

1 BEFORE THE SHORELINES HEARINGS BOARD
2 STATE OF WASHINGTON

3 JOHN MARNIN and JUYNE COOK,

4 Petitioners,

5 and

6 PACIFIC COAST SHELLFISH GROWERS
7 ASSOCIATION,

8 Intervenor,

9 v.

10 MASON COUNTY, STATE OF
11 WASHINGTON, DEPARTMENT OF
12 ECOLOGY,

13 Respondents,

14 and

15 PAUL MATSENBAUGH, KEN NELSON ,
16 and RICH HULTZ,

17 Intervenors.

SHB NO. 07-021

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

18 Petitioners, John Marnin and Juyne Cook (Marnin/Cook), are challenging the conditions
19 placed on a shoreline substantial development permit issued by Mason County and a shoreline
20 conditional use permit issued by the State of Washington, Department of Ecology (Ecology)
21 governing their shellfish operation on the shoreline of Mason County. The hearing in the case
 was conducted in Allyn, Washington on December 10, 2007, and Lacey, Washington on

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1 December 11, 2007. Administrative Appeals Judge, Phyllis K. Macleod, presided for the Board
2 comprised of Kathleen D. Mix, chair, William H. Lynch, Andrea McNamara Doyle, Judy
3 Wilson, and O'Dean Williamson. John Bolender recused himself from the case based on a
4 potential conflict of interest with a scheduled witness. Counsel Ross Radley represented the
5 petitioners Marnin/Cook; Deputy Prosecuting Attorney T.J. Martin represented Mason County;
6 Assistant Attorney General Thomas J. Young represented Ecology; Counsel Amanda Carr and
7 Samuel Plauche represented the intervenor Pacific Coast Shellfish Growers Association
8 (PCSGA); and Counsel Aaron Laing and Curtis Smelser represented the intervening neighbors
9 Matsenbaugh, Nelson, and Hultz. The proceedings were recorded by Kim Otis and Randi
10 Hamilton of Gene Barker & Associates, dba Olympia Court Reporters of Olympia, Washington.
11 Witnesses were sworn and heard, exhibits were introduced, the parties presented arguments to
12 the Board, and the Board conducted a site visit to the Marnin/Cook property. Based upon the
13 evidence presented, the Board makes the following:

14 FINDINGS OF FACT

15 1.

16 Juyne Cook and her husband, John Marnin, reside in a single family dwelling on the
17 shore of Hood Canal at 16231 E. S.R. 106, Belfair, Washington. They have lived there since
18 1968. (Marnin testimony). The property includes privately owned tidelands approximately 100'
19 x 265' in size. The parcel is designated Urban Residential under the Mason County Shoreline
20 Master Program (MCSMP). The general area is characterized by single family residences which
21

1 are a mix between permanent and vacation homes. The site lies between S.R. 106 and the south
2 shore of Hood Canal. (County Ex. 1).

3 2.

4 In 1999, John Marnin began a small oyster growing project on the privately owned
5 tidelands in front of their house. He began with baby oysters that were cultivated on the beach.
6 The waters were well-suited to shellfish cultivation as evidenced by the success of the growing
7 efforts. Over the ensuing years, Mr. Marnin expanded the number of oysters being cultivated
8 and increased the level of activity on the tidelands. He began to explore different growing
9 methods including stacked growing cages and floating structures housing oysters and clams.¹ He
10 expanded his operation to include clam production, and developed groin-like structures to aid in
11 growing the clams. He also installed rebar and polyvinyl fencing approximately 12 inches high
12 to limit the migration of the growing oysters and bagged oysters from migrating off his property.
13 Mr. Marnin began obtaining live oysters from third party harvesters, including a number of tribal
14 harvesters from the Skokomish and S'Klallam tribes. (County Ex. 32). The business, known as
15 Little Creek Shellfish, grew to employ workers to tend the oyster and clam beds, to sort oysters,
16 package them, and transport them to wholesale distributors in Seattle, Oregon, and California.
17 Mr. Marnin does not make retail sales of oysters or clams from the site and he does not provide
18 products to wholesale customers at the site. Instead, he transports live oysters to off-site
19 wholesale shellfish distributors. (Marnin testimony).

20 _____
21 ¹ Mr. Marnin used floating structures for a period of time to suspend clams and oysters near the water's surface. He has discontinued the practice and dismantled the structures. He has no plan to reinstitute the use of floating structures and is not seeking approval for them in this proceeding. (Marnin testimony).

1 3.

2 The shellfish industry operates on a short turnaround time. Typically orders for shellfish
3 are received shortly before the desired delivery date. To be able to meet distributor's demands
4 for product, shellfish farmers have to accumulate certain inventories of live shellfish available
5 for immediate delivery. This inventory is particularly important when tidal cycles make it
6 difficult or impossible to access growing areas. Many shellfish farmers obtain and store oysters
7 and clams from third parties and tribal harvesters in order to meet customer demands. Without
8 live inventory readily accessible and available to respond to orders quickly and reliably, a viable
9 aquaculture business cannot be maintained. (Marnin testimony, Downey testimony, Bishop
10 testimony).

11 4.

