Pierce County
Office of the Pierce County Hearing Examiner
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STEPHEN K. CAUSSEAUX, JR.
Pierce County Hearing Examiner

March 26, 2008

Taylor Resources, Inc.
Attn: Diane Cooper
SE 130 Lynch Road
Shelton, WA 98584

RE: ADMINISTRATIVE APPEAL: CASE NO. AA16-07, APPLICATION NO. 612676

Dear Appellant:

Transmitted herewith is the Report and Decision of the Hearing Examiner regarding your request for the above-entitled matter.

Very truly yours,

TERRENCE F. McCARTHY
Deputy Hearing Examiner

TFM/ca
cc: Parties of Record
PIERCE COUNTY PLANNING AND LAND SERVICES
PIERCE COUNTY CODE ENFORCEMENT
PIERCE COUNTY DEVELOPMENT ENGINEERING DEPARTMENT
PIERCE COUNTY PUBLIC WORKS AND UTILITIES DEPARTMENT
TACOMA-PIERCE COUNTY HEALTH DEPARTMENT
FIRE PREVENTION BUREAU
PIERCE COUNTY PARKS AND RECREATION
PIERCE COUNTY COUNCIL
PIERCE COUNTY RESOURCE MANAGEMENT

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OFFICE OF THE HEARING EXAMINER

PIERCE COUNTY

REPORT AND DECISION

CASE NO.:	ADMINISTRATIVE APPEAL: CASE NO. AA16-07 APPLICATION NO. 612676
APPELLANT:	Taylor Resources, Inc. Attn: Diane Cooper SE 130 Lynch Road Shelton, WA 98584
APPELLANT'S ATTORNEY:	Gordon Derr LLP Samuel W. Plauche 2025 1st Avenue, Ste. 500 Seattle, WA 98121
INTERVENERS:	Coalition to Preserve Puget Sound Habitat Case Inlet Shoreline Association Henderson Bay Shoreline Association Case Inlet Beach Association Protect Our Shoreline
INTERVENER'S ATTORNEY:	Bricklin Newman Dold LLP Attn: David Bricklin 1001 – 4th Avenue, Ste. 3303 Seattle, WA 98154
COUNTY'S ATTORNEY:	Jill Guernsey Deputy Prosecuting Attorney 955 Tacoma Avenue South #301 Tacoma, WA 98402
INTERVENER:	North Bay Partners
INTERVENERS' ATTORNEY:	Jerry Kimball 1200 5th Avenue, Ste. 2020 Seattle, WA 98154

SUMMARY OF REQUEST:

The appellant is appealing Pierce County's August 8, 2007, determination that shoreline substantial development permit, Case No. SD22-00 has expired and that a new permit is necessary. SD22-00 was approved on December 28, 2000, by the Pierce County Hearing Examiner to allow for the commercial planting, cultivation and harvesting of geoduck clams on private tidelands. The County has determined that the permit has expired and therefore does not allow continued activities relating to geoduck planting, cultivations and harvesting. Appellant disagrees and asserts that the permit may not have even been necessary in the first place. The site is on the east shore of Case Inlet/North Bay, located approximately one-half mile northwest of Joemma Beach State Park, in Section 8, 9, and 16 in T20N, R1W, W.M., in Council District #7.

SUMMARY OF DECISION: See Decision.

DATE OF DECISION: March 25, 2008

COURT REPORTER: Linda M. Grotefendt, CCR
James, Sanderson & Lowers

PUBLIC HEARING:

After reviewing Planning and Land Services Report and examining available information on file with the application, the Examiner conducted a public hearing on the request as follows:

Parties wishing to testify were sworn in by the Examiner.

The following exhibits were submitted and made a part of the record as follows:

1	Planning and Land Services Staff Report and attachments
2	Resume of Wayne Daley
3	Photographs taken by Wayne Daley
4	"Sustainable Shellfish Recommendations for Responsible Aquaculture"
5	"Effect of Shellfish Aquaculture on Fish Habitat"
6	"A Framework for developing 'ecological carrying capacity' mathematical models for bivalve mollusk aquaculture"
7	"A Review of the Ecological Implications of Mariculture and Intertidal Harvesting in Ireland"
8	"The Potential Impacts of the Commercial Geoduck (Panope generosa) Hydraulic Harvest Method on Organisms in the Sediment and at the Water Sediment Interface in Puget Sound"
9	Environmental Conservation pages 1-7

10	Letter from Tadas Kisielius to Examiner dated October 5, 2007
11	Pacific Coast Shellfish Growers Association "Geoduck Farming Is Good for Washington State"
12	DNR "Geoduck Clam Research and Management, Pacific Shellfish Institute Component Deliverable 3"
13	"Dirty Jobs" segment on Geoducks (not produced due to copyright protection)
14	Protect Our Shoreline Powerpoint
15	Letter from Department of Ecology to Roger Giebelhaus dated September 1, 2006
16	Seminar Document entitled Washington Sea Grant pages 1-111
17	Letter from Bill Dewey to Pierce County Council dated May 21, 2007
18	Analysis of geoduck farm obstruction and visibility during summer daylight hours from Memorial Day to Labor Day (Chart)
19	Shellfish Industry Goals and Research Priorities 2015
20	Spreadsheet of analysis of ACOE NWP 48 Report Forms
21	"Calculation of Fill Comprised of Plastic PVC Tubing in Tidelands for a One-Act Geoduck Operation"
22	Email from Wayne Polsson dated September 27, 2007
23	Geoduck Aquaculture Technical Meeting of August 31, 2006
24	Washington Geoduck Growers Environmental Code of Practice(ECOP)
25	Geoduck Growers ECOP Updated
26	"Material Removal From Beach"
27	Washington Department of Fish and Wildlife forage fish data, maps, and texts
28	NWP 48 with Regional Conditions
29	NWP 48 Terms and Conditions 9/07
30	Mark Luckenbach's Abstract
31	Duplicate of Exhibit "4"
32	Letter to Ty Booth from Gordon Derr dated 8/22/07
33	Second Substitute House Bill 2220
34	Sea Grant Brochure Bivalve Aquaculture and the Environment
35	Duplicate of Exhibit "16"
36	"The Cutability of Rock Using High – Pressure Water Jet" (16 pages)
37	Duplicate of Exhibit "11"
38	Effects of Geoduck Aquaculture on the Environment 2007
39	Duplicate of Exhibit "48"
40	Photographs of Foss Site
41	Comprehensive Literature Review of February 6, 2004
42	Concerns and Questions relevant to infaunal and epibenthic impacts of Geoduck aquaculture by Leitman/Detheier Data Group
43	Partial listing of studies used by Protect Our Shorelines
44	People for Puget Sound Policy on Geoduck Intertidal Farming 9/20/06
45	Letter from Protect Our Shoreline re: Comments on 2007 Geoduck Literature Review dated September 23, 2007
46	Letter to County Council from Robin Downey dated October 5, 2007

47	Resume of Jeffrey D. Parsons, PhD
48	Map of Foss Farm and Washington Shellfish Site
49	List of parcel numbers and property owners SD22-00
50	Metzger Map of Foss Farm
51	Geoduck Environmental Code of Practice (22 pages)
52	Photographs (A-P) of beach
53	Photographs (A-E)
54	Aerial Photo of Foss Farm location
55	Aerial Photo of Washington Shellfish location
56	JARPA Permit Application
57	County's Prior Staff Report
58	Hearing Examiner's Decision (environmental file dated December 28, 2000 from SKC)
59	Shoreline Management Substantial Development Permit SD22-00
60	Declaration of Robert C. Paradise Hearing Date July 3, 2003
61	Declaration of William A. Garrison
62	Verbatim Transcripts of Proceedings Monday, September 15, 2003
63	Verbatim Transcripts of Proceedings November 3, 2003
64	Certification of Administrative Record 32471-7-II
65	Washington Shellfish Case 132 Wn. App 239 131, P.3d 326 (2006)
66	Letter from Vicki Diamond to L.H. Hendricks
67	Email from Pat Prendergrass to Trish Byers
68	DFW Shoreline Management Act pages 1-9 AGO 2007 No. 1
69	Substantial Development Permit Decision dated January 19, 2007 Case No. SD53-05 (SKC)
70	Hearing Examiner's Amended Report and Decision dated January 19, 2007
71	Corrected Shoreline Substantial Development Permits
72	Memorandum of David Risvold to Kathleen Larrabee dated March 21, 2007
73	Email from Ty Booth to Vicki Diamond dated May 21, 2007
74	Notification of Puyallup Tribe
75	Photographs of SD22-00 dated July 6, 2007
76	Photographs of SD22-00 dated July 13, 2007
77	Email from Vicki Diamond to Jan Regan and Sue Larson dated July 13, 2007
78	Email from Dave Rosenkranz to Diane Ranes, Kathleen, Mitchell Brells and Vicki Diamond dated August 9, 2007
79	Department of Natural Resources email by Sarah Dzimbal
80	Letter from J. Pharris to K. Townsend re: AGO 2007 No. 1, Bricklin/Newman letter
81	Letter from the Department of the Army, Seattle District Army Corps of Engineers of Catherine Townsend
82	72 FR 11092-01
83	33 C.F.R. Section 322.2
84	Letter from Bill Dewey to Penny Dalton, Washington Sea Grant dated 9/28/07
85	Letter from Jeff Fisher to Dr. Rachel Waters dated 10/3/07

