

1 **BEFORE THE HEARING EXAMINER FOR MASON COUNTY**

2 Phil Olbrechts, Hearing Examiner

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4 RE: Taylor Shellfish Company	DECISION UPON RECONSIDERATION
5 Shoreline Substantial 6 Development Permit	
7 SHR2023-00003	

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9 **Overview**

10 The Applicant’s Motion for Reconsideration is granted in part. The conditions of
11 approval of the October 9, 2023 Final Decision are replaced with the conditions at the end
12 of this decision. Track change identifies changes from the conditions originally
13 recommended by staff. The findings of fact and conclusions of law of the Final Decision
are left unchanged except that they are overridden to the extent inconsistent with this
Decision Upon Reconsideration.

14 As correctly identified by several hearing participants, Condition 24, regarding
15 monitoring, was the most significant condition subject to the reconsideration request.
16 Third party review will still be required, but in a more limited and directed manner. The
17 reconsideration briefing has developed enough of a record to lay out the basic scope and
18 rudimentary methodology for monitoring. As pointed out by some commentators, the
19 Applicant’s proposed monitoring came short because it lacked both performance standards
20 and correction measures. With this background, this decision sets the scope and gaps that
21 must be addressed for a complete monitoring plan. The Applicant’s final monitoring plan
will have to conform to these guidelines as found necessary by a third-party qualified
expert selected by the County. No over-water work will be allowed until such a
monitoring plan is approved by staff. Persons who wish to have a copy of the plan when
approved should leave their contact information with Mr. Viscusi, the planner in charge of
reviewing this project.

22 The condition requiring green bags has been eliminated. The color of the bags (at least
23 green/blue as opposed to black) does not make enough of a difference to aesthetic impacts
24 to be validly regulated. New evidence was allowed on this issue because no one contested
the color of the bags at the hearing. The issue was raised for the first time by the
Examiner after closing the hearing and the Applicant had a due process right to have some
input on that issue.

The other revisions requested by the Applicant were largely reasonable and had only a
modest effect on project impacts. To off-set the impact of marginally expanded hours, the

1 Applicant is now required to set up a complaint number and to distribute that to persons
2 within audible and/or visual range of the project site. That same notice must also provide
3 a reporting number for any sightings of adverse interactions between protected Orca
4 whales and project gear.

5 **Discussion**

6 **A. Reconsideration Evidence.**

7 As identified in the Order Setting Reconsideration Briefing Schedule, the only new
8 evidence authorized for the reconsideration round of review was on the color of the
9 oyster bags. Pursuant to that Order, the following documents/evidence are stricken
10 from the reconsideration briefing: Appendix A to Applicant's Recon Reply; the
11 Section 4.0 study supporting Applicant's Recon Study; the Morisette 11/1/23
12 photographs; the Patillo 11/1/23 resume.

13 No new evidence was allowed for the Applicant's proposed monitoring plan. The
14 Applicant's proposed monitoring plan was primarily based upon information already
15 in the record and any evidence presented beyond that was not considered. The
16 Applicant's presentation of the plan was not considered as based upon expert opinion
17 (which would constitute new evidence), but rather was taken as based upon the
18 information in the record and thus at equal probative value as comments submitted by
19 other hearing participants. Under these parameters, the scope and some of the
20 monitoring methodology was synthesized from the briefing submitted on the
21 Applicant's reconsideration request. Peer review from a qualified expert will be
22 required to evaluate the accuracy of any methodology that is dependent upon
23 information outside the record. The most pertinent example is the Applicant's
24 proposal to use 5 ppm of dissolved oxygen as a benchmark for adverse water quality
25 impacts. It is anticipated and expected that the independent, qualified expert required
by this decision will ascertain whether best available science supports using such a
benchmark.

