it will be determined during review of the next SSDP application whether any future re-reviews are appropriate. *Findings 7, 27, 28, and 29.*

DECISION

Based upon the preceding findings and conclusions, the request for a Shoreline substantial development permit to develop commercial intertidal geoduck beds on leased tidelands totaling 0.7 acres at 9230 Hunter Road NW, Units F and G is **GRANTED** subject to the following conditions:

1. Prior to or in conjunction with the commencement of bed preparation, and during operation, all regulations and requirements of the Thurston County Resource Stewardship Department, and the October 13, 2016 mitigated determination of non-significance shall be met.
2. A survey by a licensed professional surveyor must be completed prior to the onset of geoduck farming activities. This survey is to ensure that the geoduck farms is limited to the tideland area for which the property owners have a right to lease.
3. The proposed project must be consistent with all applicable policies and other provisions of the Shoreline Management Act, its rules, and the Shoreline Master Program for the Thurston Region.
4. This approval does not relieve the Applicant from compliance with all other local, state and/or federal approvals, permits, and/or laws necessary to conduct the development activity for which this permit is issued. Any additional permits and/or approvals shall be the responsibility of the Applicant.
5. This proposal does not include using fill, such as gravel, on the beach. A permit from the U.S. Army Corps of Engineers shall be obtained prior to any beach fill or excavation if such permit is required. It is the responsibility of the Applicant to investigate the need for this permit.
6. No discharge of sediments into Puget Sound shall be permitted at any time except as approved by the US Army Corps of Engineers and WA Department of Ecology.
7. Bed preparation must commence within two years and all tubes and netting must be installed within five years of the effective date of this permit. The effective date is the date of the last action required on the shoreline permit and all other government permits and approvals that authorize the development to proceed.
8. This approval authorizes one geoduck aquaculture cycle. The Applicant shall apply for a new shoreline substantial development permit prior to re-planting tidelands with a second crop of geoduck. At the time of that review it will be determined if subsequent re-reviews are necessary.

9. All activities related to the proposed geoduck bed shall be in substantial compliance with the site plan submitted and made part of this staff report, including modifications as required by this approval. Any expansion or alteration of this use will require approval of a new or amended shoreline substantial development permit.
10. Any lighting associated with the operation shall be designed and placed to avoid direct or reflected glare onto nearby residences.
11. Noise from equipment or personnel engaged in the operation shall not rise to the level of persistently annoying as reported by any nearby property owner. Although this level of noise is subjective, the County will investigate and may require appropriate mitigations. Additionally, noise from machinery and equipment shall not exceed 60 decibels at the property line during daylight hours and 50 decibels from 10:00 PM to 7:00 AM as limited by WAC 173-60-040.
12. All tubes, mesh bags, and nets used on the tidelands below the ordinary high water mark shall be clearly, indelibly, and permanently marked to identify the permittee name and contact information. On area nets, identification markers shall be placed with a minimum of one identification marker for each 100 square feet of net.
13. Hard markers or structures on the beach and in the water shall be avoided where possible. This includes but is not limited to property boundary markers and equipment to hold down netting.
14. Physical activities on the beach pursuant to this permit shall not begin and are not authorized until 21 days from the date of filing of the Hearing Examiner's decision with the Department of Ecology as required in RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within 21 days from the date of filing have been terminated, except as provided in RCW 90.58.140(5)(a) and (b).
15. Unsuitable material (such as debris, concrete asphalt, tires) shall not be used for any purpose below ordinary high water mark.
16. Surf smelt spawn and herring spawn surveys shall be conducted prior to undertaking activities listed in the Biological Evaluation (6.1(C)).
17. New geoduck aquaculture activities shall not be placed within 16 horizontal feet of eelgrass or kelp.
18. New geoduck aquaculture activities shall not be placed above the tidal elevation of +7 feet mean lower low water—this area is documented surf smelt spawning habitat.
19. No aquaculture gear shall be stored waterward from the line of mean higher high water for a period exceeding seven consecutive days.

20. All pumps that use seawater shall be screened in accordance with NMFS and WDFW criteria.
21. No vehicle or equipment shall be washed within 150 feet of Eld Inlet.
22. Land vehicles shall be stored, fueled, and maintained in a vehicle staging area placed at least 150 feet from any water body.
23. The Applicant/operator shall inspect all vehicles daily for fluid leaks before leaving the staging area and repair any leaks before the vehicle resumes operation.
24. At least every three months, during extremely low tide cycles when the PVC tubes are exposed, and after storms, the geoduck beds shall be patrolled and all loose gear and debris shall be removed from the beach. During these patrols, the netting shall be inspected to ensure it is secure.
25. Barges and vessels used for shellfish culturing in the action area shall not ground in eelgrass.

Decided May 17, 2017.



Sharon A. Rice
Thurston County Hearing Examiner

THURSTON COUNTY
PROCEDURE FOR RECONSIDERATION AND APPEAL
OF HEARING EXAMINER DECISION TO THE BOARD

NOTE: THERE MAY BE NO EX PARTE (ONE-SIDED) CONTACT OUTSIDE A PUBLIC HEARING WITH EITHER THE HEARING EXAMINER OR WITH THE BOARD OF THURSTON COUNTY COMMISSIONERS ON APPEALS (Thurston County Code, Section 2.06.030).

If you do not agree with the decision of the Hearing Examiner, there are two (2) ways to seek review of the decision. They are described in A and B below. Unless reconsidered or appealed, decisions of the Hearing Examiner become final on the 15th day after the date of the decision.* The Hearing Examiner renders decisions within five (5) working days following a Request for Reconsideration unless a longer period is mutually agreed to by the Hearing Examiner, applicant, and requester.