86	Letter from Representative Lantz to Attorney General dated 9/28/06
87	Letter from David Bricklin to the Thurston County Board of Commissioners dated 7/10/07
88	Commercial Geoduck Fishery Management Plan and EIS Departments of Fisheries and Natural Resources, 1985
89	SEPA Determination of Nonsignificance dated 1998
90	Preliminary Assessment and Corrective Action Plan dated 5/6/04
91	"Draft Programmatic Biological Evaluation of Potential Impacts of Intertidal Geoduck Culture Facilities on Endangered Species and Essential Fish Habitat"
92	Letter from R. Doenges to M. Taylor dated 1/3/07
93	Memorandum from R. Knust re: SEPA Lead Agency and MDNS dated 6/29/07
94	Habitat Conservation Plan for WDNR Geoduck Fishery dated July, 2007
95	Report from Golder to Taylor Shellfish (Summary Observations from Engineering Geological Reconnaissance - August 30, 2007) to Diane Cooper
96	"How Does Shellfish Farming Impact Puget Sound?" dated 9/24/07
97	Entrex Comments on Proposed Nationwide Permit D dated 11/2007
98	"Changes in Species Richness with Stocking Density of Marine Bivalves"
99	"Interactive Effects of Initial Size, Stocking Density, and Type of Predator Deterrent Netting on Survival and Growth of Cultured Juveniles of the Soft-Shell Clam"
100	"The Role of Oyster Reefs as Essential Fish Habitat"
101	"The Importance of Habitat Created by Molluscan Shellfish to Managed Species Along the Atlantic Coast of the United States"
102	"Effects of Shellfish Farming on the Benthic Environment"
103	"Environmental Management of Marine Aquaculture in Tasmania, Australia"
104	"Using Bioenergetics of Intertidal Oyster Populations as a Measurement of Anthropogenic Perturbations to Shellfish Growing Waters"
105	"The Role of Mussel and Mussel Culture in the Dutch Wadden Sea"
106	"A Comparative Evaluation of Habitat Value of Shellfish Aquaculture Gear" Vol. 23, No. 3 Pgs. 867-874 (2004)
107	"Benthic Macrofauna – Habitat Associations in Willapa Bay, Washington, USA"
108	"Suspension-Feeding Bivalves and the Fate of Primary Production: An Estuarine Model Applied to Chesapeake Bay"
109	"Influence of Shellfish Farming Activities on Nitrification, Nitrate Reduction of the Thau lagoon, France"
110	"Shellfish Water Quality Trends and Threats in Puget Sound"
111	"A Multidisciplinary Approach to Evaluating Impacts of Shellfish Aquaculture on Benthic Communities"
112	"Physical Disturbance and Marine Benthic Communities: The Effects of Mechanical Harvesting of Cockles on Non-Target Benthic Infauna"
113	"A Preliminary Study on the Effects of Oyster Culturing Structures on Birds in a Sheltered Irish Estuary"
114	"Hood Canal Salmon Enhancement Group 175 Mooluskan Study, Final Report 10/30/2006"

115	"Habitat Association of Estuarine Species" Volume 29, No. 6B, Pgs. 1150-1160
116	"Potential Indirect Effects on Shellfish Culture on the Reproductive Success of Benthic Predators"
117	"Testing the Potential Effects of Shellfish Farming on Swimming Activity and Spacial Distribution of Sole in a Mesocosm" Pgs. 1014-1028 (2006)
118	"Improving Marine Water Quality by Mussel Farming: A Profitable Solution for Swedish Society"
119	"Oyster Reef Restoration in Virginia, USA: Rehabilitating Habitats and Restoring Ecological Functions"
120	"Oyster Reef Habitat Restoration" Pg. 64-78
121	"Shellfish as the Impetus for Embayment Management"
122	"Influence of Oyster Culture on Water Column Characteristics in a Coastal Lagoon"
123	"Faunal Utilization of created Intertidal Eastern Oyster Reefs in the Southeastern United States"
124	"Comparative Use of Longline Oyster Beds and Adjacent Tidal Flats by Shorebirds and Waders on Humboldt Bay, California"
125	"Effects of Filter-Feeding Oysters on Sedimentation Rates and Phytoplankton Species Composition: Preliminary Results of Mesocosm Experiments"
126	Study by Dr. Newell
127	Study by Dr. Newell
128	"Environmental Interactions of Bivalve Shellfish Aquaculture"
129	"Intertidal Culture of Juvenile Geoduck Clams: An Examination of Predator Protection Technology and Potential Environmental Interactions"
130	"The Impacts of Aquacultured Oysters, on Water Column Nitrogen and Sedimentation: Results of a Mesocosm Study"
131	"Macroalgae Growth of Bivalve Aquaculture Netting Enhances Nursery Habitat for Mobile Invertebrates and Juvenile Fishes" Vol. 336 Pgs. 109-122 (2007)
132	"Eelgrass is Great, but Shellfish Aquaculture is Better Marine Aquaculture and the Environment"
133	"Environmental Impacts of Shellfish Aquaculture: Filter Feeding to Control Eutrophication"
134	"The Transport and Fate of Suspended Sediment Plumes Associated with Commercial Geoduck Harvesting"
135	"The Effect of Manila Clam Cultivation on an Intertidal Benthic Community: The Early Cultivation Phase"
136	"Ecological Effects of Intertidal Manila Clam Cultivation" Observations at the End of the Cultivation Phase"
137	"Intertidal Clam Harvesting: Benthic Community Change and Recovery"
138	"Oysters and Clams Clean up Dirty Water"
139	"Assessing the Relationship Between the Ichthyofauna and Oyster Mariculture in a Shallow Coastal Embayment, Drakes Estero, Point Reyes National Seashore"
140	"Proposed Effluent Guidelines and New Source Performance Standards for the Concentrated Aquatic Animal Production Facility Point Source Category"

141	Final Supplemental EIS dated May 23, 2001
142	"Ecological Implications of Intertidal Mariculture, Observed Differences in Bivalve Community Structure Between Farm and Reference Sites"
143	"Keystone Species of the Estuary"
144	CV of Dr. Fisher
145	CV of Dr. Davis
146	CV of David Troutt
147	CV of Dave Findley
148	Resume of Lynn Goodwin
149	Email by Brad Murphy, Department of Ecology
150	Series of Photographs 1 through 44, Photograph 49
151	Photographs (adjacent to McCormick property)
152	Photograph of moonsnail
153	Email from Janney Pinneo dated 7/8/07
154	Large Aerial Photos
155	"Army Corps Establishes New Shellfish Permit" Newsletter National Shellfish Association
156	Photograph showing earthquake damage submitted by Ms. Rydell
157	Photograph showing beach after earthquake submitted by Ms. Rydell
158	Photograph of beach submitted by Ms. Rydell
159	Photograph of bank toward neighbor submitted by Ms. Rydell
160	Photograph of upland area submitted by Ms. Rydell
161	Notice of Appeal of Administrative Decision filed by Gordon Derr dated August 22, 2007, with attachments
162	Letter to Samuel Plauche dated August 29, 2007
163	Letter to Examiner from David Bricklin dated August 30, 2007
164	Stipulation and Proposed Order on Invention dated October 2, 2007
165	Letter to Examiner from Tadas Kisielius dated October 5, 2007
166	Witness List and Exhibit Listed submitted by Taylor Shellfish dated October 5, 2007
167	Letter to Counsel from Examiner dated October 15, 2007
168	Prehearing Order from Examiner dated October 15, 2007
169	Letter to Examiner from Jerry Kimball dated October 16, 2007
170	Intervener's Coalition to Preserve Puget Sound Habitat, ET Al's Opening Brief dated October 19, 2007
171	Intervener's Coalition to Preserve Puget Sound Habitat, ET Al's Witness and Exhibit List dated October 19, 2007
172	Witness and Exhibit List of Intervener North Bay Partners dated October 19, 2007
173	Pierce County's Witness List dated October 19, 2007
174	Taylor Shellfish – Summary of Expert Testimony dated October 19, 2007
175	Taylor Shellfish – Prehearing Brief dated October 19, 2007
176	Pierce County's Amended Witness List
177	Taylor Shellfish – Supplemental Witness and Exhibit List dated October 25, 2007

178	Email correspondence re: hearing dates and prehearing orders
179	Newspaper Article from Peninsula Gateway of October 31, 2007
180	Letter to Planning from Linda M. Grotefendt, Court Report dated January 16, 2008
181	Letter to Examiner from Samuel W. Plauche dated January 16, 2008
182	Letter to Examiner from Jerry Kimball dated January 17, 2008
183	Letter to Examiner from Jill Guernsey dated January 22, 2008, with attached proposed Findings of Fact
184	Intervener's Proposed Findings of Fact and Conclusions of Law and Declaration of Service submitted by David Bricklin dated January 22, 2008
185	Taylor Shellfish Farm's Post-Hearing Brief submitted by Samuel Plauche and Tadas Kisielius dated January 22, 2008 and Declaration of Service
186	Letter to Examiner from Jill Guernsey dated February 7, 2008, with attached SHB 07-021 decision
187	Letter to Examiner from Tadas Kisielius dated February 7, 2008, with attached SHB 07-021 Order on Reconsideration and Modified Findings of Fact, Conclusions of Law, and Order
188	Letter to Counsel from Examiner dated February 22, 2008

This matter came on for hearing before Terrence F. McCarthy on November 1, 2007. It was continued to November 2, 2007, and continued thereafter to December 13, 2007, and December 14, 2007. The record was left open until January 23, 2008, for purposes of parties submitting closing briefs and proposed findings and conclusions.