The Applicant was specifically invited to submit its own mitigation plan to help avoid
some of the legal problems with delegating too much decision making authority to
staff level of review. Condition No. 24 originally required a third-party reviewer to
draft a monitoring plan for the project. This was problematical because it delegated a
major part of the project review to approval at the staff level without public input. It
also opened the door to the argument that this delegated review created a two hearing
process, because the approval of staff would likely be construed as subject to appeal
to the hearing examiner. The reconsideration process enabled another round of public
input and substantially limited the degree to which decision making on the project is
delegated to staff. The details of the monitoring plan have now been fleshed out as
much as the record enables. Although this still leaves the chance that a staff decision
on the monitoring plan could be appealed administratively, the remaining potential
issues for appeal have been substantially narrowed.

1 The only new evidence authorized by the Order Setting Reconsideration Briefing
2 Schedule was the color of the oyster bags. This was authorized to avoid violating the
3 procedural due process rights of the Applicant. No one at the hearing contested the
4 proposed black coloring of the oyster bags. This issue was raised for the first time by
5 the hearing examiner after the close of the hearing. The Applicant was given no
6 reasonable opportunity to defend itself on this issue.

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10 **B. Condition No. 24: Monitoring**

11 The Applicant's proposed monitoring plan is found to serve as a good foundation for
12 monitoring project impacts and addresses all project impacts that should be
13 monitored. However, there are some gaps in the overall plan. Since the County does
14 not have any staff with technical expertise in shoreline biology, third party review
15 will be required to fill in the gaps of the plan. The discussion below will provide as
16 much guidance in filling those gaps as can be derived from the record.

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20 **a. Monitoring: Legal Basis**

21 The use of monitoring to assure no net loss of ecological function is solidly
22 authorized in case law and pertinent regulations. Such legal authority finds
23 monitoring coupled with performance standards and corrective action to serve as a
24 sensible and fully justified means of addressing the uncertainties inherent in the
25 science evaluating critical areas such as shorelines.

The insightful reconsideration comments by project opponents reveals that the scope
of the monitoring plan, i.e. what impacts should be addressed, is sufficiently
comprehensive. The biggest omission in the plan is the lack of performance
standards and remedial measures should impacts need further mitigation. This
omission was ably identified by Mr. Pattillo. The Applicant didn't respond to this
issue in its reconsideration reply. As shall be discussed, the Shoreline Hearings
Board has reversed the approval of a shoreline permit for failing to include correction
actions. The Applicant's monitoring plan also fails to provide sufficient baseline
measurements. Monitoring may also be of insufficient frequency and/or duration.

The County's Shoreline Master Program directly encourages and/or requires
monitoring. MCC 17.50.210B1ii requires that new aquaculture be located, designed
and maintained to assure no net loss of ecological function as demonstrated in a
habitat management plan. MCC 17.50.020 requires a "habitat management plan" to
include how project impacts can be avoided or mitigated in accordance with
"mitigation sequencing." MCC 17.50.020 identifies the last step in "mitigation
sequencing" to include "[m]onitoring the impact and the compensation projects and
taking appropriate corrective measures." For this project, as identified in the Final
Decision, monitoring is an appropriate and necessary part of mitigation given the
uncertainties of project impacts due to its unique size and the low flushing
characteristics of Oakland Bay.

1 The Applicant suggests in its reconsideration motion that monitoring is not necessary
2 because the Final Decision finds that the proposal doesn't create any significant
3 impacts. As noted in the Final Decision, however, no significant impacts were found
4 under the preponderance of evidence and substantial evidence standards. This does
5 not definitively mean that beyond a reasonable doubt no impacts will occur, but rather
6 that the most compelling evidence on balance establishes that more likely than not
7 there will not be significant impacts. As identified in the
8 Final Decision, the studies used to support the proposal are not always directly
9 applicable, especially given the unique large scale of the project and the low flushing
10 of Oakland Bay. These elements create a degree of uncertainty in the estimation of
11 impacts that are appropriately addressed by monitoring.

12 A similar approach was validated in a recent unpublished case applying monitoring as
13 a SEPA condition. *See Phillips 66 Co. v. Whatcom Cnty.* Wash., No. 82599-2-I
14 (Wash. Ct. App. Feb. 28, 2022). In *Phillips*, the Applicant operated an oil refinery
15 and applied for permits to install new oil storage tanks one-half mile from the sea.
16 Project opponents feared this addition would increase sea vessel traffic and thereby
17 harm protected Orca whales.

