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BEFORE THE HEARING EXAMINER
FOR MASON COUNTY

RE: Taylor Shellfish Farms)
Shoreline Substantial) TAYLOR SHELLFISH FARMS'
Development Permit) MOTION FOR
SHR2023-00003) RECONSIDERATION

I. INTRODUCTION

On October 9, 2023, the Hearing Examiner issued his Findings of Fact, Conclusions of Law and Final Decision (“Decision”) for Taylor Shellfish Farms’ proposal to install and operate a floating oyster bag farm in Oakland Bay, SHR2023-00003 (“Project”). The Decision approves the Project’s shoreline substantial development permit (“Permit”) subject to 26 conditions.

Taylor Shellfish appreciates the extensive time and attention that the Hearing Examiner has dedicated to reviewing the Project. Taylor Shellfish agrees with the Hearing Examiner’s Decision to approve the Permit, and it has no concerns with the vast majority of the conditions. Taylor Shellfish submits this reconsideration motion only to seek revisions to four conditions of approval in the Decision and removal of one condition. Three requested revisions are to incorporate changes that Taylor Shellfish identified

1 during the hearing process. *See* Exhibit 31 (requesting revisions to proposed conditions 9
2 and 12 in the Staff Report, which correspond with conditions 5, 13, and 16 in the
3 Decision). The remaining revision and request for removal are to two new conditions
4 added in the Decision and for which the Hearing Examiner invited input or proposals from
5 Taylor Shellfish (conditions 24 and 25).¹

6 For the reasons set forth below, Taylor Shellfish respectfully requests the Hearing
7 Examiner modify these conditions of approval in the Permit.

8 II. MOVING PARTY

9 The moving party is Taylor Shellfish Farms. Taylor Shellfish's address is 130 SE
10 Lynch Road, Shelton, WA 98584, and its telephone number is 360-432-3348. Taylor
11 Shellfish is represented by Plauché & Carr LLP, whose address is 1218 Third Avenue,
12 Suite 2000, Seattle, WA 98101, and its telephone number is 206-588-4188.

13 III. ARGUMENT

14 A. Conditions 5 and 13 Should Be Revised to Allow for Emergency Responses

15 Taylor Shellfish respectfully requests that the Hearing Examiner revise conditions
16 5 and 13 in the Decision as follows (proposed deletions are in strikethrough and additions
17 are in underline):

18 5. Except as otherwise provided, ~~All~~ vessel activity shall be restricted to
19 daylight hours, including weekends. No work at night shall occur other than
20 emergency responses and activities, which may be conducted at any time on an
as-needed basis. Work and vessel hours may extend to an hour before and after
21 daylight hours between October and April of each year.

22 13. Except as otherwise provided, ~~All~~ vessel activity shall be restricted to
23 daylight hours, including weekends. No work at night shall occur except that in
24 the months from October through April the Applicant's vessel activity may
25 occur one hour before dawn to one hour after dusk, and emergency responses

¹ Additionally, Taylor Shellfish notes that conditions 10, 11, and 12 appear to be duplicative of conditions 2, 3, and 4. Taylor Shellfish has no objection to these conditions but notes this in case the inclusion of all these conditions was unintentional and the Hearing Examiner prefers to delete duplicative conditions.

1 and activities may be conducted at any time on an as-needed basis, to the
2 extent consistent with the County’s noise ordinance.

3 As set forth in hearing Exhibit 31, and as Ms. Ewald testified at hearing, one of the
4 Project’s benefits is that it allows for most regular work to be completed during daylight
5 hours. Ex. 31 at 2; Decision, App. A at 11-12. Taylor Shellfish appreciates that conditions
6 5 and 13 currently allow for work and vessel activities to extend one hour before dawn
7 and one hour after dusk from October through April of each year. However, as set forth in
8 Taylor Shellfish’s August 8 letter and as described at hearing, Taylor Shellfish also needs
9 the ability to operate vessels at night on an as-needed basis in response to emergencies.
10 Ex. 31 at 2; Decision, App. A at 86-87. “Those emergencies would include situations that
11 must be addressed immediately in order to prevent loss or harm . . . or system failure due
12 to extreme weather or accidents.” Decision, App. A at 87.