12 Mr. Marnin leases approximately 13.5 acres of tidelands from other property owners in
13 various locations along Hood Canal and Puget Sound. He harvests oysters from these properties
14 as the shellfish are ready for market or as the owners request. He brings the live oysters to his
15 site, sorts them, and stores and tends them on his tidelands until they are transported to the
16 wholesale distributors. Mr. Marnin also obtains live shellfish harvested by third parties and
17 tribal harvesters from properties in which he has no ownership or leasehold interest. In both
18 cases, he stores in bags and tends live oysters on his tidelands that were harvested off-site until
19 they are transported to market. (Marnin testimony). The practice of storing live oysters in bags
20 on the tidelands is referred to in the shellfish industry as "wet storage." Wet storage is an
21

1 integral part of Mr. Marnin’s oyster operation and is a common part of shellfish businesses
2 falling into the category of “shellstock shippers.” (Marnin testimony, Bishop testimony).

3
4 5.

5 The Washington Department of Health authorizes and licenses activity in the shellfish
6 industry in three basic categories: (1) harvester, (2) shellstock shipper, and (3) shucker/packer.
7 (Ex. I1-5)(Downey testimony). Under applicable regulations, harvesters can only sell shellfish
8 to shellstock/shippers or shucker/packers. Mr. Marnin is licensed as a shellstock/shipper. (Ex.
9 I1-6). The shellstock/shippers often use wet storage to keep product obtained from third party
10 harvesters alive until it is moved to the wholesale market. Wet storage involves placing bags of
11 oysters in locations on the tidelands where they will be covered with water in a manner similar to
12 naturally occurring shellfish. When properly tended, the oysters generally survive well in wet
13 storage, with typical losses in the range of 1 to 2 per 122 oysters. (Marnin testimony). The
14 oysters continue to grow slowly during this period of wet storage. Wet storage is important to
15 both harvesters and shellstock/shippers. It is important to harvesters because they are prohibited
16 from selling their oysters to entities other than a shellstock/shipper or shucker/packer. (Downey
17 testimony). Wet storage is important to shellstock/shippers because it allows the oyster farmer to
18 accumulate an adequate supply of product to fill orders when tides or weather conditions
19 temporarily diminish the opportunity to collect shellfish. (Bishop testimony).

1 6.

2 Mr. Marnin engages in wet storage on his tidelands as a regular part of his operations.
3 He often has as many as 200 bags of oysters on the tidelands in wet storage. Bags of oysters are
4 typically stored for 24-72 hours, although it can be longer. The amount of time the bags remain
5 on the tidelands depends on a number of factors, including tidal conditions and market demands.
6 The bags are brightly colored, indicating the size of oyster in the bag, aiding Mr. Marnin in
7 inventory control. (Marnin testimony). Some of the neighbors find the brightly colored bags on
8 the beach aesthetically offensive and would like to see the practice stopped. (Hultz testimony).

9 7.

10 The ability to perform the tasks necessary to cultivate and harvest oysters and clams is
11 highly dependent on tides. Much of the oyster cultivation on the Marnin site is conducted
12 between the +2 and -1 tidal elevation. Growing racks are in deeper water, and wet storage and
13 clam production are located further up the beach at areas up to and beyond the 0 tide mark. Mr.
14 Marnin leaves unimpeded access to the upper 60 feet of the beach and waterward 60 feet of his
15 tidelands for public access. (Marnin testimony). Access to the oyster beds to seed oysters, to
16 tend the oysters, maintain the beds, move items in wet storage, and harvest the crop is only
17 available during low tide events. During some parts of the year, primarily the winter months, the
18 tides sufficiently low to allow access to the oyster beds occur in the middle of the night. (Ex. II-
19 8). During the summer, the lowest tides are often during the daylight hours. Fall and spring
20 have low tides that begin in daylight and extend into darkness or begin in darkness and extend
21 into daylight. A condition that prohibits working during the lowest tide of the day precludes the

1 oyster/clam farmer from accessing product to fill orders and prevents needed maintenance of the
2 beds and structures. Shellfish operations differ from geoduck operations because the tending and
3 harvesting of shellfish can only occur when low tides provide access to the tidelands. By
4 contrast, geoducks are harvested in deep water by divers and are not tended before or after
5 harvesting in the same manner as oysters. A restriction to daytime hours of operation does not
6 impair a geoduck operator's ability to access the product for harvest and delivery. (Bishop
7 testimony). On some days, the low tide only provides access to the tidelands for a portion of a
8 full working day. (Ex. I1-8). The working hours for an oyster/clam operation are set to coincide
9 with the lowest tide of the day. (Bishop testimony). Workers at the Marnin site generally come
10 from the Shelton area to work at the property, approximately 25 miles away. Splitting the
11 working hours on a given day would be a serious burden for the crew. (Marnin testimony). A
12 limitation or condition of operation that requires split shifts would make it difficult to recruit and
13 retain workers. (Marnin and Bishop testimony).

14
15 8.

16 Mr. Marnin has adopted work policies that are designed to minimize the impact his
17 operations have on the neighbors. He has workers use a wheelbarrow to move products on the
18 beach, rather than using a motorized vehicle. He has directed the workers to refrain from playing
19 music out loud and to avoid shouting or making loud noises while working on the beach. He has
20 moved the sorting function for clams and oysters from the beach to the garage on his property to
21 minimize worker's presence on the beach and limit associated noise. He has directed the

1 workers to use personal headlamps for illumination at night, and has discontinued the use of any
2 type of floodlight. (Marnin testimony). It is impossible, however, to eliminate all activity on the
3 beach at low tide and still operate a viable shellfish business. This results in some nighttime
4 activity on the beach during certain times of the year, primarily winter months. (Bishop
5 testimony).

6 9.

