

**SUPPLEMENTAL FINDINGS, CONCLUSIONS AND DECISION
OF THE HEARING EXAMINER FOR
THURSTON COUNTY**

CASE NO: 961372 (Application by Taylor Shellfish Company for a shoreline substantial development permit to construct and operate mussel rafts in Totten Inlet)

APPLICANT: Taylor Shellfish Company

SUMMARY OF REQUEST:

The Applicant requests a substantial development permit under the state Shoreline Management Act to construct and operate a mussel facility consisting of 58 rafts anchored off-shore along the eastern shoreline of north Totten Inlet.

LOCATION OF PROPOSAL:

A portion of the south half of Section 5, T19N, R2W, W.M., which is approximately 600 feet waterward of the mean lower low water mark of the western shore of the Steamboat Island Peninsula, between approximately 85th Avenue NW and 90th Avenue NW.

SUMMARY OF DECISION:

SUPPLEMENTAL DECISION IN NO. 961372

The requested substantial development permit is denied.

HEARING AND RECORD:

The hearing on this request was held before the undersigned Hearing Examiner on February 13 and 17, 2012. The record was held open until April 9, 2012 for submission of post-hearing briefing by the parties. Due to the amount of evidence and the nature of the issues, the Hearing Examiner requested a number of extensions in the time for decision. The final extension, to which the Applicant agreed, was until July 19, 2012.

The Hearing Examiner decision on this application was issued on July 19, 2012. As described in detail below, this decision held that the evidence was insufficient to show compliance with governing standards in a number of areas and gave the Applicant options for proceeding. The decision gave the Applicant 30 days to decide which option it would choose and stated additional time would be granted for this purpose on request. By letter dated August 16, 2012 to the Hearing Examiner, the Applicant chose how it wished to proceed.

The July 19, 2012 Hearing Examiner decision listed Exhibits 1 through 55 which were admitted into the record in this matter. That decision also listed the individuals who testified. This Supplemental Decision admits the following two additional exhibits into the record:

Exhibit 56. Letter dated August 16, 2012 from Samuel W. Plauche to Hearing Examiner Bjorgen.

Exhibit 57. E-mail sent August 27, 2012 from Tom Bjorgen to Brendan Donckers, Jeff Fancher, Billy Plauche, Laura Kisielius, Michael Witek, Robert Smith and Cami Petersen.

No testimony was taken in reaching this Supplemental Decision.

SUPPLEMENTAL DECISION IN NO. 961372

PAGE 2

SUPPLEMENTAL FINDINGS OF FACT

182. The 181 Findings of Fact entered as part of the July 19, 2012 Hearing Examiner decision in this matter remain in effect. These supplemental findings continue the numbering in that decision.

183. The nature of the Applicant's proposal is set out in detail in the Findings in the July 19, 2012 Hearing Examiner decision. To summarize, the Applicant, Taylor Shellfish Company, requests a substantial development permit under the Shoreline Management Act, Chap. 90.58 RCW, to install and operate a facility in northern Totten Inlet for the raising of *Mytilus edulis galloprovincialis*, popularly referred to as Gallo mussels. The facility would consist of 58 separate rafts anchored to the sea floor in water depths of 15 to 70 feet mean lower low water. Each raft would be 30 by 34 feet in size. The rafts would be attached end to end, with two feet in between, in two lines of eight rafts each and six lines of seven rafts each. Each line of eight rafts would be 256 feet long. Each line of seven rafts would be 224 feet long. These groups of rafts would be aligned with their long axis parallel to the shore in the general configuration shown at Exhibit (Ex.) 1, Attachment (Att.) e.

184. The rafts will be constructed of untreated lumber (Douglas fir), welded aluminum cross beams, and 55-gallon recycled food product barrels for floatation devices. Synthetic "socks" made of a polypropylene or polyethylene mesh will be suspended from the raft structure, as shown in Ex. 1, Att. g. Each raft will have approximately 720, 16-foot long lines of socks suspended from it. The distance from the bottom of the lines to the sea bed will range from approximately three feet to forty eight feet. The socks will be seeded with immature mussels at a density of approximately 150 mussels per foot. The mussels will require approximately 14 to 18 months to reach harvestable size. Predator nets will enclose the underwater features of the rafts to exclude

fish, marine birds, and marine mammals until the mussels are large enough to no longer be vulnerable to predation.

185. After making detailed Findings of Fact and discussing the governing legal standards, the July 19, 2012 decision concluded that the proposal does not comply with the standards for issuance of a substantial development permit in the following ways:

(a) The evidence submitted does not properly consider cumulative impacts of this project on dissolved oxygen (DO). In the absence of an adequate cumulative effects analysis, it cannot be concluded that this proposal complies with governing standards as far as its effect on DO is concerned.

(b) The evidence did not examine the extent of *Beggiatoa* under these or other raft facilities or its effect on benthos. It is also not clear whether the high sulfide readings under the Deepwater rafts, which the evidence showed were sufficient nearly to exclude or extirpate benthic life for a period of months, are expected to be exceeded over the finer sediment at the project site or are found under other mussel raft facilities in the Inlet. For these reasons, the cumulative effects on benthic life of *Beggiatoa* and sulfide levels beneath this proposal and other existing mussel facilities in the Inlet have not been covered under applicable standards. In the absence of an adequate analysis of these cumulative effects, it cannot be concluded that this proposal complies with governing standards.