The decision of the Hearing Examiner on an appeal of a SEPA threshold determination for a project action is final. The Hearing Examiner shall not entertain motions for reconsideration for such decisions. The decision of the Hearing Examiner regarding a SEPA threshold determination may only be appealed to Superior Court in conjunction with an appeal of the underlying action in accordance with RCW 43.21C.075 and TCC 17.09.160. TCC 17.09.160(K).

A. RECONSIDERATION BY THE HEARING EXAMINER (Not permitted for a decision on a SEPA threshold determination)

1. Any aggrieved person or agency that disagrees with the decision of the Examiner may request Reconsideration. All Reconsideration requests must include a legal citation and reason for the request. The Examiner shall have the discretion to either deny the motion without comment or to provide additional Findings and Conclusions based on the record.
2. Written Request for Reconsideration and the appropriate fee must be filed with the Resource Stewardship Department **within ten (10) days of the written decision**. The form is provided for this purpose on the opposite side of this notification.

B. APPEAL TO THE BOARD OF THURSTON COUNTY COMMISSIONERS (Not permitted for a decision on a SEPA threshold determination for a project action)

1. Appeals may be filed by any aggrieved person or agency directly affected by the Examiner's decision. The form is provided for this purpose on the opposite side of this notification.
2. Written notice of Appeal and the appropriate fee must be filed with the Resource Stewardship Department **within fourteen (14) days of the date of the Examiner's written decision**. The form is provided for this purpose on the opposite side of this notification.
3. An Appeal filed within the specified time period will stay the effective date of the Examiner's decision until it is adjudicated by the Board of Thurston County Commissioners or is withdrawn.
4. The notice of Appeal shall concisely specify the error or issue which the Board is asked to consider on Appeal, and shall cite by reference to section, paragraph and page, the provisions of law which are alleged to have been violated. The Board need not consider issues, which are not so identified. A written memorandum that the appellant may wish considered by the Board may accompany the notice. The memorandum shall not include the presentation of new evidence and shall be based only upon facts presented to the Examiner.
5. Notices of the Appeal hearing will be mailed to all parties of record who legibly provided a mailing address. This would include all persons who (a) gave oral or written comments to the Examiner or (b) listed their name as a person wishing to receive a copy of the decision on a sign-up sheet made available during the Examiner's hearing.
6. Unless all parties of record are given notice of a trip by the Board of Thurston County Commissioners to view the subject site, no one other than County staff may accompany the Board members during the site visit.

C. STANDING All Reconsideration and Appeal requests must clearly state why the appellant is an "aggrieved" party and demonstrate that standing in the Reconsideration or Appeal should be granted.

D. FILING FEES AND DEADLINE If you wish to file a Request for Reconsideration or Appeal of this determination, please do so in writing on the back of this form, accompanied by a nonrefundable fee of **\$669.00** for a Request for Reconsideration or **\$890.00** an Appeal. Any Request for Reconsideration or Appeal must be **received** in the Permit Assistance Center on the second floor of Building #1 in the Thurston County Courthouse complex no later than 4:00 p.m. per the requirements specified in A2 and B2 above. **Postmarks are not acceptable.** If your application fee and completed application form is not timely filed, you will be unable to request Reconsideration or Appeal this determination. The deadline will not be extended.

* Shoreline Permit decisions are not final until a 21-day appeal period to the state has elapsed following the date the County decision becomes final.



Project No. _____
Appeal Sequence No.: _____

☐ Check here for: RECONSIDERATION OF HEARING EXAMINER DECISION

THE APPELLANT, after review of the terms and conditions of the Hearing Examiner's decision hereby requests that the Hearing Examiner take the following information into consideration and further review under the provisions of Chapter 2.06.060 of the Thurston County Code:

(If more space is required, please attach additional sheet.)

☐ Check here for: APPEAL OF HEARING EXAMINER DECISION

TO THE BOARD OF THURSTON COUNTY COMMISSIONERS COMES NOW _____
on this _____ day of _____, 20__, as an APPELLANT in the matter of a Hearing Examiner's decision
rendered on _____, 20__, by _____ relating to _____

THE APPELLANT, after review and consideration of the reasons given by the Hearing Examiner for his decision, does now, under the provisions of Chapter 2.06.070 of the Thurston County Code, give written notice of APPEAL to the Board of Thurston County Commissioners of said decision and alleges the following errors in said Hearing Examiner decision:

Specific section, paragraph and page of regulation allegedly interpreted erroneously by Hearing Examiner:

1. Zoning Ordinance _____
2. Platting and Subdivision Ordinance _____
3. Comprehensive Plan _____
4. Critical Areas Ordinance _____
5. Shoreline Master Program _____
6. Other: _____

(If more space is required, please attach additional sheet.)

AND FURTHERMORE, requests that the Board of Thurston County Commissioners, having responsibility for final review of such decisions will upon review of the record of the matters and the allegations contained in this appeal, find in favor of the appellant and reverse the Hearing Examiner decision.

STANDING

On a separate sheet, explain why the appellant should be considered an aggrieved party and why standing should be granted to the appellant. This is required for both Reconsiderations and Appeals.

Signature required for both Reconsideration and Appeal Requests

APPELLANT NAME PRINTED

SIGNATURE OF APPELLANT

Address _____

Phone _____

Please do not write below - for Staff Use Only:

Fee of ☐ \$669.00 for Reconsideration or \$890.00 for Appeal. Received (check box): Initial _____ Receipt No. _____

Filed with the Resource Stewardship Department this _____ day of _____, 20__.

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