7 The visual impact of the shellfish operation varies, depending on the tide. The Board
8 visited the site during the minor low tide of a winter day, and the entire shellfish operation on the
9 tidelands was covered with water. Consultant Lee Boad, of The Wetland Corps, prepared a
10 report with a calculation to determine what percentage of the year the stacked growing racks
11 would be visible from adjacent areas. The racks are exposed to view when the tidal elevation
12 falls below 1.5'. The Boad analysis found that of the 730 total low tides in 2007, 299 receded
13 below an elevation of 1.5' (41%). Of these 299, 140 were daytime tides (19%). Because the
14 actual water elevation is below 1.5' for an average period of time less than 20 percent of an
15 overall tidal event, the report estimated the oyster racks would be visible at the water surface for
16 not more than 5-10 percent of any given year. (Ex. P-1). At the hearing, Mr. Boad testified that
17 the percent of time the racks were visible would increase if the racks were stacked on risers. If
18 the structures were 19" high, he estimated they could be visible up to 15-20 percent of any given
19 year, although he had not conducted a specific analysis of such a scenario. (Boad testimony).

1 10.

2 Mr. Boad's report also addressed whether the polyvinyl fencing or groin-like structures
3 on the site was causing beach erosion. Mr. Boad conducted three site reviews to assess
4 conditions on the tidelands. He concluded that "the features associated with the aquaculture use
5 of the subject property are not resulting in shoreline erosion that could negatively modify
6 shoreline function or habitat." (Ex. P-1). He noted no consistent sediment buildup or downdrift
7 erosion associated with the groin-like structures. He observed only a limited amount of updrift
8 sediment along one portion of the polyvinyl fencing. He concluded the situation was not
9 creating a detrimental shoreline impact. (Ex. P-1). No technical evidence or expert opinion was
10 presented controverting this conclusion.

11 11.

12 As the nature and extent of the Marnin oyster operations expanded, some of the
13 neighboring property owners became concerned with the impacts the use was having on the
14 beach environment and their enjoyment of the shoreline. The neighbors were upset by the
15 workers making noise on the beach, including noise during sleeping hours. They found the
16 bright bags of oysters and the polyvinyl fencing on the beach unsightly and inconsistent with the
17 natural shoreline views. The complaining neighbors were worried that employees were using the
18 septic system on site, which might not be adequate for that purpose, and were disturbed by
19 employees parking on the road right of way. They also raised a concern that sediment movement
20 on the beach was being harmed by the polyvinyl fencing and groins used in the shellfish

1 operation. The neighbors further considered the growing cages, poles, and fencing a hazard to
2 navigation in the water. (County Ex. 14).

3 12.

4 The complaining neighbors contacted Mason County and asked the County to investigate
5 whether Mr. Marnin had permits for the activities he was conducting on the property. After
6 some investigation, Mason County concluded that Mr. Marnin needed to apply for a shoreline
7 substantial development permit (SDP) and a shoreline conditional use permit (CUP) to continue
8 his shellfish operation.²

9 13.

10 The County considered the activities a substantial development based on interference
11 with public use of the water. The County required a shoreline conditional use permit because
12 floating structures were being used on the site and because the County found Mr. Marnin's sales
13 of oysters to wholesale distributors in Seattle and elsewhere to be commercial activity rather than
14 aquaculture. (County Ex. 1). Under the MCSMP, cottage industries are required to obtain a
15 shoreline conditional use permit. (MCC 17.50.060). At Mason County's direction, Mr. Marnin
16 and Ms. Cook filed the SDP and CUP applications for the shellfish operation.

17
18
19
20 ² Mr. Marnin also has a salmon and rainbow trout rearing operation on the site that he engages in as a hobby. The
21 County and State permit decisions on appeal in this case do not address the ponds, or other activities being pursued
to raise salmon and trout. This decision, likewise, omits substantive consideration of, or authorization for, the fish-
rearing activity. It should be noted, however, that throwing salmon or trout carcasses on the beach is probably ill-
advised, given the dissolved oxygen concerns present in Hood Canal.

1 14.

2 Mason County Planner, Kell McAboy prepared a staff report for the combined shoreline
3 applications. (County Ex. 1). The County's analysis concluded that the permit should be
4 approved with conditions to minimize the impacts to surrounding residential property owners.
5 The recommended conditions included: (1) adequate on-site parking for employees and
6 residents, (2) limit of five persons working on the premises at any given time, (3) marking
7 tideland boundaries for safety, (4) single dark color for mesh bags used for wet storage, (5)
8 limiting stacked growing cages to 3 high, not waterward of -2 tide and no more than 100 cages at
9 any given time, (6) removing groin-like structures in clam beds if experimental growing of clams
10 proves unsuccessful, (7) storing growing cages and floating structures out of view, (8) between
11 dusk and dawn, sorting and grading only in garage structure, limiting activity on the beach to the
12 minimum necessary to collect bagged oysters and wet-store sorted product, (9) maintaining one
13 sani-can on-site for employees use, (10) providing unimpeded public access to the upper 60 feet
14 of beach and lower 60 feet of tidelands (-2 tide to a -3.8 tide). (County Ex. 1).

15 15.

16 The case went before the Mason County Hearing Examiner, Phil A. Olbrechts. After a
17 hearing and site visit, the Examiner issued a decision approving the applications with conditions
18 that required significant changes to the shellfish operations. (County Ex. 34). The Examiner
19 included conditions similar to those recommended in the staff report relating to parking, number
20 of employees, marking the boundary, single color bags, limits on growing cages, storing

1 equipment out of view, unimpeded public access to the upper 60 feet of the beach and the lower
2 60 feet of the tidelands, and provision of a sani-can.