13 There is no strong reason to prohibit vessel activity of this limited nature, and no
14 grounds for specifically disallowing this activity have been provided. Instead, there are
15 compelling reasons to allow it so that Taylor Shellfish can most effectively take actions to
16 protect the Project in the event of an emergency. *Id.* Further, allowing emergency
17 operations at night is important to maintain consistency with the Mason County Shoreline
18 Master Program (“SMP”). MCC 17.50.210(b)(M). Therefore, pursuant to Hearing
19 Examiner Rules of Practice and Procedure 2.30(b)(2)-(4), Taylor Shellfish respectfully
20 requests that the Hearing Examiner revise conditions 5 and 13 as set forth above to allow
21 for necessary emergency responses and activities at any time on an as-needed basis.

22 **B. Condition 16 Should Be Revised to Ensure Feasibility**

23 Taylor Shellfish respectfully requests that the Hearing Examiner revise condition
24 16 in the Decision as follows:

- 25 16. Debris or deleterious material resulting from installation and maintenance of
 the farm shall be removed from the project site and shall not be abandoned

1 along adjacent shorelines ~~or allowed to enter waters outside of the DNR lease~~
2 ~~boundary (Exhibit 9)~~. Equipment and structures shall also not be abandoned in
3 the shoreline area. Taylor Shellfish shall inspect project gear on a regular basis
4 (at least once per week), and if any gear is identified as missing, Taylor
5 Shellfish shall conduct patrols within 48 hours to collect such gear. Complaints
6 regarding debris shall also be responded to within 48 hours.

7 As set forth in hearing Exhibit 31, these revisions are necessary to ensure the
8 Project's permit conditions are reasonable and feasible. Ex. 31 at 2-3. Taylor Shellfish
9 takes its responsibility to secure, monitor, and maintain its aquaculture gear very
10 seriously. However, imposing a blanket prohibition on any project materials from leaving
11 the site—which is arguably implied by the prohibition against materials entering waters
12 outside of the DNR lease boundary—is not feasible for any type of project, and Taylor
13 Shellfish is not aware of such language previously being imposed for any use or
14 development within Mason County or elsewhere. Further, such a prohibition is
15 inconsistent with other approvals, including the programmatic Endangered Species Act
16 consultation, which acknowledges materials sometimes may leave a site despite operators'
17 best efforts and requires monitoring to retrieve debris. Ex. 14 at 3-4.

18 Given the interest in this farm and other considerations, Taylor Shellfish is willing
19 to conduct much more frequent monitoring than is currently required under the
20 programmatic consultation. As stated in the proposed revision above, Taylor Shellfish will
21 conduct regular inspections of the Project—at least once per week. Taylor Shellfish
22 anticipates that those inspections will not identify any gear that is missing and has left the
23 lease boundary. However, if any gear is identified as missing, Taylor Shellfish will
24 conduct patrols of the surrounding areas within 48 hours to collect such gear. Taylor
25 Shellfish will also respond to any complaints regarding debris within 48 hours.

A prohibition on any Project materials leaving the property's boundary is
unsupported by the record and would be infeasible for any type of shoreline use or activity

1 to guarantee. Taylor Shellfish’s proposed revisions to condition 16 are feasible and
2 advance the interests underlying the condition. Therefore, pursuant to Hearing Examiner
3 Rules of Practice and Procedure 2.30(b)(2)-(4), Taylor Shellfish respectfully requests that
4 the Hearing Examiner revise condition 16 as set forth above.