After opening comments, appearing was TY BOOTH who briefly summarized the staff report which, with its attachments, was marked as Exhibit "1" and admitted into evidence. This appeal is regarding shoreline substantial development permit Case No. SD22-00 which was applied for on July 10, 2000. A hearing was held on the request on December 6, 2000, and a decision approving the substantial development permit was issued on December 28, 2000. This December permit was the first shoreline substantial development permit issued for a geoduck farm in unincorporated Pierce County. This request was a new venture for Taylor Shellfish and it was a new venture for Pierce County Planning and Land Services. He then put on a slide show of photographs of the surrounding property area and the site. The Foss site is pretty much undeveloped. Its high bank waterfront acreage has a small cabin on it. This appeal centers around the five year expiration provisions of the Pierce County Code. The language concerning expiration of the permit in the December 2000, decision is a standard condition that is imposed on shoreline permits that are processed by the County. It is a broiler plate, that is automatically placed on every permit. Frankly, in looking at the language he originally felt that the permit was good indefinitely.

The purpose of this hearing is to discuss whether or not the permit expires after six years and whether or not a permit is even necessary. The applicant contends that they were informed that they had six years to establish their farm and once they established it that it would be good to operate indefinitely. The County contends that the operation

must have a new permit each and every five years; that shoreline substantial development permits have a life history of five years. His personal opinion is that once they establish their farm within six years they should be allowed to operate in perpetuity. There are provisions in the code where someone could seek revocation of the shoreline substantial development permit if they are not in fact following conditions. While that is his personal opinion he never did hold that out as being the position of the County. There have been many meetings within the Planning Department with regard to the overall issue of timing and his opinion was and is in the minority. The vast majority felt that there was a six year time period for establishment of the farm, but also that they could operate for no longer than six years.

He received a complaint about the farm continuing to operate after the expiration date and eventually a decision was made saying that the permit expires after six years. He supports the decision that was issued. If he did not, he could find employment elsewhere. If the applicant wishes to change the code there is a process here that is a legislative process to change the code. The elected officials need to address that issue. In the last couple of years we have had an unprecedented amount of correspondence, calls, emails, and everything regarding the entire geoduck industry. The County has a long history of requiring renewals for permits after six years. For example the Washington State Department of Natural Resources has two sites in Puget Sound where they essentially dump dredged materials. They come in every six years for new permits. DNR disposal sites are similar in that they both involve ongoing development. The geoduck farming continues on as does disposing of dredged material. The applicant has inserted into their appeal the issue of whether or not geoduck farms constitute development. He then went through his photo presentation demonstrating that the site is bordered on the north by a string of waterfront houses and on the south by Joemma State Park . He submitted numerous views of the operations in July, 2007. Thereafter he went through the language concerning a shoreline development permit as used in the report. He indicated that there may be a question about the definition of development and it is clear to him that this is a use. There aren't any buildings being built, however, maybe it isn't technically dredging, but it does involve inserting hydraulic wands 3.5 feet into the beach and liquefying the beach which causes turbidity. The silt dissipates throughout the beach and it is similar to dredging. It is not dredging though. They are doing a function similar to drilling in that they are inserting high pressure water 3.5 feet into the beach as stated before and liquefying it. They insert plastic PVC tubes into the beach at the beginning of the process but it is not drilling. They are not removing sand although they are displacing sand. When they displace the sand they also remove geoducks from the beach. They are placing obstructions on the beach. Photos speak to that. The cost of netting, tubes, labor, barges, fuel, etc. would exceed $5,700. They are asking that the Hearing Examiner uphold their decision. In giving his presentation he did acknowledge that he himself felt that there was no necessity for obtaining an additional permit, but after initially going through analysis as performed by their staff he determined that he was in error. Exhibit "67" was admitted into evidence. Basically it reads that authorization to conduct activities is limited to five years plus one year extension. Jeff Stewart of D.O.E. indicated that they thought that the development

was the planting, growing, and harvesting of clams. In other words, the permit gets a crop harvested. Exhibit "73" was admitted into evidence. Exhibit "77" and "78" were admitted into evidence. He stated that he made comparisons with regards to dredging and drilling; also removal of sand, gravel, and mineral; he also made a comparison to driving of pilings and placing of obstructions. He discussed that this is a project of permanent or temporary nature which interferes with the normal use of the shoreline. Exhibit "57" was admitted into evidence which is the Examiner's December decision. When the County went through the process of trying to determine its position with reference to the shoreline substantial development permit language it did consult with the Department of Ecology who indicated that they agreed with the decision as issued by the County. He did not analyze whether or not the placement of tubes and net with rebar was a structure. He corrected his prior testimony by indicating that the County's decision was issued on August 8, 2008. There was no official Department position as to an expiration date of a permit before August 8, 2008, although many permits were renewed every five years. There was no appeal from the original decision (December decision). The complete text of Mr. Booth's testimony is set out in pages 1-63 of the transcript of proceedings dated November 1, 2007.

Appearing was BRAD MURPHY from the Washington State Department of Ecology, Southwest Regional Office. He is a wetland and shoreline specialist. He reviews permits for both wetland and shoreline issues and provides technical assistance to local governmental agencies. They do not review shoreline substantial development permits. They review conditional use permits and variance permits. It was the position of DOE that if the timeframe for the permit (i.e. five years) had expired, they should be coming back in for a new/updated permit. Exhibit "149" was admitted into evidence. Mr. Murphy's testimony is set out on pages 64 - 80 of the transcript of proceedings dated November 1, 2007.

Appearing was VICKI DIAMOND who stated that she is the Supervisor of Pierce County Current Planning. She is responsible for subdivisions, administrative decisions, or any case that could go before the Pierce County Hearing Examiner. She is also responsible for providing technical support and advice at the Pierce County Development Center. She has been with the Planning Department since 1993. Mr. Booth is one of the employees she supervises. There has been a substantial amount of discussion about the expiration dates of shoreline development permits in conjunction with geoducks. After reviewing documentation, consultation with legal counsel, and numerous staff discussions, this department issued a formal opinion on August 8, 2007. There was no official administrative determination prior to that date. Her opinion was that there was no expiration once the use was initiated and established. Geoduck harvesting and aquaculture is something we have been learning about. It is new to us. The staff that handles shorelines was unsure as to whether or not the permit did expire. Mrs. Diamond's testimony is set out on pages 81-89 of the transcript of proceedings dated November 1, 2007.

Appearing was SAMUEL W. PLAUCHE, attorney at law, who briefly summarized their

position. There are two legal issues before you. The first of which is whether or not the substantial development permit that was issued to Taylor expired after five years. The question is; Did they put a five year expiration on the permit? That requires an interpretation of the permit language. The staff's previous interpretations are irrelevant. The second issue before the Hearing Examiner is; Does the appellant need to get a permit to continue their operations? Are there on-going operations development as defined under the Shoreline Management Act and under the Pierce County Code. According to the Attorney General, whether or not farms are regulated as development and require a permit is a case-by-case analysis. We need to look at the facts of each case. The County has determined that geoduck farming requires a shoreline substantial development permit and that those permits expire after five years. The County's interpretation, I think, is that they have to expire after five years. That interpretation puts all existing farms at risk. Mr. Plauche's opening testimony is set forth on pages 89-97 of the transcript of proceedings.

Appearing was DIANE COOPER, an employee of Taylor Shellfish in their regulatory compliance area. She is a liaison between the company and regulatory agencies. She ensures that Taylor Shellfish is complying with all regulatory requirements necessary for their operation of 9,000 acres of aquaculture. She also represents the company as well as the industry on a variety of advisory committees. Exhibit "54" was admitted into evidence. Exhibit "50" was admitted into evidence. When she applied for the permit she was applying for an on-going activity. She understood that the County understood that that was her request. It is stated on her JARPA application. She understood from the permit that she could install the farm and that there would be no reason to appeal that decision. The timeframe for planting and harvesting geoducks is four to seven years. The risk of a five year limit is that the rules could change and interpretation such as this could change. Thus, we could end up with a geoduck in the ground that we could not harvest. The AGO's opinion was directed to the Department of Ecology. The Department of Ecology has not adopted the AGO's opinion. She indicated that she has not received any complaints or telephone calls about the process in several years. Exhibit "48" was admitted into evidence. She compared their operation to the Washington Shellfish operation. There is no comparison between their location and the Washington Shellfish location. They are different in terms of area and potential for conflict. The Army Corp regulates geoduck farming. They regulate shellfish farming under either the dredge and fill, discharge and dredge and fill material under the Clean Waters Act, Section 4.04 or work in navigable waters under Section 10 of the Rivers and Harbors Act. Under their Act, the Army Corps of Engineers considers their tubes and nets to be a structure. The Seattle District Army Corps of Engineers has determined that the normal operation of geoduck farms does not necessary result in discharge of dredge and fill. Her JARPA application indicated that she is requesting a permit for the installation and on-going operation of a geoduck farm. Exhibits "68", "69", "70", and "74" were admitted into evidence. During her testimony she indicated they distinguished their operation from Washington Shellfish operations. They do not use floating rope, they use weighted rope that the drivers use to guide them along the bottom. They have one dive barge and then one barge for the harvest equipment and

product and a limited number of workers. They do flag the area to keep the other boaters out of the area pursuant to County ordinance. In terms of installation they insert the tubes into the soil, they plant the seed, then they cover the tubes with an area wide net which is staked down with rebar. They are farming 12 acres as they did at Washington Shellfish. The Army Corps of Engineers has denoted that geoduck aquaculture is an obstacle or other obstruction and therefore requires a permit. Initially there was a debris problem at the Foss site, but they have changed their methods. The net serves the purpose of keeping predators out. They also serve the purpose of securing the tubes in a location and not let them drift away. Based on her personal observations, the litter problem has been reduced significantly. At this particular site the harvest does occur within five years of planting. If they had planted the entire site in 2001 they could have harvested it within a five to six year limit. However, they did not because they did not have enough seeds. They replant areas as well as plant new areas. They replant almost immediately The cycle is about four years. The Federal aquatic farm registration process does not include scrutiny of the Shoreline Management Program issues and its process. Her testimony is contained in the November 1, 2007, transcript from pages 97-164.