3 16.

4 The Examiner, however, added additional restrictions addressing the groin-like structures
5 which required the applicants to pay Mason County to hire a fisheries biologist or other qualified
6 expert to assess the impacts of the groins on fish and shellfish habitat and erosion and accretion
7 of adjoining properties. The groins would only be allowed to remain if they would create no
8 adverse impacts and if the applicant could establish the groins facilitate aquaculture operations.
9 The Examiner also placed a limit on the days and hours of operation, restricting outdoor work to
10 the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday. Employees were prohibited from
11 working out of doors on holidays recognized by the federal government. A limit was also
12 imposed on the number of weekly vehicle trips serving the property. The Examiner required the
13 applicants to remove all polyvinyl fencing and prohibited delivery of oysters by boat. (County
14 Ex. 34).

15 17.

16 The applicants and Mason County separately moved the Hearing Examiner to reconsider
17 several of the conditions/restrictions included in the decision. The contested conditions related
18 to requiring a study of the groin-like structures, limiting operations to weekdays, 8:00 a.m. to
19 5:00 p.m., limiting the vehicle trips, removing the polyvinyl fencing, prohibiting water delivery
20 of shellfish, and prohibiting colored mesh bags. (County Exs. 32, 33.).

1 18.

2 The Examiner issued an Order on Request for Reconsideration which placed more
3 stringent requirements on the project than the original decision. The prohibition on night work
4 was replaced with a system that allowed the applicants to work after sunset to compensate for
5 hours when tidal conditions prevented operations during normal business hours. (8:00 a.m. to
6 5:00 p.m.). This would result in some occasions when work could not be pursued for eight
7 consecutive hours and the workers would have to travel to the work site for split shifts.
8 Nighttime work was further restricted by a condition stating, “Noise on all parts of the property
9 attributable to work operations shall not be audible beyond the property lines, with the
10 qualification that occasional accidental noises shall be allowed and that noise may be audible on
11 adjoining intertidal areas or waterward of the ordinary high water mark.” (County Ex. 29).

12 19.

13 The Examiner’s Order on Reconsideration incorporated a new legal analysis of the
14 MCSMP in which he characterized certain activities associated with the operation as
15 “aquaculture” and others as “commercial” or “cottage industry.” The Order limited the
16 definition of aquaculture to the growing and handling of shellfish cultivated by the applicant on
17 his property or on leased lands. The Examiner characterized all other activities associated with
18 the Marnin shellfish operation as part of a cottage industry. This revised legal approach led to a
19 new condition prohibiting all wet storage of product received from third parties by truck on the
20 basis that the cottage industry provisions disallow outdoor commercial activities. Any water
21 deliveries (which were now allowed four times per month) could be wet-stored for no more than

1 24 hours. The Hearing Examiner concluded that the water deliveries were an inherent and
2 necessary part of engaging in a cottage industry. Actual water deliveries are rare in this
3 operation. During 2006, Mr. Marnin received approximately four deliveries by water. He
4 received no water deliveries during 2007. (Marnin testimony).

5 20.

6 The applicants appealed the Hearing Examiner's decision to this Board. The Pacific
7 Coast Shellfish Growers Association intervened in the case to address certain conditions the
8 association believed would significantly burden shellfish operations throughout the state. The
9 neighbors, Paul Matsenbaugh, Ken Nelson, and Rick Hultz intervened to express their
10 particularized interests in the conditions the Hearing Examiner placed on the project.

11 21.

12 Any Conclusion of Law deemed to be properly considered a Finding of Fact is hereby
13 adopted as such.

14 Based upon the foregoing Findings of Fact the Board makes the following

15 CONCLUSIONS OF LAW

16 1.

17 The Board has jurisdiction over the parties and the subject matter of this case pursuant to
18 RCW 90.58.180. The Board considers the case *de novo* (WAC 461-08-500(1)) and the
19 appealing parties have the burden of proving the permit conditions are inconsistent with the
20 Shoreline Management Act (SMA) or the Mason County Shoreline Master Program (MCSMP).

2.

The issues remaining for resolution at hearing included:

1. Whether the Marnin/Cook shellfish operation was properly required to obtain a shoreline substantial development permit and a conditional use permit for the activities being undertaken on the site?
2. Whether the permit condition limiting the employee hours of operation to specific days and times and the noise restriction were consistent with the SMA and the MCSMP, supported by substantial evidence, unreasonable or arbitrary?
3. Whether the permit condition limiting wet storage is consistent with the SMA and the MCSMP, supported by substantial evidence, unreasonable or arbitrary?
4. Whether the permit condition requiring removal of polyvinyl fencing is consistent with the SMA and the MCSMP, supported by substantial evidence, unreasonable or arbitrary?
5. Whether the permit condition restricting the color of mesh oyster bags is consistent with the SMA and the MCSMP, supported by substantial evidence, unreasonable, or arbitrary?

The appellants' objection to the permit condition limiting water delivery of harvested oysters to four times per month was withdrawn at the outset of the hearing.

The first issue is whether the activities the applicants are conducting on this site require any type of shoreline permit and, if so, which permit or permits are necessary. A “substantial development” cannot be undertaken on shorelines of the state without obtaining a permit from the appropriate regulatory entity. RCW 90.58.140(2). The SMA defines a development as:

‘Development’ means a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level.