5 **C. Condition 24 Should Be Revised to Adopt a Specific Monitoring Plan**

6 Taylor Shellfish respectfully requests that the Hearing Examiner revise condition
7 24 in the Decision as follows:

8 24. ~~As outlined in Finding of Fact No. 5P, the Applicant shall pay for a third party~~
9 ~~qualified expert hired by the County to formulate a monitoring plan that~~
10 ~~monitors uncertain environmental impacts that are attributable to the proposal.~~
11 ~~The third party expert shall identify impacts that are potentially significant and~~
12 ~~reasonably uncertain due to gaps/deficiencies in scientific literature, regulation~~
13 ~~and/or the unique environmental conditions of the proposal. The monitoring~~
14 ~~plan shall include performance standards that trigger mandatory mitigation.~~
15 ~~Project impacts shall be limited to those not already subject to monitoring by~~
16 ~~other agencies. The impacts shall be those that can be reasonably assessed as~~
17 ~~attributable to the proposal and addressed by additional project mitigation.~~
18 ~~Installation of the proposal shall not be allowed until baseline conditions are~~
19 ~~measured as found necessary prior to installation by the third party expert. The~~
20 ~~Project shall be monitored pursuant to the October 19, 2023, monitoring plan~~
21 ~~developed by Confluence Environmental Company for the Project. If reports~~
22 ~~from such monitoring are required by, or provided to, other agencies with~~
23 ~~subject matter authority and/or expertise, the County may rely upon or~~
24 ~~coordinate with such agencies’ analysis in evaluating the reports and~~
25 ~~determining appropriate follow-up actions or mitigation, if any.~~

19 The Decision contains a thorough discussion of the Project’s anticipated impacts to
20 all issues of concern, Decision, Findings 5.A-5.O, and summarizes this discussion as
21 follows: “the record of this proceeding strongly supports the findings of no significant
22 adverse environmental impacts given the heavily regulated and researched aquaculture
23 industry and the detailed and compelling work of the Applicant’s biologist, Chris
24 Cziesla.” Decision, Finding 5.P at 28. Nonetheless, the Decision adds a new condition
25

1 requiring monitoring for the Project to address “arguably uncertain impacts,” primarily in
2 light of the setting and size of the Project. *Id.*

3 Condition 24 in the Decision does not set forth specific monitoring requirements.
4 Rather, it requires an evaluation to be conducted in the future to determine the appropriate
5 scope and extent of monitoring. Further, the Decision makes clear that a potential outcome
6 of that evaluation is that no additional monitoring would be required. Decision, Finding
7 5.P at 33 (“Given the thorough environmental review conducted by the Applicant and the
8 large number of aquaculture research studies, there should be no surprise if the
9 independent reviewer hired by the County concludes that no monitoring is necessary”).

10 The Decision provides Taylor Shellfish with another option for addressing
11 monitoring—namely, submitting a reconsideration request with proposed monitoring
12 conditions. Decision, Finding 5.P at 33 n.26. A proposed monitoring plan is included in
13 the October 19, 2023, memorandum attached as Appendix A to this reconsideration
14 motion. This monitoring plan has been developed by Chris Cziesla from Confluence
15 Environmental Company, who is highly qualified and has extensive experience
16 developing and participating in monitoring plans in Puget Sound. Ex. 34. The proposed
17 plan includes monitoring associated with all items of potential concern identified in the
18 Decision, using methods that are well accepted and/or that have been subject to peer
19 review. App. A. As such, this plan is likely more extensive than a plan to be developed in
20 the future, and it has the added benefit of providing certainty to the County and other
21 stakeholders as to the scope and extent of monitoring actions. Finally, consistent with the
22 Decision, condition 24 as revised would allow the County to rely upon or otherwise
23 coordinate with other agencies that have authority and expertise on the issues that are
24 subject to monitoring to reduce potential regulatory inefficiencies. Decision, Finding 5.P
25 at 31-32. Accordingly, Taylor Shellfish respectfully requests that the Hearing Examiner

1 revise condition 24 of the Decision as set forth above.