18 After holding a hearing on the proposal, the hearing examiner issued a finding of fact
19 determining that "*the County has correctly determined that the permit and MDNS as*
20 *issued should not present any additional risk or harm to the environment in general*
21 *or the Killer Whales in particular. The evidence shows that there will be no increased*
22 *vessel traffic."* Despite this, the hearing examiner also added a condition requiring
23 the amount of vessel traffic to be monitored, to ensure that it would in fact not
24 increase. The condition further provided that the proposal would be subject to
25 additional SEPA review if the monitoring revealed that vessel traffic increased by a
threshold set in the condition.

17 The *Phillips* Applicant argued that the hearing examiner had no authority to impose
18 monitoring for vessel traffic when she already determined that the proposal wouldn't
19 increase that traffic. Citing WAC 197-11-768, which is identically worded to the
20 MCC 17.50.020 "mitigation sequencing" definition, the Court found that the County
21 was "*entitled to monitor the project to make sure it complies with the application and*
22 *any conditions imposed.*"

23 The facts and law of the *Phillips* case are directly on point with the Taylor Shellfish
24 application. Despite a finding of no impacts, monitoring is still appropriate to ensure
25 that the impacts do not occur. As outlined in the Final Decision, the need for
monitoring arises from the unique large scale of the project and uncertainties involved
in applying scientific studies that assessed impacts by smaller projects. In addition,
the low flushing action of Oakland Bay further added to the uncertainty of future
impacts.

It is also pertinent to recognize that the uncertainties of critical area studies in general
and associated need for monitoring has been recognized in both agency regulations

1 and judicial decisions. This is well exemplified in *Swinomish Tribal Cmty. v.*
2 *Hearings Bd.*, 161 Wn. 2d 415 (Wash. 2007). In that case, the Growth Management
3 Hearings Board invalidated the critical area regulations of Skagit County in part
4 because the County’s monitoring program to assess the effectiveness of its critical
5 area regulations was not sufficient. The monitoring program failed to compensate for
6 the uncertainties of the best available science used to establish that the regulation
7 complied with the Growth Management Act. In that case, as here, the monitoring
8 program of the County wasn’t supplemented with sufficient performance standards.
9 The Court found as follows:

6 *The issue of the benchmarks in the monitoring program dovetails into*
7 *what the role of adaptive management is in the protection of critical*
8 *areas. When a monitoring system detects newly discovered risks to critical*
9 *areas from land use or development, adaptive management is a process*
10 *used to confront the scientific uncertainty surrounding them. WAC 365-*
11 *195-920. As part of the GMA's regulations describe it, critical areas*
12 *regulations are "treated as experiments that are purposefully monitored*
13 *and evaluated to determine whether they are effective and, if not, how they*
14 *should be improved to increase their effectiveness." WAC 365-195-920(2).*
15 *An effective adaptive management program thus "relies on scientific*
16 *methods to evaluate how well regulatory and nonregulatory actions*
17 *achieve their objectives." Id. In short, under GMA regulations, local*
18 *governments must either be certain that their critical areas regulations*
19 *will prevent harm or be prepared to recognize and respond effectively to*
20 *any unforeseen harm that arises. In this respect, adaptive management is*
21 *the second part of the process initiated by adequate monitoring.*

16 *Swinomish Tribal Cmty. v. Hearings Bd.*, 161 Wn. 2d 415 (Wash. 2007).

17 The uncertainty of the scientific studies that render critical area regulations
18 “experiments” in critical area protection is also present in the studies used to assess
19 the impacts of proposal that affect critical areas. Given the unique features and scale
20 of the Taylor Shellfish project, its mitigation measures and conditions of approval are
21 similarly experimental in nature as the regulations designed to protect them. Further,
22 as with the Skagit County monitoring program, the program proposed by Taylor
23 Shellfish is deficient in its lack of “benchmarks,” what Mr. Patillo termed
24 performance standards. Such benchmarks are expressly required in the County’s
25 mitigation sequencing standards, MCC 17.50.020, which requires that monitoring
must be coupled with “taking appropriate corrective action.”