RCW 90.58.030(3)(d). The applicants contend the shellfish operation is not a “development,” citing Attorney General Opinion 2007 No. 1.³ They argue that the equipment used on the tidelands presents no obstacle to public use of the surface water and that no permit is required because aquaculture is permitted outright on this site under the MCSMP. In fact, the stacked growing cages, rebar stakes protruding from the tidelands, polyvinyl fencing across the area, and stationary boundary markers do present a hazard to surface water users. Their presence changes the otherwise natural tideland surface and diminishes the usable water area. The presence of some moderately sized rocks in the vicinity does not obviate the impact the shellfish installation has on nearshore water users.

³ Attorney General Opinion 2007, No.1 addresses, in part, whether geoduck farms require a shoreline substantial development permit. The Opinion concludes that the need for a substantial development permit must be determined on a case by case basis. Each situation must be examined individually to determine whether the activities are properly considered “development” under the Shoreline Management Act. Interference with normal public use of surface waters is a key consideration in such an analysis.

1 4.

2 This case is similar in some respects to *Washington Shellfish, Inc. v. Pierce County*, 132
3 Wn. App. 239, 131 P.3d 326 (2006), where the Court of Appeals concluded that a geoduck farm
4 created barriers to public use of the surface water through its boundary markings and vertical
5 PVC pipes. The geoduck operation was considered a substantial development and was required
6 to obtain a substantial development permit. This requirement was imposed, despite the fact that
7 geoduck harvesting was “permitted outright” on the site. The court rejected the applicant’s
8 argument that a permit was not required for a “permitted” use stating:

9 Similarly, the PCC 20.24.030(A) clause that geoduck harvesting is
10 “permitted outright in all shoreline environments” does not absolve WSF
11 of the need for a shoreline substantial development permit. Instead, it
12 means simply that (1) geoduck harvesting, as contrasted with some other
13 use, like building a dock, for example, is permitted in these shoreline
14 environments; and (2) therefore, WSF need not apply for and obtain a
15 conditional or special use permit to harvest geoducks along its leased
16 shorelines.

17 *Washington Shellfish, Inc. v. Pierce County*, 132 Wn. App. at 255. The Marnin/Cook shellfish
18 operation is a major presence on the shoreline and presents an obstacle to full surface water
19 access just as the geoduck operation did in *Washington Shellfish*. Accordingly, the Marnin
20 shellfish enterprise is properly considered a shoreline development. The petitioners have
21 provided no evidence or argument that the cost of the tideland installations and associated
equipment fall below the criteria for a “substantial” development. Therefore, the applicants have
failed to meet the burden of proof for showing the operation is not a shoreline substantial

1 development. The development is properly considered substantial and a shoreline substantial
2 development permit is, thus, required.

3 5.

4 The next issue is which regulatory provisions govern the substantial development for this
5 activity. Mr. Marnin and the Shellfish Growers Association contend his entire operation is
6 aquaculture. Mason County and the neighbors allege that any activities extending beyond Mr.
7 Marnin planting, caring for, and harvesting his own oysters are commercial activity and must be
8 evaluated under the Cottage Industry section of the MCSMP, which require a conditional use
9 permit in addition to the SDP.

10 The MCSMP Use Regulations define aquaculture as follows:

11 Aquaculture involves the culture and farming of food fish, shellfish, and
12 other aquatic animals and plants in lakes, streams, inlets, bays and
13 estuaries. Methods of aquaculture include, but are not limited to, fish
14 pens, shellfish rafts, racks and longlines, seaweed floats and the culture
of clams and oysters on tidelands and subtidal areas. Excluded from this
definition are related commercial or industrial uses such as wholesale
and retail sales, or final process and freezing.

15 MCC 17.50.060. Aquaculture practices are defined to include:

16 Any activity directly pertaining to growing, handling, or harvesting of
17 aquaculture produce including but not limited to propagation, stocking,
18 feeding, disease and pest treatment, waste disposal, water use,
19 development of habitat, maintenance and construction of necessary
20 equipment building and growing areas.

1 MCC 17.50.040. By contrast, the definition of commercial development is: “The primary use is
2 for retail or wholesale trade or other business activities.” MCC 17.50.040. A cottage industry is
3 defined as small scale commercial or industrial activities on residential properties:

4 Small scale commercial or industrial activities on residential properties
5 performed in the residence or building accessory thereto. The principle
6 practitioner must reside on the property. Cottage industries are
7 considered as residential uses and minor commercial development and
8 substantial developments under this Master Program provided they do
9 not alter the character of the site as residential property and wholesale
10 and retail trade is minimal. Cottage Industries must comply with all
11 applicable County Ordinances and require a Conditional Use Permit.

12 MCC 17.50.040

13 6.

14 The controversy over which regulatory framework applies to Mr. Marnin’s operations
15 centers on the part of his operations that involve live oysters harvested off-site and/or by third
16 parties. The question is whether his receipt of live oysters harvested off-site by third parties, and
17 subsequent wet storage, sorting, and transporting of these live oysters to market is properly
18 considered aquaculture or commercial development under the MCSMP. The definition of
19 aquaculture in the MCSMP is broadly stated, as is the definition of aquaculture practices. The
20 handling and harvesting of aquaculture produce is included in the definition of aquaculture
21 practices. Mr. Marnin’s wet storage of live oysters received from tribal or third party harvesters
is a form of handling aquaculture produce. The oysters are tended during wet storage, which
requires proper placement in the tidelands and periodic turning while the bags of oysters are
awaiting final removal and delivery to wholesalers. The oysters are alive during this process and

1 are still growing, although the amount of growth occurring during typical periods of wet storage
2 is minimal.

3 7.