Appearing was BRIAN PHIPPS who indicated that he is the geoduck manager for the applicant and stated that they always following the best management practices. Exhibit "51", geoduck and ethical code of practice was admitted in evidence. He oversees the day to day operation of the Taylor Shellfish geoduck farms and he is the one responsible for applying the best management practice and environmental codes and practice. He is responsible for the 56 leased and Taylor owned farms which are located in South Puget Sound. There is one farm in Hood Canal. He visits the farm twice a month. He has three managers under him, a maintenance crew, a harvest crew, and a planting crew. There are five different age classes of geoducks on the shore of Foss property. The property boundary to the south is Joemma Park. They started planting on the site in 2001 and have planted an area each year from 2002-2006. The timeframe between planting and harvesting varies from four to seven years. Food and growth dictate when the harvest will take place. They try to obtain two pound geoducks as that is what the market requests. There are about 900,000 geoducks planted on the Foss Farm which were planted between the years 2003-2006. They are probably 1.3 million pounds on the Foss Farm and the estimated value of these geoducks is between $15 and $20 million dollars. They start the process with installing tubes in the ground and then a crew will come through and put seeds in the tubes and canopy netting over the top. The net is staked into the ground with bent rebar which is shaped like a candy cane. Then six to 18 months later they will remove the tubes, more towards 18 months on the Foss Farm area. After they remove the nets and tubes there is nothing on the farm except for beach and the geoducks. Then they will come through in a few years and harvest the product. They mark the corners of the beds with a ½ inch PVC pipe which sticks out of the ground two to three inches when they are finished planting it. He then reviewed photographs contained within Exhibit "52". The predator nets are half inch squares which are staked into the ground. The nets are 50 foot by 50 foot in size. Exhibit "76" was admitted into evidence. The harvest crew consists of three to five

people who work four hours a day and approximately nine days while the tide is out. 75% of their harvest is beach and 25% is intertidal harvest. That is where the divers approach the geoduck as opposed to people on the beach approaching them. Exhibits "53" A, B, C, D, and E were admitted into evidence. These are photographs of the harvesting process. Exhibits "54" and "60" were admitted into evidence. 900,000 geoducks cover ten acres. In the harvesting process they harvest 3,500 to 4,000 pounds per day. Harvesting on the beach consists of the employee inserting a wand approximately 3 to 3 ½ feet into the beach and liquefying the row of geoducks so that the geoducks float to the surface. A barge is at the site for ten days to two weeks. Exhibit "75" was admitted into evidence. Within one to two tidal cycles after harvest the site will be relatively flat. It is soft to walk on, but you are able to walk on it a few minutes after harvest. The holes in the picture are representative of the end of each row. There was thereupon a discussion comparing their site with the Washington Shellfish site. He has never seen a windsurfer at Joemma State Park. Exhibits "64" and "58" were admitted into evidence. Exhibit "61" was admitted into evidence. People do recreate in the area of Foss Farm. They kayak and boy scouts come down in canoes and climb the bluffs. His testimony is contained on Pages 165-194 of the transcript of proceedings.

No further testimony was taken on November 1, 2007.

NOVEMBER 2, 2007

After opening remarks on November 2, 2007, BRIAN PHIPPS returned to testify. The purpose of the tubes and nets is to obstruct predators from getting into the geoduck seed. Some of the predators get caught in the nets. They usually don't leave the barge at the site for more than ten days at a time. On Exhibit "53" the harvester is standing in a hole which is about thigh deep.

Appearing was DOCTOR JEFF FISHER who stated that he is a managing principal for Pacific Northwest Operations of Environ International Operation. They are an environmental science and research consulting firm. He has assisted Taylor in evaluating various actions. He doesn't see the geoduck structures as blocking migratory pathways or creating types of obstructions for fish. He introduced Exhibits "100", "115", "117" and "120". Geoduck structures are not structures in the context of bulkheads. The tube field and the netting over the tube field provides a structured habitat for the geoducks. The gear used in raising geoducks acts as a structured habitat. The structured environment increases invertebrate density by 44 fold over the unstructured environment. Exhibit "141" was admitted into evidence. The system of harvesting does not remove sand rather it displaces it. It doesn't result in a significant net onshore transport of settlement. We have to remember when looking at the site after harvesting that you have removed many two pound geoducks. Harvest holes will be rapidly filled in the area of this farm because of the tide. The shellfish aquaculture gear provides a three dimensional structure from which the biogenetic community can develop. It is a structured habitat in the same context that the oyster reefs are structured habitats. The

structure is the combination of the tubes and the nets and the tying down of the same. His testimony is contained on pages 23-55 of transcript of proceedings of November 2, 2007.

Appearing was DAVE FINLEY, geologist, who stated that geoduck beds located along the intertidal zone may have some affect on beach processes in the form of locally retaining some beach sand in the area of the plastic tubes. However, there is no discernable difference according to him in beach mortality rates from pre-geoduck operations to the present. His testimony is contained on pages 55-61 of the transcript of proceedings.

Appearing was LESLIE FOSS who stated that she is an early childhood education teacher at Everett Community College. Her grandfather purchased the property which consists of 126 acres with one mile of beach. They have a little cabin and a rope swing. The cabin is 12 by 20. When the applicants were harvesting she didn't hear anything but singing from the harvesters. She indicated that the applicants regularly police the beach. They find debris on the beach from people using the park. People use the park as access to the Foss property. They find beer bottles and different glass debris on site. People in the park trespass all the time. The lease they signed with Taylor requires Taylor to comply with all applicable rules and regulations which includes presumably the Shoreline Management Act. The site is posted "No Trespassing". Ms. Foss' testimony is contained on pages 55-79 of the transcript dated November 2, 2007. Her family uses the cabin for recreational purposes.

Appearing was SHERI M. LUEDTKE who testified that she lives directly north of the Foss lease. Exhibit "150" was admitted into evidence. The tubes that are planted work loose and they find them on the beach. Geoducks are planted up to the north property line which is just adjacent to where the cabins start. If you look at Exhibit "150" #3 they are going to see many loose tubes. The nets get loose, the tubes get loose with tide action and before you know it the tubes are all over the beach. They can't use their float tubes and float with the current like they use to use before the planting of this area. She used to fish from an intertube with her feet hanging out and she can no longer do that. It is not safe. It is not safe to take your boat in the area that is planted because of the possibility of breaking or damaging your propeller. The same too with kayaking. While you can kayak you have to be careful of the depth of the water. She has seen sea life trapped under the nets. There used to be a lot of crabs on the beach, but there aren't anymore. They have disappeared since harvesting has started. The nets attract seaweed and the seaweed then starts baking in the summertime and lets off a horrible odor. This horrible odor is increased by the smell of dead fish and the time period during the summer of the low tide the odor is often hard to bear. She is concerned about the fact that Taylor does not mark their barges and does not mark any of their equipment. The barges when they come stay for weeks at a time and the nets that are placed over the tubes are not always secured and do not always cover all of the tubes.

There is a total absence of crabs and sea life that existed prior to the planting and

harvesting of this area. She took a photograph of the rebar that was there several days after it was photographed.

There is a great deal of recreational boating as well as commercial boating in the area. Joemma Park is one of the primary places to launch a boat on the western side of the Key Peninsula so they have motorboats coming by frequently. They also have a couple of youth camps in the immediate area, one to the north is a catholic camp and they have a couple different sailing vessels. They see a stream of boats coming by on Thursdays or Fridays heading north for the weekend. Jared's Cove, which is their destination, is probably ten miles from the Foss site. The barges came this winter (2007) and they stayed for weeks and weeks at a time. Barges would go away, but then they would come back. They were there so often that we thought they became part of the landscape. After harvesting you could sink six to ten inches in the sand if you are walking the beach. Ms. Luedtke's testimony is contained on pages 61-124.

Appearing was WAYNE DALEY who stated that he is a fisheries scientist. He walked the beach after harvesting and sank up to a point where he couldn't get his feet out of the sand without feeling like he was going to fall on his face. He observed dead animals under nets. He is a fly fisherman and the geoduck operation would definitely interfere with fly fishing. The geoduck structures interfere with the normal behavior of sand lances which are a forage fish that salmon use for survival. He has fished this area for years and he would not even try to fish the area for sea run for cut throat in the same manner that he has fished it previously. The lines and hook would obviously become entangled with the material in the area. These structures would definitely interfere with the normal behavior of salmon who would be normally working their way along the beach and utilizing the sand area. There is no question about the fact that aquaculture activities along our shoreline are causing tremendous stressors. That is why the governor has declared Puget Sound an area of importance. He is concerned about the intensive nature of geoduck farming on the beaches and on habitat. Foss Farm provides a unique area. It is a broad area of significantly altered habitat and there are many issues yet to be resolved with reference to the intensity of this type of commercial farming. Mr. Daly's testimony is contained on pages 61-156 of the transcript of November 2, 2007.