It is recognized that the *Swinomish* case applies to regulations, as opposed to project
level review. However, there is no cognizable reason to find it distinguishable on that
basis so long as any resulting mitigation is reasonable and capable of being
accomplished. Further, even at project level shoreline review the courts are just as
strict about requiring effective adaptive management. The lack of an effective
adaptive management program served as the basis for overturning an approved

1 shoreline permit in *De Tienne v. Shorelines Hearings Bd.*, 391 P.3d 458 (Wash. Ct.
2 App. 2016). In that case, a shoreline substantial development permit Applicant
3 proposed a subtidal geoduck operation for Henderson Bay in Pierce County. A
4 Supplemental Environmental Impact Study prepared for subtidal geoduck operations
5 in the State of Washington included a mitigation measure requiring a buffer of two
6 vertical feet and 180 horizontal feet between geoduck farms and eelgrass beds. The
7 Applicant proposed a ten-foot horizontal buffer in lieu of the 180 foot buffer and a
8 reduced two foot vertical buffer. This reduced buffer was based upon expert
9 testimony that a ten foot buffer with monitoring would be sufficient to protect the
10 eelgrass. The hearing examiner approved a ten-foot buffer with monitoring for the
11 intertidal zone and a 25-foot buffer with monitoring for the subtidal zone.

12 On appeal of the *de Tierne* shoreline permit, the Shoreline Hearings Board (SHB)
13 found the Applicant and Pierce County relied on monitoring and an "*unspecified*
14 *approach to adaptive management*" to "*justify the reduced buffer size.*" The SHB
15 further found that an "*overreliance on monitoring and adaptive management to*
16 *mitigate impacts ... is particularly concerning*" because "*the Permit does not*
17 *incorporate any required implementation for change—i.e. to increase the buffer*
18 *should monitoring prove the need for greater protection.*" 391 P.3d at 471. The
19 over-reliance upon ineffective monitoring served as a central basis for SHB denial of
20 the shoreline permit, as follows in the SHB decision:

21 *The Board concludes that Pierce County approved a permit with the*
22 *smallest buffer possible, in the absence of any scientific basis for such a*
23 *small buffer. This small buffer, when combined with an overreliance on*
24 *monitoring and adaptive management, a lack of accounting for off-site*
25 *impacts, and the potential need for restoration and/or expansion of*
eelgrass made particularly fragile from past commercial geoduck harvest
activity at the Site, contravenes the requirements in the SMA, its
implementing regulations, and Pierce County's SMP...

18 The Court of Appeals agreed with the Board's reasoning and upheld the SHB's
19 reversal of the shoreline permit approval. Taylor Shellfish's monitoring plan is
20 similarly deficient in a lack of both performance standards and correction actions.
21 The draft plan sets a level of 5ppm for dissolved oxygen, but otherwise identifies no
22 performance standards to identify when action must be taken and no suggested
23 corrective measures should those standards not be met. As previously identified,
24 monitoring serves as a recognized form of addressing the uncertainties of the best
25 available science underlying protection of critical areas. For it to work effectively,
however, it must be coupled with a plan for corrective action when deficiencies are
discovered.

b. Monitoring – Guidelines for Staff Approval

The Applicant's monitoring plan is assessed using the section numbers of the
Applicant's submission below:

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2.1 *Water Circulation/Flushing*

The Applicant proposes to limit monitoring of water circulation impacts to comparing water velocities at the project site with those around the site. The Applicant correctly notes in its reconsideration briefing that if there is no change in circulation, then there is no need for any measuring of scour or erosion since that would only be caused by a change in water circulation. If circulation does change, the Applicant has not proposed any benchmark for what would constitute an adverse change in circulation. It appears likely that any change in circulation would necessitate either additional monitoring or corrective action, but that can be left up to peer review. A benchmark for changes in circulation should be developed and a “next step” plan for further monitoring and/or corrective action to be taken if the benchmark is reached.