4 Mason County would exclude from the definition of “aquaculture” Mr. Marnin’s receipt
5 of oysters from tribal and third party harvesters based on the language: “Excluded from this
6 definition are related commercial or industrial uses such as wholesale and retail sales, or final
7 processing and freezing.” (MCC 17.50.060). This case is apparently the first time Mason County
8 has imposed the commercial designation on an aquaculture operation within the County. Neither
9 has it previously split an aquaculture operation into two distinct categories for regulation and
10 permitting. In fact, the analysis used to support the permit conditions changed significantly
11 between the original Hearing Examiner decision and the decision on reconsideration. At
12 hearing, Mason County’s planner on the case expressed some uncertainty over whether the
13 operation should be considered as commercial based on wholesale sales. In the absence of a
14 long standing and consistent position on the interpretation of its regulations governing
15 aquaculture, the County’s analysis is not entitled to the same measure of weight that it would be
16 given if the County had a well-established regulatory history on the topic. *See, Gaines v.*
17 *Employment Sec.*, 140 Wn. App. 791, 796, 166 P.3d 1257 (2007) (holding that when an agency
18 is charged with administering a special field of law, its construction of statutory words and
19 phrases should be accorded substantial weight.).

1 8.

2 Mr. Marnin's operation does not include a final processing or freezing plant under the
3 MCSMP aquaculture exception, nor do his activities include either final processing or freezing of
4 oysters. He sorts and ships live oysters to wholesale distributors. He does not shuck the oysters
5 or conduct any type of final processing. He simply sorts oysters, boxes, and ships them to the
6 wholesale market. He also has no facility for freezing them. No specific argument has been
7 made that the operation is excluded from aquaculture based on engaging in final processing or
8 freezing. Rather, Mason County excluded a portion of the operation from the aquaculture
9 definition because it considered receiving live oysters from third parties, wet storing the live
10 oysters, and transporting them to wholesale distributors as "related commercial or industrial uses
11 such as wholesale or retail sales." Mr. Marnin does not transact oyster sales at the site in
12 question. He has no retail outlet, and he does not provide oysters to wholesale customers at the
13 property. Instead, he transports all the oysters to offsite wholesale distributors in a truck -
14 including those oysters he both cultivates and harvests on-site, those he harvests from off-site
15 tidelands, and those he obtains from tribal/third party harvesters.

16 The activities Mr. Marnin conducts on the property are aquaculture practices such as
17 tending the live oysters growing on the tidelands, tending those growing in constructed cages and
18 tending those growing in mesh bags. He also sorts the live oysters. These activities do not lose
19 their nature as aquaculture practices based on the origin of the oysters or the length of time the
20 oysters are present on his tidelands. Mr. Marnin's business cultivates and handles live oysters
21 and transports them to market. Accordingly, the regulations governing aquaculture under the

1 MCSMP cover the range of activities he is undertaking, and they are the proper source for
2 conditioning the substantial development permit in this case.

3 9.

4 The Board's conclusion that the activities on this site are properly governed by the
5 aquaculture regulations, rather than commercial regulations is consistent with prior Board
6 decision in this area. In *Fisheries v. Mason County*, SHB 91-33 (1992), the Board rejected the
7 argument that proposed equipment and buildings pertaining to an aquaculture activity should be
8 regulated under the Commercial Development section of the MCSMP. The Board noted prior
9 cases recognizing aquaculture as a specific regulatory regime:

10 And in *Jamestown Klallam Tribe et. al. v. State of Washington,*
11 *Department of Natural Resources et. al.*, SHB Nos. 88-4/5 (1989), Order
12 on Motions for Summary Judgment, this Board, in determining the
13 proper "Use" category, held that the Aquaculture section of the
14 applicable master program was a section specifically directed to
15 aquaculture, which consequently, prevailed over the general Commercial
16 Development section.

17 From our own analysis of the Commercial Development chapter of the
18 MCSMP and from the analyses found in *Gruver* and *Jamestown*, we
19 conclude that the proposed project is not a Commercial Development as
20 defined in Chapter 7.16.040 of the MCSMP and that, therefore, the
21 conditional use permit requirement for that category is not applicable.

In the present case, the activities conducted on the Marnin site relate to aquaculture and not to
engaging in retail or wholesale sales on the property. *See also, Cruver v. San Juan Cy., Webb,*
SHB 202 (1976).

10.

Categorizing the shellfish operation as aquaculture does not mean the business can operate free from Mason County shoreline regulations. The MCSMP has a number of aquaculture use regulations designed to address the very legitimate concerns of water users and nearby residents including:

4. Aquaculture practices shall be located and conducted so as to provide reasonable navigational access to waterfront property owners and along the shoreline.

6. Aquaculture development shall not cause extensive erosion or accretion along adjacent shorelines.

10. Aquaculture structures shall be placed in such a manner, and be suitably marked, so as to minimize interference with navigation.

11. Aquaculture development shall be designed and constructed to harmonize as far as possible with the local shoreline environment and shall be maintained in a neat and orderly manner.

12. Proposed aquaculture developments shall make adequate provisions to control nuisance factors such as excessive noise and odor and excessive lighting.

MCC 17.50.060

11.

The Mason County staff recommended a number of conditions on this project based on the MCSMP's aquaculture use policies, cottage industry provisions, and shoreline conditional use permit requirements. The Hearing Examiner used the same criteria to impose conditions on the shellfish operation. Because the Board concludes that the entirety of Mr. Marnin's activities on the site are properly considered aquaculture, we also conclude the aquaculture use

1 regulations, but not the cottage industry provisions or the shoreline conditional use criteria, are
2 the proper source for conditioning the project. We next turn to the several conditions imposed
3 on the Marnin aquaculture enterprise that are in controversy.