Appearing was JEFF PARSON who stated that he is an environmental consultant with training in civil engineering. He has walked the beach. It is a very sandy beach. It looked like a lot of the sand had been delivered there recently in the geological sense which means over the last decades. In walking the beach there was one area that was extremely soft on both of his visits and that was about 100 to 150 feet off of the beach immediately in front of John McCormick's property. He sunk six to ten inches covering my feet up to my shins. It was a very distinct area. This was an area of slough of the long shore in an area that basically had been harvested plus two feet on either side of the harvested area. The area looked to be liquefied. There was a large quantity of water seeping out of the beach. It is his understanding that the applicants inject water into the beach to fluidize the bed and allow the geoducks to float to the top as a method of

extraction. There are a number of areas where he noted seeps along the beach. He has never observed this degree of fluidation on a shoreline before. He has been involved in many different projects including projects for the Department of Fish and Wildlife. The harvesting operations that they are utilizing would be considered a dredging process. This is based on his experience of working with the Washington State Department of Fish and Wildlife on a habitat conservation plans. It is their theory that if a particular project has the environmental ramifications of another process then the process should be included and we should talk about it in our literature and review. In his experience of what he has seen as well as the photographs provided he sees no difference between harvesting and dredging. There is a particular kind of dredging that is called agitation dredging which is essentially shooting a water jet into the subsurface through any number of means and removal by a machine of the sediment. There is no difference between that particular kind of dredging process and the process that is used to harvest geoducks. This is the type of definition which the State Department of Fish and Wildlife uses and this is the definition that he teaches his students in college.

No further testimony was taken on November 2, 2007.

DECEMBER 13, 2007

Appearing was JOHN McCORMICK who resides to the north of the Foss property. His testimony begins on page 6 of the December 13, 2007, transcript. Before they started farming they were able to let their children run free. The sand is too soft and they are concerned about the children sinking in the sand. After they harvest there are bowl shaped pits along the beach. You actually sink anywhere from six inches to a foot and a half immediately after the harvesting. Since this process has started they have lost almost all of the sand in front of their house. The sand in front of his house has left the beach and appears to be deposited on the nearby spit which has grown dramatically.

Appearing was ROBERT PARADISE who testified concerning the impact of the geoduck operation upon their recreational uses of diving and sailboarding. He has, in the past, got caught in the geoduck nets and nearly drown. His has been diving for approximately 30 years of which 20 years have been on Puget Sound. He has been sail boarding for about 12 years. Nets are a hazard and are one of the main concerns of divers in the Puget Sound area. Divers have drown in Puget Sound when they have become entangled in the nets. He has dived in this area on occasion and he noticed dozens of broken tubes washed out into deep water, maybe 30 to 40 feet deep. Tubes don't float and they are thrown on shore, but when the current brings them out they sink. Thousands of tubes are commonly found in Henderson Bay. They have also found numerous tubes in the Joemma Park area. The visibility of diving ten to 15 feet south of the site is good, the visibility to the north of the site is very poor. The winds in the area are great for windsurfing. It is exposed to the south and the strong winds usually come from that direction. Any obstruction in the water is a hazard to windsurfing. In the Puget Sound primarily the only way of being injured is hitting something in the water. He dives several times a week and testified that this area is

also a hazard for anchoring a boat because of the possibility of getting tied up in the netting. The Foss area and Joemma State Park are great places for beginners to dive. The bay is very enclosed, it is safe, and doesn't deep very quickly. It is a great place to certify divers. He is a math high school teacher by profession.

Appearing was JANIE PINNEO who testified that she has a beach house close to the site. Taylor's testimony concerning no complaints about operations of the site is absolutely untrue. It is far from consistent with her recollection and knowledge. She does know that Sheri Luedtke has had contact with Diane Cooper with concerns. She has made calls and She actually wrote an email they sent out. She spoke to a foreman on the site about her complaints. When she was kayaking recently she was surprised to see them planting because she was under the impression that their permit had expired. She was also looking for marking on the nets and tubes and couldn't find any. She did find a large net, but it did not belong to the appellant. In her daily walking she found a large canvas sack that had four numbers on it. It is a sack that they used in harvesting. It was about a mile north of Camp Gallagher. She found a baby otter on the beach. The otter had a rubber band around his stomach that it was trying to get off. Obviously the band was from the Taylor Shellfish operations prior to their going to using single large nets. Their nets were not secured tightly. She could see that when she was kayaking. Things could get under the nets. The area is far from pretty. They avoid it when the tide is out. The workers do not clean up after themselves. They are always picking up geoduck garbage to include broken tubes, nets, orange crates, and bags. They have picked up piles of garbage. The photographs demonstrate how there are gaps in the netting where animals and fish can get under the nets and get caught. She has seen rebar standing out by itself. The rebar and the netting definitely interfere with kayaking in the area. The main thing it does affect is that you can't push off the sand as you would on a normal beach. She is a new kayaker and her husband doesn't like to be out in the middle by herself so the placement does affect her. She feels like it is her job to clean up after their harvesting. She is constantly picking up tubes and other materials left behind by the appellant and there is no one coming out and checking to make sure that garbage is picked up. It has become our job. Anytime you walk the beach you see garbage that has to be picked up. At the last community meeting there was another pile of garbage that people had collected. They haven't used the small nets in quite a while, but we are still picking them up as well as broken tubes and orange crates, nets, seedling bags. They had their annual and their was a pile of garbage they picked up that weekend. Ms. Pinneo's testimony ended on page 76 of the transcript of December 13, 2007.

Appearing was LAURA HENDRICKS whose testimony began on page 76 of the transcript dated December 13, 2007. Exhibit "26" entitled "Protect our Shoreline" was admitted into evidence. She indicated that the shellfish industry has made statements that the beaches are lowered one to two inches after harvesting. According to her calculations one inch equals a loss of 134 cubic yards and two inches equals the loss of 268 cubic yards of sand. That is 13 dump trucks for one acre of planting. Exhibit "21" was admitted into evidence. There are 18.62 cubic yards of tubes per acre or 868,586

cubic inches per acre. She introduced Exhibit "43" and "4". She is a member of Henderson Bay Shoreline Association. There are actually five or six different groups. Protect our Shoreline is a Thurston group. Case Beach Shoreline Association is another one. There is a Case Inlet Association and they are now working with the Jefferson County Association as well as an Anderson Island Association. They started out as concerned citizens that wanted to find out what aquaculture was and what it was doing. Their concern is how much habitat alteration and modification is each county going to allow in this state and what are the long term consequences of that alteration. There are impacts from the sky to the ground as a result of geoduck harvesting. If you look to the sky you see the impacts to the birds from nettings of the geoducks and oyster nets.

The Examiner asked the attorneys for their view of the issues before the Examiner and it was determined that the issues were whether the project meets the requirements for a substantial development permit and whether the permit that was issued in 2000 has expired. Exhibit No. "4" was admitted into evidence.

BRIAN PHIPPS was recalled to the stand to testimony. His testimony starts at page 95 of the transcript dated December 13, 2007. This farm is never completely covered in tubes. The only tubes currently on the site are the 2006 tubes. The soft area described by Dr. Parsons and Ms. Luedtke is a soft shrimp area. They staple their nests down every six feet with rebar. The overlay is a net that is 50 by 50. The substrate returns to a firm condition after two tide cycles. They are able to walk through it. Exhibit "153" and "154" A –E were admitted into evidence. He has met with Ms. Luedtke concerning debris issues and marking issues. Barges are used there and looking at our harvest records they were there about 40 days. Not 40 days in a row, but about 40 days in a time period from February – June. They also used little outboard boats with skiff with just an outboard on them.

Appearing was BILL DEWEY whose testimony begins on page 128 of the transcript dated December 13, 2007. He manages public affairs for Taylor Shellfish and he does the regulatory and water quality work. He works with the legislature and with various local, state, and federal governments with whom they interact. His recollection is that he invited people to call for tour of the site. People are welcome to visit at their own risk. He does not generally extend invitations on leased property. He disagreed with the testimony of Mr. Daley that the structures are totally unnatural and salmon would avoid them. He believes this type of structure serves as an aggregating device for fish. Exhibit "142" was admitted into evidence. His testimony was based in part upon oyster culture studies and the sand flat type environment. Species do not change their applicability. Algae raises up in the water column and stimulates eelgrass beds. Tubes create a smorgasbord type environment for salmon. It serves as an aggregating device. The mesh diameter is big enough for fish to go through the nets. The size of the net would not preclude sand lance penetrating the net. Exhibit "91" was admitted into evidence. He does not see a significant adverse environmental affect from geoduck cultivation and harvesting at the scale that it is currently being practiced. It is the tubes

and the nets that provide a protective environment for the geoducks.