2.2 *Dissolved Oxygen, nitrogen, algal blooms.*

This is the one impact where the Applicant has identified a benchmark, specifically 5 ppm for dissolved oxygen. No benchmark is provided for chlorophyll. There is also no duration or frequency set for the amount of testing. It would appear that as the oyster stock grows that it will consume increasing rates of oxygen over time. Further, impacts on oxygen and nitrogen could accumulate over time. For these reasons, the monitoring plan should specify frequency and duration of testing. A baseline measurement should be included. A benchmark for chlorophyll a should be included as well as corrective measures should the benchmarks be exceeded.

2.3 *Contaminants*

Disturbance of sediment toxins may not need any monitoring. The mitigation measures proposed by the Applicant and the comparatively lower toxin levels at the project compared to the southern end of the bay may not trigger the need for monitoring. The Department of Health may provide sufficient oversight on the issue in its efforts to assure that the oysters are free from contaminants. The need for monitoring is an issue left open to the peer review process.

If monitoring is found necessary, a rational testing methodology would involve limiting water quality testing to installation impacts and then additional water quality testing if the video surveillance proposed by the Applicant reveals additional sediment disturbance. Benchmarks, a baseline of water quality and corrective action would need to be specified. More detail needs to be provided on the frequency of testing and video surveillance, as well as the duration of video surveillance.

3.1 *Fish Migration*

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The Applicant’s proposed methodology for monitoring impacts to fish migration is based upon a study outside the record and for that reason is left to peer review. Impact assessment should be limited to fish protected by the County’s critical area regulations, which could be indirect through redirection of predator migration patterns. The monitoring plan needs to be supplemented with benchmarks, frequency and duration of monitoring and corrective action. Baseline conditions should be evaluated if that can be done without causing an unreasonable delay in commencement of the project. If baseline data collection confirms that protected fish don’t migrate through the project area, no additional monitoring would be necessary.

3.2 *Whales*

The Applicant’s proposal for monitoring killer whales is limited to documenting Southern Resident Killer Whale adverse interactions with project gear by Applicant employees. The Applicant proposes to have its employees document protected whale interactions from observations while working at the project site and also when the presence of the whales is reported to unspecified agencies. The monitoring plan should include a mailing to residents in view of the project site with the contact information of the agency to which sightings should be reported. The Applicant’s proposed monitoring plan doesn’t include any benchmarks or corrective actions. As noted in the Applicant’s proposal, other regulatory agencies have oversight over project impacts to whales. Given this other regulatory oversight, peer review should assess whether benchmarks and corrective action plans are necessary for Mason County to enforce.

3.3 *Submerged Aquatic Vegetation*

The Applicant proposes to conduct a submerged aquatic vegetation (SAV) survey after project application. As determined in the Final Decision, there was no eelgrass or other protected SAV currently present at the project site. Given the lack of protected SAV, no monitoring is found necessary for this impact.

C. Conditions 5 and 13: Working Hours

Section IIIA of the Applicant’s motion for reconsideration requests that Conditions 5 and 13 be revised to allow for emergency work to be done outside of authorized hours of operation. This is a reasonable request and granted. A condition of approval is added to require the distribution of a noise complaint line for residents close enough to the shoreline to potentially be adversely affected by project noise.

D. Condition 25: Bag Color

The condition requiring green or blue bags is stricken. The new evidence presented by the Applicant establishes that green or blue bags do not definitively create less

1 adverse aesthetic impacts than black bags. The reason for this determination is
2 largely legal, based upon the unavoidable subjective nature of the County's aesthetic
3 standards. The blue/green coloring condition was based upon MCC 17.
4 50.210(B)(1)(L), which requires that development be designed to "minimize visual
5 impacts". Basing the green/blue requirement upon this criterion is vulnerable to
6 invalidation. An ordinance violates due process if its terms are so vague that persons
7 of common intelligence must necessarily guess at its meaning and differ as to its
8 application. *Anderson v. Issaquah*, 70 Wn. App. 64 (1993). Given the renderings of
9 the project under blue skies presented by the Applicant as part of its reconsideration
10 request, persons of common intelligence certainly could differ as to whether
11 green/blue bags make any material difference from black bags in aesthetic impacts.
12 Reasonable minds could certainly differ as to whether more likely than not green/blue
13 bags are necessary to minimize aesthetic impacts. The 1986 study did conclude that
14 blue/green is preferable, but this study has not been adopted by DOE or Mason
15 County and DOE does not consider the study to be prescriptive on gear color, stating
16 that the study is dated and that color is only one factor to be considered in aesthetic
17 impacts. See Appendix C to Applicant's reconsideration motion. For all these
18 reasons, the blue/green bag color is no longer found supported by the record.