(c) The evidence shows by a preponderance that this proposal, considered by itself, would not cause any significant spreading of or genetic pollution by Gallo mussels. The evidence also shows the same about the mussel facilities existing in 2002 in Totten Inlet, those at Deepwater and Gallagher Cove. The evidence does not show, however, the combined effect of potential Gallo dissemination when all mussel facilities in Totten Inlet are considered, including this proposal. For that reason, the evidence does not properly

consider the cumulative effects of this proposal on the spreading of or genetic pollution by Gallo mussels. In the absence of an adequate analysis of these cumulative effects, it cannot be concluded that this proposal complies with governing standards.

(d) Apart from cumulative impacts, the evidence was insufficient to show that the proposal's effect on benthic life through sulfide levels, deposition of organic material and generation of *Beggiatoa* complies with the requirements to protect habitat found in Section B of the Regional Criteria of the Shoreline Master Program for the Thurston Region.

(e) Given the letter at Ex. 8, p. 2-126 from the U.S. Fish and Wildlife Service opposing growing Gallo mussels on rafts in Totten Inlet because of the risk to the native mussel and the wildlife species that feed on it, and the responses to that letter, the evidence is insufficient to show consistency with SMP Section 2 V B, or the policies of RCW 90.58.020 as they relate to potential spread or hybridization of Gallo mussels.

186. The bases for each of these holdings are set out in detail in Conclusions of Law 12 through 35 and 57 through 71 of the July 19, 2012 decision.

187. The July 19, 2012 decision concluded also that in all matters other than those just listed, the proposal complies with governing standards, subject to the conditions set out in that decision.

188. Against this background, the decision settled on its specific directions in the following four Conclusions of Law:

"77. The remaining question is the proper response to the deficiencies described above. The law requires an adequate analysis of cumulative impacts before an SDP may be issued. As shown, that was not carried out for this proposal in three areas, dissolved

oxygen, the effect on the benthic community, and the spreading of or genetic pollution by Gallo mussels. Therefore, the application could be denied at this stage on that basis. As also shown, however, this proposal has undergone an extraordinary amount of review, including an evaluation of the Applicant's technical reports by an independent panel of high qualifications. The deficiencies in the review of cumulative impacts are ones of process, not substance; that is, until this review is carried out, we do not know whether the cumulative impacts in fact will allow approval or require denial. Under these circumstances, it would serve neither fairness nor efficiency to deny the entire project and require the Applicant to appeal to obtain the right to carry out the required cumulative impacts analysis.

78. Therefore, this decision will give the Applicant a choice. It may inform the Hearing Examiner that it wishes to challenge the determination that the present analysis of cumulative impacts is deficient and the requirement to perform an additional analysis under the standards above. In that case, I will issue a supplemental decision denying the application on that basis, and the Applicant may appeal. Alternatively, the Applicant may inform the Examiner that it wishes to carry out the analysis of cumulative effects required by this decision. In that case, the Examiner and the parties will confer about the timing and nature of that analysis.

79. In addition, the discussion above discloses two areas apart from cumulative effects where the preponderance of the evidence is insufficient to show compliance with the governing standards. First, whether the apparent near exclusion or extirpation of benthic life under the rafts, although temporary and limited in area, is consistent with the governing standards, and second, whether the position stated in the letter from the U.S.F.W.S. on the spread or hybridization of Gallo mussels is applicable to this proposal.

80. If the Applicant chooses to undertake further examination of cumulative impacts, then it is fairest and most efficient to allow it and other parties to submit supplemental evidence

and argument on these two issues. If the Applicant chooses not to do so, then I would make a decision on these two issues on the basis of the evidence already submitted."

189. The Applicant responded to these options through Exhibit 56, choosing not to submit additional evidence on cumulative impacts or other issues. This exhibit also sets out the Applicant's reasons for its decision.

SUPPLEMENTAL CONCLUSIONS OF LAW

81. The 80 Conclusions of Law entered as part of the July 19, 2012 Hearing Examiner decision in this matter remain in effect. These supplemental conclusions continue the numbering in that decision.

82. The July 19, 2012 Hearing Examiner decision held that the evidence was insufficient to show compliance with governing standards in the five areas summarized in Conclusion No. 185 (a) through (e), above. This analysis was not challenged through motions to reconsider. Therefore, this analysis and the Conclusions of Law embodying it in the July 19 decision remain in effect.

83. As described above, the July 19 decision gave the Applicant a choice between two options. First, it could present additional evidence in the areas in which the evidence was held to be insufficient. After considering that and any evidence submitted by the other parties, a supplemental decision on the merits would be issued. Second, the Applicant could decline to present additional evidence and could proceed to an appeal of the holdings of the July 19 decision as it desired. The Applicant chose the second option.

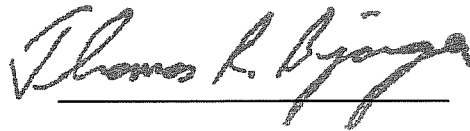
84. With this choice, the five areas remain in which the evidence is insufficient to show compliance with governing standards. The burden of proof respecting the issuance of permits

before local government is on the applicant. Batchelder v. Seattle, 77 Wn. App. 154, 159 (1995). Therefore, the requested substantial development permit must be denied for noncompliance with the governing standards set out in the July 19, 2012 Hearing Examiner decision in these five areas.

SUPPLEMENTAL DECISION

For the reasons set out above and in the July 19, 2012 Hearing Examiner decision in this matter, the requested substantial development permit is denied.

Dated this 14th day of July, 2012.

A handwritten signature in black ink, reading "Thomas R. Bjorgen", written over a horizontal line.

Thomas R. Bjorgen

Thurston County Hearing Examiner



Project No. 961372 SSDP
 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 \$595.00 for Reconsideration or \$820.00 for Appeal. Received (check box): Initial _____ Receipt No. _____
 Filed with the Resource Stewardship Department this _____ day of _____, 20____.

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 **\$595.00** for a Request for Reconsideration or **\$820.00** 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.