Appearing was JONATHAN DAVIES whose testimony begins on page 173 of the transcript of December 13, 2007. He has a BA and a Masters in Environmental Studies and PhD in Fisheries Science from the University of Washington and he is a current Associate Professor with the U of W. He is an affiliate faculty member. He works as a researcher for Taylor Shellfish. Because of the higher energy situation of the wave action at this particular site bio deposits are simply flushed away. Geoducks result in increased filtration, reduced turbidity by reducing their cestode or planktonict. There is very little written about geoducks specifically. Geoducks are a clam. There is a great deal that is known about the effects from shellfish aquaculture on the environment. No studies have been done yet on the harvest effects. Exhibit "127" was admitted into evidence. The Segrant analysis indicates that there are many areas of concern that have not been adequately studied with reference to geoduck agriculture.

Appearing was LYNN GOODWIN who co-authored a 1985 environmental impact study about geoduck fishery. The average size of a geoduck in the wild is about 1/3 pound per square foot. The subtidal wild stock geoduck fishery is different in some ways and very similar in others ways to the intertidal fishery. They are not dramatically different.

No further testimony was taken on December 13, 2007.

DECEMBER 14, 2007

Appearing was DAVID TROUT who submitted Exhibit "146", his curriculum vitae. He indicated he was the National Resource Director for the Nisqually Indian Tribe. He is a biologist by trade. Geoduck aquiculture, if properly managed in proper areas and if it avoids critical areas for bate fish or other natural occurring features that are important for natural processes within the beaches or for survival of fish, can have positive aspects. Salmon ultimately feed on things that feed on materials that are reproduced by shellfish.

Reappearing was BRIAN PHIPPS who stated that they installed 100,000 tubes in 2002, roughly 50,000 in 2003, 100,000 were replanted in 2004, 60,000 to 70,000 were planted in 2005, and in 2006 roughly the same number 60,000 to 70,000. They average about 35,000 tubes per acre. Currently there are 50,000 to 60,000 tubes on site. There are about 900,000 geoducks on site. They can plant 20,000 ducks a day for five days with probably a six to eight man crew. A different crew installs the tubes. They can install about 10,000 tubes a day with a six to eight man crew. After they put the tubes in another crew comes in and plants. They can harvest an average of 3,000 pounds a day so a harvest of 60,000 pounds would take approximately 20 to 25 days. The crew for harvesting consists of three; two harvesters and one bander. They have 600,000 pounds per harvest over the year. As soon as a geoduck is pulled out they wash them, band them, and put them in a crate. They put a rubber band on them to keep them closed. Sound travels great distances at night. Conservations can be heard long distances at night.

Appearing was BRYNN RYDELL, a member of the Foss family, who introduced Exhibit "155" and "156" into evidence. Exhibit "153" was also admitted into evidence. She introduced photographs surrounding the Nisqually quake.

Reappearing was MR. McCORMICK to clarify his previous testimony.

No one spoke further in this matter and the Examiner took the matter under advisement. The hearing was concluded.

NOTE: A complete record of this hearing is available in the office of Pierce County Planning and Land Services.

FINDINGS, CONCLUSIONS AND DECISION:

FINDINGS:

1. The Hearing Examiner has admitted documentary evidence into the record, heard testimony, and taken this matter under advisement.

2. Notice of this request was advertised in accordance with Chapter 1.22 of the Pierce County Code. Notice of the date and time of hearing was published two (2) weeks prior to the hearing in the official County newspaper.

3. This hearing was opened on November 1, 2007, and continued to November 2, 2007. It was thereupon continued to December 13, 2007, and the hearing was completed at about 12:00 p.m. on December 14, 2007. The record was left open by the Examiner until January 26, 2008, for purposes of the attorneys preparing proposed findings and conclusions.

4. Taylor Shellfish has a leasehold interest in approximately one mile of shoreline in the Conservancy and Natural Shoreline Environments with the Rural (R10) zone classification. The site is located on the east shore of Case Inlet/North Bay on private tidelands located immediately north of Joemma State Park. The topography of the intertidal zone where Taylor wishes to plant and cultivate geoducks is relatively flat with a gradual slope. The project would not involve work on the adjoining high bank bluff located to the east. The site is owned by the Foss family and is improved with a small single family cabin and a rope swing.

5. On the 28th day of December, 2000, Stephen K. Causseaux, Jr., Hearing Examiner issued a decision granting Taylor's request for a shoreline substantial development permit to allow the commercial production of geoduck clams on this site. The decision of Mr. Causseaux contained several conditions.

Conditions 4 and 5 are the subject of this litigation; they provided as follows:

4. Construction or substantial progress toward construction of a project for which a permit has been granted pursuant to the Act must be undertaken within two (2) years after the approval of the permit. Substantial progress toward construction shall include, but not be limited to the letting of bids, making of contracts, purchase of materials involved in development, but shall not include development or uses which are inconsistent with the criteria set forth in WAC 173-14-100. Provided, that in determining the running of the two (2) year period hereof, there shall not be included the time during which a development was not actually pursued by construction and the tendency of litigation unreasonably related thereto made it reasonable not to so pursue; provided further, that local government may, at its discretion extend the two (2) year time period for a reasonable time based on factors, including the inability to expeditiously obtain other governmental permits which are required prior to the commencement of construction.

5. If a project for which a permit has been granted pursuant to the Act has not been completed within five (5) years after the approval of the permit by local government, the local government that granted the permit shall, at the expiration of the five (5) year period, review the permit, and upon a showing of good cause, do either of the following:

    1. Extend the permit for one (1) year; or
    2. Terminate the permit; provided that nothing herein shall preclude local government from issuing Substantial Development Permits with a fixed termination date of less than five (5) years.

See Exhibit "1F".

6. On August 8, 2007, David Rosencranz, Assistant Director, for the Department of Planning and Land Services forwarded a certified letter to Taylor indicating that the shoreline substantial development permit issued on December 28, 2007, the permit had expired. He stated in pertinent part:

> "Planning and Land Services has reviewed this matter and concludes that the permit was issued for five years, and that a

one year extension was granted. Thereby extending the life of the permit to six years. Accordingly, the permit has expired and further work at the site will require application for approval of a new shoreline substantial development permit. See Exhibit "1D". To support his decision Mr. Rosencranz cited RCW 90.58.143(1) and (2) and (3) and (4). He also cited WAC 173-27-090, Pierce County 20.76.030(G), and WAC 173-27-090(3). Mr. Rosencranz also relied upon an opinion of the Attorney General 2007 AGO No. 1 and *Washington Shellfish Inc. v. Pierce County*, 132 Wn. App 239 (2006).

See Exhibit "5" which is hereby incorporated by reference as though fully set forth.

7. The August 8, 2007, letter issued by Mr. Rosencranz was probably initiated by a petition filed by neighbors to revoke the permit issued herein. The petition was filed on the 2nd day of July, 2007. The petition alleged that there was no provision for extending shoreline substantial development permits beyond six years, that it had been more than six years, that the petitioners were neighbors of the project, and that the project was operating on an expired permit. See Exhibit "1C".

8. On August 22, 2007, Taylor filed an appeal of the Administrative Determination issued on August 8, 2007, by David Rosencranz. Within the petition they alleged that Taylor's geoduck farming activities at the Foss site do not constitute "development" under the Shoreline Management Act and in support of this position they cited AGO 2007-001. They allege that Foss Farm does not substantially interfere with the public use of the waters and is therefore not "development". They allege in the petition that while they initially filed the request for a shoreline substantial development permit they basically just filed the request to cooperate with the County. They really did not believe one was necessary. They also alleged that Taylor completed the development of the Foss Farm within five years stating namely that they established boundaries of the farm, planted the areas appropriate for geoduck culture with geoduck seeds, registered the farm with the Department of Fish and Wildlife, and notified potentially affected tribes that they had established an artificial shellfish bed and that Taylor had initiated a regular rotation of planting geoduck at the established farm. In part, Taylor relied upon statements made by County officials outside of their official capacity. See Exhibit "1A". Taylor alleges that the administrative determination was based on the onerous premises that on-going planting and harvesting operations at the farm constitute development.

9. The revocation request filed by the neighbors was withdrawn prior to hearing.

10. This appeal involves two issues; first Taylor argues that the permit has not expired as they have met conditions 4 and 5 by establishing a geoduck farm

within the required timelines as such Taylor argues that the farm is allowed to continue in perpetuity. Second, Taylor argues that the establishment and operation of a geoduck farm does not constitute development and therefore a shoreline substantial development permit was not necessary in the first place.

11. The appellant, Taylor, has the burden of proving the decision of Mr. Rosencranz dated August 8, 2007, was clearly erroneous. See Pierce County Code 1.22.090(G).

12. Pursuant to Pierce County Code 1.22.090(H) the Examiner may reverse or affirm wholly or in part or modify the administrative official's order, requirement, decision or determination. If the Hearing Examiner reverses the administrative official's decision the entire action shall be remanded to the administrative official for an action consistent with the Hearing Examiner's decision.

13. County staff has argued that Taylor's permit expired five years after it was granted with an additional one year extension thereby extending the expiration date to February 12, 2007, six years after it was approved by the Department of DOE.