2 **D. Condition 25 Should Be Stricken**

3 Taylor Shellfish respectfully requests that the Hearing Examiner strike condition
4 25 in the Decision, which states as follows:

5 25. All visible floating project gear shall be green and/or blue in color. The oyster
6 bags may not be black as proposed.

7 Taylor Shellfish seeks reconsideration of this condition for multiple reasons and,
8 consistent with the Decision, is providing additional information addressing the viability
9 of utilizing green and/or blue gear instead of black gear. *See* App. B and App. C.

10 Green and/or blue gear is not currently available for this type of system. App. B at
11 1. All oyster bags—whether used for on-bottom, near-bottom, or floating cultivation
12 systems—in Washington State and, to Taylor Shellfish’s knowledge, elsewhere, are
13 composed of black plastics. *Id.* As Taylor Shellfish stated during the permit process, black
14 material is used because it is the most resistant to ultraviolet (“UV”) light, which can
15 potentially degrade plastics, and it can be produced with the most uniformity in color:

16 Except for navigation aids, the project will use colors and materials that
17 blend into the surrounding environment where practicable, provide the
18 highest UV resistance, and most uniformity. In particular, the project will
19 utilize black colors in the floating oyster bags. Advances in gear
20 development since publication of the aquaculture siting study have
21 improved the consistency and experience of aquaculture gear. Black-
22 colored gear is consistent in quality and viewer experience. It strikes an
23 optimum balance between blending into the environment while also being
24 sufficiently visible to ensure it can be safely avoided by recreational and
25 other users. In addition, black gear is more stable and UV-resistant
compared to blue and green colored gear. As a result, the project is
designed to minimize aesthetic impacts to the greatest extent feasible, and
it will not substantially detract from the aesthetic qualities of the
surrounding area, nor will it have a more than moderate aesthetic impact.

24 Ex. 25 at 6. *See also* Ex. 25 at 5; Taylor Shellfish August 30, 2023, Response to

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1 Comments, App. C at 4; Taylor Shellfish September 18, 2023, Response to Comments,
2 App. 3 at 5.

3 Because there is no green and/or blue gear commercially available, it would need
4 to be produced specifically for the Project and would likely result in over \$600,000 in
5 additional costs compared to using black gear. App. B at 1. Further, there are significant
6 doubts as to whether blue or green gear could be commercially produced with a uniform
7 and consistent color. Taylor Shellfish uses two variations of oyster bags—Generation 2
8 (“G2”) and Generation 3 (“G3”). *Id.* Each type of bag is produced by different
9 manufacturers who use different processes. *Id.* G2 bags are produced by manufacturers in
10 Washington State using extrusion molding. *Id.* G3 bags are produced by manufacturers in
11 Canada using injection molding. *Id.* at 1-2. Further, both G2 and G3 bags are equipped
12 with specialized flotation devices produced by Taylor Shellfish using a different type of
13 production process—rotational molding. *Id.* at 2.

14 Because all manufacturers currently produce black gear, no colors are added to the
15 gear during the production process, and all types of gear have a uniform and consistent
16 color despite the different production processes. *Id.* It is not currently possible to order
17 specialty-made blue or green clips, lines, and other fasteners for the Project, and
18 navigational buoy colors are dictated by the Coast Guard and therefore cannot be
19 produced with green or blue colors. *Id.* It is possible to try to produce green and/or blue
20 oyster bags and floats for the Project, but coloring would need to be added during the
21 process of producing the G2 bags, G3 bags, and floats. *Id.* While Taylor produces the
22 floats for both types of bags and can undertake best efforts to add coloring that would
23 produce uniform and consistent floats, it has never done this previously and hence does
24 not have confidence that different production batches would look uniform and consistent.
25 *Id.* Moreover, Taylor Shellfish does not have control over the production of the G2 and