4 12.

5 The Hearing Examiner decision limited operations on the tidelands to 8:00 a.m. to 5:00
6 p.m. on weekdays. Work was prohibited on weekends and federal holidays, and between the
7 hours of 5 p.m. and 8:00 a.m. This condition was imposed to prevent interference with the
8 neighbors' peaceful enjoyment of their waterfront during the early evening and nighttime hours.
9 It was patterned after a condition placed on geoduck operations in a Kitsap County case.
10 (County Ex. 29, p.6). On reconsideration, the Examiner acknowledged Mr. Marnin's need to
11 work during low tides and modified the restriction on work hours to allow work during darkness,
12 the same night, to compensate for access to the tidelands lost as a result of the work hours
13 limitation. The evidence showed that the actual work involved in oyster farming and other
14 tideland aquaculture is heavily dependent on the tides. The work area is only accessible for
15 seeding, tending, turning, maintaining, wet-storing, and harvesting when the tide is out far
16 enough to expose the beds and growing cages. Normally this occurs once a day during the
17 lowest tide of the day. During certain parts of the year, the lowest tide of the day occurs after
18 5:00 p.m. and before dark or before 8:00 a.m. The nature and extent of the impacts from the
19 aquaculture operations are self-limiting to the extent that tideland work is restricted to some
20 portion of the lowest tide of the day. A blanket prohibition on all work during the evening or

1 early morning hours does not adequately balance the needs of the aquaculture operation and the
2 interests of the neighbors.

3 13.

4 Shellfish aquaculture is different from geoduck aquaculture because it is necessary to
5 tend the beds and harvest the product during a low tide. Geoducks are harvested by divers in
6 deep water and such activity can be accomplished on a fixed schedule without harming the
7 aquacultural enterprise. Restricting work hours based on daylight alone fails to recognize the
8 unique influence tidal fluctuations have on shellfish propagation, maintenance, and harvesting.
9 The 8:00 a.m. to 5:00 p.m. limit on working in the tidelands would significantly harm a shellfish
10 growing operation.

11 14.

12 Aquaculture is a beneficial use of the State's shorelines which is encouraged by state and
13 local regulations. The State identifies aquaculture as an activity of statewide interest observing:

14 Properly managed, it can result in long-term over short-term benefit and
15 can protect the resources and ecology of the shoreline. Aquaculture is
16 dependent on the use of the water area and, when consistent with control
of pollution and prevention of damage to the environment, is a preferred
use of the water area.

17 WAC 173-27-241(3)(b). Mason County policies also recognize aquaculture as a beneficial use
18 of the shoreline providing:

19 Potential locations for aquaculture practices are relatively restricted due
20 to specific biophysical requirements such as water quality, temperature,
21 substrate, dissolved oxygen, and salinity. Priority should be given to
aquaculture uses in areas having a high potential for such uses.

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The County should strengthen and diversify the local economy by encouraging aquaculture uses.

(Ex. II-13, Mason County Comprehensive Plan, Page IX.4).

The Board concludes that the work hours and work days restrictions imposed in this case are unreasonable, and inconsistent with the recognized statewide interest in properly managed aquaculture, as set forth in Ecology regulations and the MCSMP. Restrictions which make successful aquaculture operations impossible should only be imposed if no other alternative can adequately assure compliance with shoreline regulations and attendant protections for nearby property owners. For shellfish operations, tidal cycles tend to both define when work can be done on the tidelands, and limit any resulting impacts on adjoining properties. During the summer, low tides and work on the tidelands occur primarily during the day. During the winter months, low tides occur primarily during the late night/early morning hours. During the fall and spring, the lowest tides often extend from daylight into nighttime hours or the reverse. In any event, the workable hours are limited by the tide to no more than eight hours per day and many times less than eight hours. Impacts on the neighbors are more adequately addressed by requiring less intrusive work practices than by imposing a complex work-time compensation formula. Likewise, when limited by reasonable conditions on work methods, no basis exists for prohibiting work in the tidelands on weekends or federal holidays. Accordingly, the condition limiting hours of operation and prohibiting work on all federal holidays and weekends should be

1 stricken. Work on the tidelands should be limited to the minimum necessary to effectively
2 pursue aquaculture, but in no case shall work on the tidelands or beach exceed eight hours per
3 day.

4 15.

5 The parties also dispute the conditions placed on nighttime operations. The Hearing
6 Examiner indicated lights within the intertidal area would be limited to headlamps. This
7 restriction has not been challenged and is an appropriate accommodation to allow work during
8 the night, while respecting the neighbors' desire to be free from unnecessary artificial light
9 during hours of darkness. The lighting restriction is affirmed, and the use of floodlights to
10 support operations on the tidelands is prohibited.

11 The Hearing Examiner also placed a condition prohibiting noise attributable to work
12 operations from being audible beyond the property lines, with a small exception for occasional
13 accidental noises. This standard is stricter than the noise requirements of the Mason County
14 Code applicable to residential uses. Sound waves do not stop at a property line and requiring
15 complete silence at the property line imposes a virtually impossible standard for tideland
16 aquaculture. While it is appropriate to protect the residential nature of the neighborhood, there is
17 no basis in the MCSMP for imposing a noise restriction that is substantially more severe than the
18 residential standard for noise applicable in the vicinity. The noise condition should be modified
19 to provide that at all times noise must be minimized to the maximum extent possible and that in
20 no case can noise exceed the applicable residential noise limit.