14. The beach along Case Inlet north of Joemma Beach is located within the Conservancy and Natural Shoreline Environments of the Shoreline Master Program of Pierce County (SMP). The Conservancy Environment is designed to protect, conserve, and manage existing natural resources and valuable historic and cultural areas in order to ensure a continuous flow of recreational benefits to the public and to achieve sustained resource utilization. The general regulations and policies of this environment encourages development which maintains the existing character of the area and which does not consume the natural physical resource base. The Natural Environment is intended to preserve those dynamic natural systems in a manner relatively free of human influence and to discourage or prohibit those activities which might alter the natural characteristics which make these shorelines unique and valuable. General policies and regulations of this environment provide that all developments which would potentially degrade or significantly alter the natural character should be regulated. The main emphasis of regulation in these areas should be preservation of the natural systems and resources which would not allow man to consider any type of development which will affect the natural condition of the area. Physical alterations should only be considered when they serve to protect a significant, unique or highly valued feature which might otherwise be destroyed. Geoduck aquaculture is relatively new to the area and the citizens are extremely concerned about the impact of geoduck aquaculture on the environment. It is these general policies and regulations of the Natural Environment that bring the citizens forward to argue for regulation and scrutiny of the geoduck operations. Intertidal geoduck operation is in its infancy. Basically the scientists have indicated that they borrow from studies of other types of clams. This is the

information which creates the background for geoduck operations today.

15. The Pierce County Master Program regulates environments as well as uses. On Page 21 of the Master Program it states that the policies and regulations of each use activity have been developed on the premise that all appropriate shoreline uses require some degree of control in order to minimize adverse affects to the shoreline environment and adjoining properties. Each project which falls within the jurisdiction of the Act will be evaluated to determine its conformance with the policies and regulations of the appropriate use activities. Aquaculture practice is listed on page 22 of the master program. It provides that the use of shoreline areas for aquaculture should be encouraged for the production of commodities for human consumption and utilization. Aquaculture operations should be encouraged to locate and operate in a manner which would preclude damage to specific fragile areas and existing aquatic resources. These operations should generally maintain the highest possible levels of environmental quality. It also provides that the processing of aquaculture products should not have significant detrimental effects on the adjacent water areas and wetlands. Use provisions also provide that recognition should be given to the possible detrimental impact aquaculture development might have on the visual access of the upland owner and on the general aesthetic quality of the shoreline area. As aquaculture technology expands with increasing knowledge and experience, preference should be placed on underwater structures which do not interfere with navigation or impair aesthetic quality of the Washington shoreline.

16. Pierce County Code 20.24.030(A) of the Pierce County Shoreline Management Use Regulations states as follows:

> Subject to the guidelines for reviewing substantial development permits geoduck harvesting is permitted outright in all shoreline environments.

Pierce County Code 20.24.030(C) provides that "aquaculture operation and the placement of land based structures are permitted subject to the guidelines for reviewing substantial development permits". Aquaculture operations which involve the development of land based structures are allowed as conditional uses and subject to the guidelines for reviewing substantial development permits.

17. Pierce County Code 20.24.030(D) provides with reference to the Natural Environment that aquaculture operations are limited to fishing and harvesting of wild and planted stocks for recreation and commercial purposes. Operations which do not involve the placement of structures or fill in the aquatic or terrestrial environment will be allowed as a conditional use upon the showing that the activity will not substantially change the character of the site or adversely affect natural populations and shall be subject to the guidelines for reviewing

substantial development permits. Operations involving structural developments are prohibited.

18. Pierce County Code 20.24.020 contains the guidelines for reviewing substantial development permits for aquacultural activities. Within the provisions of Pierce County Code 20.24.020(A) are 15 guidelines to be used in the granting of shoreline substantial development permits. Within those 15 guidelines are provisions that aquaculture operation shall be conducted in a manner which precludes damage to specific fragile areas and existing aquatic resources. These operations shall maintain the highest possible level of environmental quality and compatibility with native flora and fauna. There was a substantial amount of concern registered by adjacent neighbors about the environmental quality of these operations. Ms. Luedtke testified about the odor that arises from the nets during the hot summer days. The seaweed, dead fish, and other things get caught in the net and on real hot days the odor from them is tremendous. There was also concern that the absence of crabs after the liquefaction of the beach. She also described the fact that the tubes which are implanted in this process escape and litter the beach. Pierce County Code 20.20 contains introduction to use activities for the shoreline. Basically it indicates that the regulations for each use activity had been developed on the premises that all appropriate shoreline uses require some degree of control in order to minimize adverse affects to the shoreline and property. Provisions cited thus far clearly indicate that a shoreline substantial development is required for aquaculture activities. Pierce County 20.04.090 provides a definition of "permit" as a substantial development permit that is issued in compliance with the Shoreline Management Act of 1971. Wherever the term "permit" is used throughout the Shoreline Management Use Regulations the term refers to a shoreline substantial development permit.

19. Pierce County Code 20.02.030 provides that hereafter no 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 waters overlying land subject to the Shoreline Management Act of 1971 shall be undertaken in compliance with the provisions of this title and then only after the securing all required permits. Permit as used in this provision is a shoreline substantial development permit by definition. Pierce County Code 20.04.640 provides that a substantial development is any development of which the total cost or fair market value exceeds $2,500 or any development which materially interferes with the normal public use of the water or shorelines of the state...

20. During the hearing process there was substantial testimony trying to distinguish the Foss operation from Washington Shellfish or trying to bring it within the confines of the decision of the 2007 AGO No. I Attorney General. During the hearing process Brian Phipps, geoduck manager, testified that Taylor uses the

Best Management Practices and follows the Geoduck Environmental Code of Practice, Exhibit No. "51". He indicated that Taylor has 56 leased and Taylor owned farms which it operates. They surveyed this site in 2000 and planted in 2001. They visit the farm twice a month. He has three managers he works with, one manager manages the maintenance crew, the second a harvest crew, and the third a planting crew. Their property boundary on the site is Joemma State Park. They have five different age group classes currently on site. After planting the tube is exposed two to three inches. They use a 50 by 50 net that is staked every six feet with a candy cane shaped bent rebar. Their harvest crew consists of three to five people who work four hours a day nine days in a row while the tide is out. They use different approaches for harvesting both the beach and the subtidal approach. Seventy-five percent of the harvest is done by beach and 25% by intertidal harvest. After harvest the beach will drop one to two inches in height. Inserting tubes is the beginning of the farming process. During harvesting process each individual will remove approximately 300 pounds of geoduck per day. The harvest will last approximately ten days. A barge will be there with equipment for ten days to two weeks. They harvest from late April to May. Harvesting is performed 800 yards from the State park. The property is posted "Private Property" although Ms. Foss did indicate that people do trespass and use the property. If they have enough seed they will plant 70,000 geoduck each year on the site. One acre of planting contains 35,000 tubes. They plant a total of 10,000 tubes per day for five days in a row. The process is started by the crew which puts in 10,000 per day. After that a crew comes in and plants geoducks. They plant 20,000 per day. It takes an eight man crew five or six days to plant the geoducks. Thereafter they spread netting over the tubes and secure them by rebar. In 2002 they planted 100,000 geoducks, 2003 - 50,000, 2004 – 100,000, 2005 – 60,000 to 70,000, 2006 – 60,000 – 70,000 geoducks. A lot of the planting depends on the number of seeds available. However, the normal calculation is one acre equals 35,000 geoduck. If fully planted this site would contain 420,000 geoducks on 12 acres. Geoducks sell for approximately $10.00 per pound. This is a multi-million dollar operation.

21. People using the park for intertubing, kayaking, wakeboarding, watersking, boating could be carried by the current down to this area and it would be dangerous to those who ended in the area of this 12 acre site and needed assistance. The planted area would definitely would interfere with fishing and other recreational uses of the surfacewater. Particularly when the water was only one to two feet above the planted tubes.

22. There appears to be several different types of harvesting available for geoducks. The harvesting performed by Foss at this site is a harvest process where they liquefy the beach. Basically the geoducks are buried about 36 inches plus under the surface. The harvesters insert a wand into the sand about three feet plus in depth. They shot water into the sand where the geoducks are planted and they liquefy the beach. They continue to insert water in the area until the geoducks

float to the top. They move along one row after another. At the end of the row they will generally leave a deep impression which takes, according to testimony, most favorable to the applicants two to three tides to clear up. The photographs of the harvest process taken place at this site clearly indicate that during the planting process there is an interference with the use of the surface waters. There is also an interference with the use of the surface waters when harvesting takes place. The testimony indicates that when the tubes are inserted a net is stretched over them then the steel rebar is inserted to hold it in place. However, after the tubes and net have been in place for a while and there are storms on the water and whatever else occurs it appears from the photographs that the tubes are loosened, that they are no longer two to four inches in height and they appear to be substantially higher and many appear to be floating or loose. After a while the net appears to be covered with a green algae and the entire area is far from attractive. It is this scene which causes so much concern from the neighbors. The neighbors have complained about the absence of sea life after the beach has been liquefied. They have also complained about the odors and the appearance and the loose tubes floating in the area. There is little doubt that when this process starts everything is neat and clean, but as time goes on the tubes loosens and the acres of tubes become a floating mess. Photographs taken on September 4, 2006, clearly demonstrate floating tubes, green algae, fish life being caught under the nets, and a rubber band around an otter. The photographs also show pictures of the barges and other equipment used in the process. There is little to no doubt that kayaking in shallow waters in this area would be a problem for kayakers particularly when loose nets and tubes are floating. It also appears that this would be very dangerous to windsurfers and unsuspecting people viewing the beach area with boats to happen on to this 12 acre site. There is no issue presented to this Examiner about the cost being in excess of $5,000 nor does it appear to this Examiner that there is any issue about the fact that this operation clearly interferes with the normal uses of the Shorelines of the State at least temporarily. See *Clamshack v. Skagit County*, 109 Wn. 2d 91 and *Washington Shellfish*...