1 G3 bags. *Id.* Taylor Shellfish can request the manufacturers of those bags to undertake
2 best efforts to produce bags that have uniform and consistent colors, but it lacks
3 confidence that they would be able to do so. *Id.* This lack of confidence is reinforced by at
4 least two considerations. First, each production process is different, utilizes numerous
5 steps that can impact the color of the final product, and relies on a complicated supply
6 chain over which Taylor Shellfish has no control. *Id.* Second, uniform and consistent
7 coloration would be made easier if the desired color were a basic color that required only
8 one or two primary color additives. *Id.* However, this would produce bright blue or green
9 colors that would stick out in the water. *Id.* Softer or more nuanced blues or greens would
10 require a complex formulation of color additives that would likely be difficult to replicate
11 or produce consistently between production batches. *Id.* Even if a particular production
12 batch of bags from a third-party manufacturer matched a production of floats
13 manufactured by Taylor Shellfish, there is no certainty or even likelihood that the next
14 batches of floats and bags would match given the different production processes involved
15 and numerous factors impacting coloration. *Id.* Therefore, notwithstanding best efforts,
16 green and/or blue bags could have a variety of shades that would be aesthetically
17 displeasing. *Id.* Such bags would not be considered an appropriate choice or consistent
18 with the 1986 Aquaculture Siting Study, and hence green or blue bags of uniform color
19 and limited variations are not commercially viable. *Id.*; App. C; Ex. 24 at 6.

20 Further, even if uniform-colored gear could be produced, it is not clear that it
21 would appreciably reduce the aesthetic footprint of the Project. Notably, while on the
22 whole the Decision is remarkable for thoroughly and accurately discussing the record
23 before the Hearing Examiner, it mistakenly states that all of the renderings and
24 photographs provided by Taylor Shellfish “are taken in grey sky conditions with the dark
25 skies reflected off the water” and suggests that “black bags would likely create an

1 unaesthetic contrast with [] sunny colors as suggested by the ‘variable’ characterization of
2 the DOE guidelines.” Decision, Finding 5.A at 12. *See also* Decision at 3 (“all the
3 photographs and rendering presented by the Applicant involve grey skies reflected off
4 dark waters. Of course, the Applicant’s proposed black gear is well camouflaged amongst
5 these dark colors. The contrast of the black against reflections of green trees and blue
6 skies is not depicted in any of the Applicant’s submissions.”). In fact, the rendering in
7 Taylor Shellfish’s Aquaculture Visual Assessment depicts the Project, as proposed with
8 black gear, under sunny conditions with blue skies and green trees. Ex. 25 at 7. Further,
9 photographs provided within the visual assessment similarly show existing operations in
10 sunny conditions with blue skies and green trees, and the depiction of the Project in the
11 rendering is consistent with these photographs. *Id.* at 9-10. Thus, given condition 24 is
12 based on the mistaken position that Taylor Shellfish did not provide renderings or
13 photographs of black gear in sunny conditions, it is not supported by the record and
14 warrants reconsideration. Hearing Examiner Rules of Practice and Procedure 2.30(b)(3).

15 Moreover, there is no Project-specific evidence in the record demonstrating that
16 green or blue gear would appreciably reduce the Project’s aesthetic footprint, even if such
17 gear could be consistently produced with uniform colors. The blue/green condition is
18 based only on recommendations in the 1986 Siting Study, which is almost 40 years old
19 and has not been adopted by Mason County and the Department of Ecology in the SMP.
20 Decision at 2; Ex. 24.² Advances in gear development since publication of the 1986 Siting

21 _____
22 ² Taylor Shellfish does not agree that the 1986 Siting Study is a formal guideline or that it specifically
23 supports the use of blue or green gear in this context. As discussed in Appendix C to Taylor Shellfish’s
24 August 30, 2023 response, the 1986 Siting Study addresses a narrow question (impacts to views from upland
25 properties) than that addressed in the SMP (impacts to the aesthetic qualities of the surrounding area).
Taylor Shellfish August 30, 2023, Response to Comments, App. C at 4; MCC 17.50.210(b)(1). Further, use
of colors that complement the dominant blue/green colors of the Puget Sound is an alternative, not universal,
requirement to mitigate aesthetic impacts. Ex. 24 at 6; Taylor Shellfish August 30, 2023, Response to
Comments, App. C at 7. And, for reasons just stated—and that are not undermined anywhere in the record—