11 **D. Condition 16: Gear Retrieval**

12 The Applicant's revision to Condition No. 16 is found reasonable. As stated in the
13 Applicant's reconsideration motion, loss of some gear is likely inevitable even with
14 responsible monitoring. The Applicant's suggested response time of 48 hours is
15 modified to the lesser of 48 hours or 5 pm the next business day.

16 **DECISION UPON RECONSIDERATION**

17 Upon reconsideration, the conditions of approval of the Final Decision are replaced
18 with those below. Revisions to the staff recommended conditions of approval are
19 identified in track change. The replaced conditions are designed and intended to
20 reflect the changes approved in the analysis outlined above. The findings and
21 conclusions of the Final Decision are left unchanged but superseded to the extent that
22 they conflict with the analysis of this Decision Upon Reconsideration.

- 21 1. New public access, including alternatives to on-site, physical access, shall be
22 required as specified in the Public Access Memorandum (Exhibit 23) and
23 Appendix 4 and shall be available for public use prior to the completion of
24 construction.
- 24 2. The public access easements proposed in the Public Access Memorandum
25 (Exhibit 23) and the permit conditions shall be recorded with the Mason
County Auditor on the deed of title and/or the face of a short or long plat.
Recordation shall occur prior to the completion of construction.
3. Ongoing maintenance of the public access sites proposed in the Public Access
Memorandum (Exhibit 23) shall be the responsibility of the Applicant unless

1 otherwise accepted by a public or non-profit agency through a formal
2 agreement recorded with the Mason County Auditor's office.

- 3 4. Signage that clearly identifies the location of the new public access sites
4 proposed in the Public Access Memorandum (Exhibit 23) shall be installed
5 and maintained by the Applicant in conspicuous locations. The signs shall
6 indicate the public's right of access, hours of access, and other information as
7 specified in the Public Access Memorandum (Exhibit 23).
- 8 5. Construction of the project shall not commence until all required state and
9 federal permits are obtained by the Applicant.
- 10 6. All of the Conservation Measures listed in the Programmatic Consultation
11 (Exhibit 14), must be implemented throughout the life of the project.
- 12 7. Regular maintenance and operation activities, as described in the Permit
13 Application Addendum (Exhibit 11), shall utilize best management practices.
- 14 8. All vessels shall be in compliance with Mason County Code Title 9, and
15 specifically Sections 9.04 and 9.36.
- 16 9. Except as provided herein, all vessel activity shall be restricted to daylight
17 hours, including weekends. No work at night shall occur other than
18 emergency responses and activities, which may be conducted at any time on
19 an as-needed basis. In the months from October through April the Applicant
20 vessel activity may occur one hour before dawn to one hour after dusk to the
21 extent consistent with the County's noise ordinance.
- 22 10. Navigational lighting shall be installed and limited to the minimum necessary
23 per U.S. Coast Guard requirements. To the extent any flexibility is provided
24 in location, navigation lights shall be configured to avoid light spillage in
25 surrounding residences.
- 26 11. Navigational aids, such as marker buoys, shall be installed in compliance with
27 U.S. Army Corps of Engineers and U.S. Coast Guard requirements.
- 28 12. Debris or deleterious material resulting from installation and maintenance of
29 the farm shall be removed from the project site and shall not be abandoned
30 along adjacent shorelines ~~or allowed to enter waters outside of the DNR lease
31 boundary (Exhibit 9).~~ Equipment and structures shall also not be abandoned
32 in the shoreline area. Taylor Shellfish shall inspect project gear at least once
33 per week and if any gear is found missing Taylor Shellfish shall conduct
34 patrols within 48 hours or 5 pm the next business day, whichever is earlier, to
35 collect such gear. Complaints regarding debris shall also be responded to
36 within the earlier of 48 hours or 5 pm the next business day.