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16.

The Hearing Examiner’s decision on reconsideration prohibited wet storage of all product received from tribal/third party harvesters. The Board has concluded that handling and wet-storing live oysters is an aquaculture activity that can be conducted on this site. The Board finds no basis to regulate differently the wet storage of oysters cultivated and harvested on-site, those harvested off-site by Mr. Marnin, or those harvested off-site by third parties. The Examiner’s decision prohibiting wet storage on the tidelands should be stricken.

17.

The Hearing Examiner’s decision prohibited the use of poly-vinyl fencing on the tidelands. The evidence established that the poly-vinyl mesh fencing is not harming normal beach development processes, but it does pose an aesthetic issue. The dark material being used for the fencing is relatively unobtrusive and blends with the colors in the natural landscape. Polyvinyl fencing is being used to advance the aquaculture operations on the site. Under the facts of this case, a condition requiring Mr. Marnin to remove the fencing used to support his aquaculture activities on purely aesthetic grounds is unwarranted under MCSMP. The permit conditions should be modified to allow polyvinyl mesh fencing, no more than 12 inches in height, in furtherance of specific aquaculture objectives, so long as the polyvinyl material is dark in color, such as black or dark brown.

18.

The Hearing Examiner’s requirement to obtain expert analysis of any impact the groin-like structures might have on the beach has been fulfilled by the Boad report. The groin-like

1 structures have no significant impact and are allowable as long as they are being used to directly
2 support active aquaculture operations.

3 19.

4 The Hearing Examiner's decision held that mesh bags used to wet-store oysters on the
5 tidelands be unison in color and dark in color. Colored tags were allowed to identify the type of
6 oysters contained in the bags. Mr. Marnin claims the colored bags are important to keeping track
7 of his inventory. The brightly colored bags do present a distinct visual departure from the
8 naturally occurring material on the beach. Successful operation of the shellfish enterprise is not
9 contingent on use of the conveniently colored bags. MCSMP Aquaculture use policy 11 requires
10 aquaculture development to "harmonize as far as possible with the local shoreline environment."
11 The use of multicolored bags is acceptable if the colors are limited to those that blend into the
12 aesthetic of the beach and tideland environment, such as browns, tans, cream, and dark greens.
13 The Examiner's condition 4 is sustained as modified by this decision allowing multiple colors
14 within a range of natural tones.

15 20.

16 The Hearing Examiner's decisions placed a number of other conditions on the
17 aquaculture operation including: parking, number of employees working outdoors, boundary
18 marking, stacking growing cages, storage, unimpeded access to the upper 60 feet of the beach
19 and lower 60 feet of the tidelands, vehicle trips, and water deliveries. These conditions have not
20 been challenged in this case and are appropriate limitations for protecting neighboring property
21 owners and maintaining consistency with Mason County's aquaculture regulations.

1 21.

2 Mason County required a Shoreline Conditional Use Permit for the Marnin/Cook
3 shellfish operation because certain activities were considered a cottage industry. Under the
4 MCSMP, cottage industries are required to obtain a conditional use permit. (MCC 17.50.060).
5 Early in the permit process, a conditional use permit was also required based on Mr. Marnin's
6 use of floating structures for aquaculture. Mr. Marnin discontinued the use of floating structures
7 and is no longer seeking approval for such an installation. As a result, any requirement for a
8 conditional use permit would be based solely on the operation being categorized, in part, as a
9 cottage industry. The Board has concluded that the entire range of activities conducted on the
10 site fall within the ambit of aquaculture and aquacultural practices. As a result, the cottage
11 industry restrictions are inapplicable to the shellfish operation, and Mr. Marnin is not required to
12 comply with the cottage industry requirement to obtain a shoreline conditional use permit. As no
13 other basis has been suggested for requiring a conditional use permit for this project, the
14 requirement to obtain a conditional use permit for the aquaculture operation is overturned.

15 22.

16 Any Finding of Fact deemed to be properly considered a Conclusion of Law is hereby
17 adopted as such.

18 Based upon the foregoing Findings of Fact and Conclusions of Law, the Board enters the
19 following:
20
21

1 ORDER

2 The Shoreline Substantial Development Permit issued by Mason County in this case is
3 remanded to Mason County for reissuance in conformance with this decision. The permit
4 condition disallowing wet storage is stricken. The restrictions on days and hours of operation are
5 stricken. The restriction on noise is modified to be more consistent with residential noise
6 standards. The nighttime restriction on lighting is affirmed. The prohibition on polyvinyl
7 fencing is modified to allow fencing if it is being used for an aquaculture purpose and if it is dark
8 in color. The condition addressing the color of mesh oyster bags is modified to allow multiple
9 colors within a range of natural tones. Other permit conditions addressing parking, number of
10 employees working outdoors, boundary marking, stacking growing cages, equipment storage,
11 unimpeded access to the upper 60 feet of the beach and lower 60 feet of the tidelands, vehicle
12 trips, and water deliveries are affirmed.

13 DATED this 14TH day of January 2008

14 **SHORELINES HEARINGS BOARD**

15 KATHLEEN D. MIX, CHAIR

16 WILLIAM H. LYNCH, MEMBER

17 ANDREA MCNAMARA DOYLE, MEMBER
18 JUDY WILSON

O'DEAN WILLIAMSON

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Phyllis K. Macleod
Administrative Appeals Judge