1 Study have improved the consistency and experience of aquaculture gear, such that it is
2 consistent in quality and viewer experience. Ex. 25 at 6. Renderings of the Project with
3 light blue and dark green oyster bags show that these bags would not appreciably reduce
4 aesthetic impacts compared to black bags; if anything, they would increase impacts.
5 *Compare* App. B at 4-5 with Ex. 25 at 7. Requiring a permittee to utilize novel gear at
6 significant costs with no appreciable aesthetic benefit would not be reasonable mitigation
7 consistent with Ecology guidelines. Decision at 2; App. C. And even if blue or green gear
8 would have some initial benefit compared to black gear, it would at most provide a
9 minimal, temporary benefit given that all oyster bags would become fouled by aquatic
10 matter within a short period of time and take on a similar appearance. App. B at 2-3.

11 Finally, Taylor Shellfish is concerned that green and/or blue gear will not perform
12 satisfactorily from an environmental standpoint. *Id.* at 3. The green or blue color
13 recommendation is based on the 1986 Aquaculture Siting Study, and since issuance of this
14 study, concerns have been raised regarding degradation of plastic aquaculture gear. This
15 concern has been addressed in multiple Shorelines Hearings Board decisions. *E.g.*,
16 *Coalition to Protect Puget Sound Habitat v. Pierce County*, SHB No. 11-019, Findings of
17 Fact, Conclusions of Law, and Order (July 13, 2012); *Coalition to Protect Puget Sound*
18 *Habitat v. Thurston County*, SHB No. 13-006c, Findings of Fact, Conclusions of Law, and
19 Order (Oct. 11, 2013); *Coalition to Protect Puget Sound Habitat v. Pierce County*, SHB
20 No. 14-024, Findings of Fact, Conclusions of Law, and Order (May 15, 2015). Taylor
21 Shellfish takes this concern very seriously and is committed to using gear that performs
22 best environmentally and is least susceptible to degradation. App. B at 3. Exposure to UV
23 light is a primary mechanism for gear degradation. *Id.* Hence, it is important for gear that

24 _____
25 advances in production have improved the consistency and experience of black aquaculture gear, such that it
is consistent in quality and viewer experience and can complement the blue/green colors of Puget Sound.

1 is routinely exposed to UV light to be able to best withstand degradation. *Id.* Black gear
2 best withstands UV exposure, and green and/or blue gear is lighter in color and may
3 degrade more readily than black gear. *Id.* Manufacturers can try to mitigate against this by
4 adding UV inhibitors during the production process, but this has been attempted in the
5 past by the manufacturer of the G2 bags and failed to produce acceptable results; the
6 expected lifetime of the bags was essentially cut in half. *Id.*

7 For the foregoing reasons, a requirement to use only blue or green gear for the
8 Project is not commercially viable, would likely exacerbate rather than minimize aesthetic
9 impacts, and presents environmental risks. Condition 25 is thus not consistent with the
10 SMA and SMP, including MCC 17.50.210(b)(J), (L), and it should be stricken. Hearing
11 Examiner Rules of Practice and Procedure 2.30(b)(2)-(4)

12 IV. CONCLUSION

13 Taylor Shellfish greatly appreciates the Hearing Examiner's review and
14 consideration of the Project. Taylor Shellfish supports the Decision to issue the Project's
15 Permit and has no concern with most conditions. Taylor Shellfish respectfully requests
16 reconsideration of, and revisions to, four conditions and removal of one condition to
17 ensure the Decision's conditions are feasible and consistent with the SMA and the SMP.

18 DATED this 19th day of October, 2023.

19 PLAUCHÉ & CARR LLP

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