23. There was quite a bit of discussion about schematics and various terminology. Dr. Jeff Fisher, an expert brought in by Taylor, indicated that much of the information they were other using with reference to geoducks was gained through oyster studies and types of clams and shellfish. He indicated that these tubes create a smorgasbord type environment for sand lance and that the mesh size they use on the nets is large enough for small fish to get through. He believes that the geoduck aquaculture does not have a significant adverse environmental impact. In looking at the pictures from Mr. and Mrs. Luedtke he disagreed with her analysis that these were dead sea creatures, he believed that they were alive. She clearly testified based upon her observations when the photograph was taken that they were dead. His testimony was based upon looking at the photograph. He also disagreed with Mr. Paradise's testimony about visibility in the water although he was not physically present when Mr.

Paradise made his observations. He disagreed that the lack of visibility was caused by the harvesting process. He further testified that tubes and the netting are structures for geoducks. There are a variety of different types of structures that they use, but basically the tubes and the netting are a protective device and the structure that is used to provide a structured habitat to protect the geoduck from adverse elements in the environment. He further indicated that there is very little information about geoducks, but that there is a great deal known about the affects of the shellfish culture.

24. Alora Hendricks testified to the volume of material used in this process by the shellfish industry. She further indicated that if the beach was lowered by inch it would be a 134 cubic yards of sand. If it was lowered by two inches it would be 268 cubic yards of sand equivalent to 13 dump trucks of sand per acre. She indicated that the volume of tubes would be about 868,586 cubic inches per acre. She is a member of Henderson Bay Shoreline Association. They are concerned about the impacts of geoducks upon the environment and have started doing research in the area. They are concerned about the lack of studies concerning geoducks.

25. According to Megan N. Dethier, PhD, University of Washington, the harvest of geoducks from high density agriculture beds will involve near total liquefaction of the sediment of at least 50 cm. While organisms in the intertidal zone are adapted to small scale physical disturbances (from waves, ghost shrimp, crab pits, etc.). This large scale is not part of their evolutionary history. Other forms of intense habitat disruption, such as mechanical dredging for clams, have been outlawed. Intertidal holes are known to fill with sediment within weeks or months after small scale digging, but there has been no research on recovery of normal intertidal sediment characteristics after liquefaction. A very limited amount of research has been done on the subtidal geoduck harvesting on non-target species, but none in the intertidal zone where the native flora and fauna are completely different. Many questions arise.

26. Dr. Jonathan Davies appeared on behalf of Taylor who indicated that he works as a researcher for Taylor and he has a very impressive curriculum vitae. There is very little written about geoducks specifically. Geoducks are a clam. There is a great deal known about shellfish culture on the environment. There was testimony that this process is a form of dredging. Dredging has been defined by the Pierce County Code as removal of material from the bottom of a stream, river, lake, bay, or other water body. The issue would be whether or not liquefying approximately one acre of a beach from about three foot plus level in depth constitutes dredging. It definitely does result in the removal of geoducks from the bottom of the stream and it also results in a floating of sand from the area. It definitely does constitute removal of sand from the area although the amount is unknown it definitely does result in sand being displaced or removed.

27. When the tide is in the tubes and net obstruct the use of shallow waters of Puget Sound by watercraft like kayaks, canoe, shallow draft, motorboats, and intertubers and fisherman. The tubes and nets also obstruct use by windsurfers, divers, and fishers. The obstructive nature of operations increases during planting and harvesting when barges, workers, hoses, and other equipment are present.

28. A "structure" is a permanent or temporary edifice or building of any piece of work artificially built or proposed apart joined together in some definite manner. See *WAC 173-27-030(15)*. PVC tubes which Taylor installs in the beach join in a definite manner when they are planted in rows in sections and covered by a net to hold them in place.

29. Pierce County Code 20.76.030(G)(3) states that "authorization to conduct development activities shall terminate five years after the effective date of a permit. The Examiner may authorize a single one year extension as set forth in Subsection 2. above." WAC 173-27-090(2)(B) contains the identical language.

30. As the above indicates the decision of David Rosencranz issued on August 7, 2007, is supported by substantial evidence and the law and therefore the appeal of Taylor is denied particularly in view of the legislative findings set out in RCW 90.58.020 that the shorelines of our State are the most valuable and fragile of its natural resources and that is great concern throughout the state relating to the utilization, protection, restoration, and preservation. The law clearly sets out that permits are valid for five years and five years only. I do agree that the decision previously entered in this case does not specifically point out as it could that the permit is good for five years, but the law very clearly sets out that it is good for five years only.

31. The installation of thousands and thousands of geoducks upon this 12 acre site and the installation of thousands and thousands of tubes and the entire harvesting process clearly interferes with the use of the surface waters at least on a temporary basis. At least one scientist during the hearing indicated that this process is considered dredging by the scientific community. Another scientist has indicated that a net installed over a tube with rebar being used as a method of hold a net in place constitutes a structure. It is a structure which is designed to protect the lives of geoducks being raised. The Taylor Farm could accommodate a minimum of 420,000 tubes all covered with nets. It could accommodate three times that number of geoducks. Typically they place three to four geoducks in each tube. It is a multi-million dollar business that does interfere with the use of the surface waters. Certainly anyone who wishes to use the water and accidentally stubbles into this area could be in jeopardy. Pierce County has clearly identified aquaculture as being an area that needs a shoreline substantial development permit regardless of any other fact. Requiring a renewal of a permit every five years is not uncommon. There were numerous examples

submitted to the Examiner during the hearing process. The shoreline substantial development permit issued to Taylor Shellfish on January 18, 2002, identified the law which indicates that development activity must terminate after five years. Unfortunately the decision itself did not refer to that portion of the law. The appeal of Taylor Shellfish is herby denied and a shoreline substantial development permit is required for their operation of the Foss site.

32. It should be noted that on October 26, 2007, the Pierce County Council amended the provisions of the Pierce County Code Chapter 20.24 governing aquaculture operations. This chapter in the future will contain guidelines for the operation of geoduck aquaculture. Aquaculture operations are limited to fishing, raising, holding, and harvesting allowed in planted stocks for recreation and commercial purposes that do not involve the use of tubes, netting, or other materials placed in the intertidal areas. Aquaculture operations that do not involve the use of tubes, netting, or other materials placed in intertidal areas will be allowed upon the showing the activity will not change the character of the site or adversely affect the natural populations and shall be subject to the standards and guidelines for reviewing substantial development permits in the Urban and Rural Residential Environments. With reference to the Natural Environment aquaculture operations are limited to fishing and harvesting of wild and planted stocks for recreation and commercial purposes. Operations which do not involve planting in the intertidal areas the placement of structures are fill in the aquatic or terrestrial environment or the use of tubes, netting, or other materials placed in intertidal areas will be allowed as a conditional use upon the showing the activity will not substantially change the character of the site or adversely affect natural populations and shall be subject to the standards reviewing substantial development permits. Operations involving structural developments are prohibited.

33. Pierce County Code 20.24.030(B)(C) provides with reference to the Conservancy Environment that "aquaculture operations which involve the development of land based structures are allowed as conditional uses and subject to the guidelines for reviewing substantial development permits". It also provides that aquaculture operations which do not involve the placement of land structures are permitted subject to the guidelines reviewing a substantial development permit. As previously stated, these provisions clearly require a substantial development permit, it the opinion of this Examiner that this operation is located in part in the Conservancy Environment and a conditional use permit may also be required. Although this issue was not raised it appears to me that the language of the ordinance is perfectly clear.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.

2. The appeal of the letter written by David Rosencranz on August 8th (Exhibit "1D")

which is hereby incorporated by reference as if set forth in full and the appeal from the same is denied.

3. The appellant's assertion that a shoreline substantial development permit is not required for their operation even though they applied for them in the past is incorrect. A shoreline substantial development permit is required for their operation at the Foss site and they are required to renew the permit at least once every five years.

DECISION:

The appeal of the Taylor Shellfish is denied.

The appellants are required to obtain a shoreline substantial development permit for their operation at least once every five years.

ORDERED this 26th day of March, 2008.

TERRENCE F. McCARTHY
Deputy Hearing Examiner

TRANSMITTED this 26th day of March, 2008, to the following:

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PIERCE COUNTY PUBLIC WORKS AND UTILITIES DEPARTMENT
TACOMA-PIERCE COUNTY HEALTH DEPARTMENT
FIRE PREVENTION BUREAU
PIERCE COUNTY PARKS AND RECREATION
PIERCE COUNTY COUNCIL
PIERCE COUNTY RESOURCE MANAGEMENT

CASE NO: ADMINISTRATIVE APPEAL: CASE NO. AA16-07
APPLICATION NO. 612676

NOTICE

1. **RECONSIDERATION**: Any aggrieved party or person affected by the decision of the Examiner may file with the Department of Planning and Land Services a written request for reconsideration including appropriate filing fees within seven (7) working days in accordance with the requirements set forth in Section 1.22.130 of the Pierce County Code.

2. **APPEAL OF EXAMINER'S DECISION**: The final decision by the Examiner may be appealed in accordance with Ch. 36.70C RCW.

NOTE: In an effort to avoid confusion at the time of filing a request for reconsideration, please attach this page to the request for reconsideration.