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- 13. All waste materials and discards shall be disposed of off-site in strict compliance with all governmental waste disposal standards, including but not limited to the Federal Clean Water Act, Section 401, and the Washington State Water Pollution Control Act (RCW 90.48). Aquacultural discards shall be disposed of in a manner that will not degrade associated uplands, wetlands, shorelines, or aquatic environments. Discards shall not be disposed of in a manner which results in offensive odors or increases the vector population.

- 14. Materials used for components that may come in contact with water shall be made of materials approved by applicable state agencies for use in water. Wood treated with creosote, chromated copper arsenate, pentachlorophenol, or other similarly toxic materials is prohibited for use in the aquatic environment. Where chemically-treated materials are the only feasible option, materials shall use the least toxic alternative approved by applicable state agencies for use in water. Treated wood elements shall incorporate design features to minimize abrasion by vessels, pilings, floats or other objects.

- 15. The project shall comply with the conditions recommended by the WA Department of Ecology in their response to the SEPA Determination of Non-Significance (Exhibit 18).

- 16. Water quality is not to be degraded to the detriment of the aquatic environment as a result of this project.

- 17. Precautionary measures shall be taken to minimize the risk of oil or other toxic materials from entering the water or the shoreline area. If any contamination is unexpectedly encountered from sites located around the project, it must be reported to Ecology (per WAC 173-340-300) via the online ERTS.

- 18. Construction of the project and ongoing project activities shall not cause extensive erosion or accretion along the adjacent shorelines.

- 19. If any archaeological or cultural resources are uncovered during construction or throughout the life of the project, please halt work in the area of discovery and contact DAHP and the Squaxin Island Tribe's Cultural Resources Director, Rhonda Foster at rfoster@squaxin.us.

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20. The Applicant's monitoring plan submitted with its reconsideration request is approved as modified by this Decision Upon Reconsideration. The Applicant shall modify its plan as outlined in this Decision Upon Reconsideration and submit it to peer review by a qualified professional paid for the Applicant and selected by the County. The modifications suggested in the Decision Upon Reconsideration are to serve as guidelines only and can be further modified as found reasonably necessary to mitigate project impacts by the qualified professional, based upon best available science. Guidelines found to be reasonably unnecessary or to cause undue burden on the Applicant shall be disregarded. The Applicant shall not be required to duplicate monitoring conducted for other agencies. The final approved monitoring plan shall be distributed to all persons who request a copy of the plan by County staff within five calendar days of approval. The monitoring plan shall be subject to appeal as governed by MCC 15.03.050(7). No work in Oakland Bay shall commence until the monitoring plan is approved.

21. Oyster bag lines shall be spaced 30 feet between the centers of the double bags to maximize navigation space between the lines.

22. Written notice shall be mailed by the Applicant on a form approved by County staff to all residents with visual and audible access to the project site that provides the following information: (a) A phone number for noise complaints; and (b) a phone number to report sightings of adverse Orca interactions with project gear.

The phone numbers can be to entities other than the Applicant so long as the problems identified in the calls are forwarded to the Applicant sufficiently quickly enough for the Applicant to remedy any on-going noise or whale problems. Within 30 days of the completion of every calendar year, the Applicant shall prepare a report summarizing the noise complaints it received the prior year for any calendar year in which five or more noise complaints are received. The report shall be submitted to County planning staff. In response to the reports, County staff may impose reasonable operational measures to reduce noise impacts that exceed County noise standards.

The limits of visual and audible access for the required notice shall be approved by County staff based upon how far out residents can hear project noise and see whale impacts from the property they occupy.

Dated this 21st day of November, 2023.

Phil Olbrechts
Hearing Examiner
Mason County

Appeal Right, Reconsideration and Valuation Notices

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The shoreline substantial development permit is a final land use decision of Mason County, subject to appeal to the Washington State Shoreline Hearings Board as regulated by the Shoreline Management Act, Chapter 90.58 RCW. No further motions for reconsideration will be considered.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.