

**From:** [BrownScott, Jennifer](#)  
**To:** [Thomas, Sue](#)  
**Subject:** Fwd: [EXTERNAL] SHR2017-00011  
**Date:** Monday, January 13, 2020 8:39:40 AM  
**Attachments:** [NOTICE OF DECISION - JAMESTOWN SHR2017-00011.docx](#)  
[Clallam - Jamestown S'Klallam Oyster Farm SSDP-SCUP.pdf](#)

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~~Dungeness NWR~Protection Island NWR~San Juan Islands NWR~~  
~~Copalis NWR~Flattery Rocks NWR~Quillayute Needles NWR~~

----- Forwarded message -----

From: **Breitbach, Tami** <[TBreitbach@co.clallam.wa.us](mailto:TBreitbach@co.clallam.wa.us)>  
Date: Mon, Jan 13, 2020 at 8:10 AM  
Subject: [EXTERNAL] SHR2017-00011  
To: Breitbach, Tami <[TBreitbach@co.clallam.wa.us](mailto:TBreitbach@co.clallam.wa.us)>  
Cc: Ballard, Greg <[gballard@co.clallam.wa.us](mailto:gballard@co.clallam.wa.us)>

Please find attached the Notice of Decision, and Findings of Fact, Conclusions of Law and Decision regarding the above-referenced proposal.

<<NOTICE OF DECISION - JAMESTOWN SHR2017-00011.docx>>

<<Clallam - Jamestown S'Klallam Oyster Farm SSDP-SCUP.pdf>>

Regards,

Tami Breitbach

Administrative Specialist II

*Clallam County*

*Department of Community Development*

*223 East Fourth Street, Suite 5*

*Port Angeles, WA 98362*

*(360) 417-2277*

# NOTICE OF DECISION

*Clallam County Department of Community Development  
223 E. 4<sup>th</sup> Street, Suite 5, Port Angeles, WA 98362*

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**DATE:** January 13, 2020

**TO:** Parties of Record

**FROM:** Clallam County Department of Community Development

**SUBJ:** Notice of Decision  
Shoreline Substantial Development Permit SHR2017-00011  
Jamestown S'Klallam Tribe, Applicant

**NOTICE IS HEREBY GIVEN THAT,** the Clallam County Hearing Examiner has issued the Decision on the above-referenced application.

**Appeal of Decision:** The decision by the Hearing Examiner is final on the date issued. Pursuant to CCC 35.01.080, appeals to the Shoreline Hearings Board of a decision on a shoreline conditional use permit may be filed by any aggrieved party in accordance with RCW 90.58.180 within twenty-one (21) days of filing the final decision by Clallam County with the Dept. of Ecology. Information on appeal process and rules of procedure is available on the Shoreline Hearings Board web site at <http://www.eluho.wa.gov/Board/SHB>

**Request for Reconsideration:** A party of record may request reconsideration of the final decision by the Hearing Examiner. A Request for Reconsideration must be received by the Clallam County Department of Community Development within **10 calendar days** from the date of mailing this notice of decision on forms provided by the Department and accompanied by a \$375.00 processing fee pursuant to CCC 5.100. Reconsideration should be granted only when an obvious legal error has occurred or a material factual issue has been overlooked that would change the previous decision. If the request is denied, the previous action shall become final unless appealed. Procedures for reconsideration are found in section 26.10.600 CCC (Clallam County Code).

**Project File:** The complete project file is available for review or copying between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday, in the Planning Division of the Department of Community Development, 223 East Fourth Street, Suite 5, Port Angeles, WA 98362.

As provided in RCW 36.70B.130, affected property owners may request a change in valuation for property tax purposes. Requests must be made in the office of the County Assessor, 223 East Fourth Street, Port Angeles, WA 98362.

**Staff Contact:** Greg Ballard, Senior Planner (360) 565-2616.

**BEFORE THE HEARING EXAMINER  
FOR CLALLAM COUNTY**

In the Matter of the Application of	)	No. SHR2017-00011
	)	
<b>Jamestown S’Klallam Tribe</b>	)	
	)	
For a Shoreline Substantial Development	)	
Permit and a Shoreline Conditional	)	FINDINGS, CONCLUSIONS,
<u>Use Permit</u>	)	AND DECISION

**SUMMARY OF DECISION**

The Jamestown S’Klallam Tribe (Applicant) requests a Shoreline Substantial Development Permit (SSDP) and Shoreline Conditional Use Permit (SCUP) to allow phased development of the commercial farming of pacific oysters, using on-bottom culture methods, on up to 34 acres of tidelands at the northwest corner of Inner Dungeness Bay, just south of the Dungeness Spit. This activity would occur on tidelands that are leased from the Washington State Department of Natural Resources (DNR) where the Applicant and the Dungeness National Wildlife Refuge (“the Refuge”) share use rights. The Applicant requests that development of the commercial oyster operation proceed in three phases: in Phase 1, the Applicant would establish five acres of on-bottom bag cultivation at a maximum commercial bag density of 4,000 bags per acre, as well as on-bottom beach harvest of mature oysters; in Phase 2, the Applicant would increase cultivation to 10 acres; in Phase 3, the Applicant would increase cultivation to up to 20 acres, in rotation over the 34-acre project site, with a maximum of 80,000 bags being used, depending on project outcomes and adaptive management.

Because the Applicant has presented sufficient information to satisfy the criteria for re-establishing a preexisting, nonconforming use (aquaculture) on-site with an SSDP and SCUP, it is appropriate to allow the first phase of the proposal to move forward. Accordingly, Phase 1 of the proposal is **APPROVED**. There is insufficient current data, however, to fully assess long-term impacts from this type of operation, especially in relation to the Refuge. Thus, limiting approval to Phase 1 alone, at this time, is warranted. In addition, conditions are necessary to mitigate specific impacts of Phase 1 of the proposal, including conditions ensuring that ongoing monitoring of impacts of the proposal, especially in relation to the Refuge, occur.

Prior to expanding operations through Phase 2 of development, this hearing shall be reopened to evaluate Phase 1 and its impacts on the environment, with particular emphasis on determining whether detrimental impacts have occurred to the Refuge in conjunction with Phase 1, whether additional conditions are necessary, and whether it is appropriate to approve additional phases of the proposal.

*Findings, Conclusions, and Decision*  
*Clallam County Hearing Examiner*  
*Jamestown S’Klallam Tribe Shoreline Substantial*  
*Development Permit and Shoreline Conditional Use Permit*  
*No. SHR2017-00011*

## **SUMMARY OF RECORD**

### Hearing Date:

The Hearing Examiner initially held an open record hearing on the SSDP and SCUP applications on April 5, 2018. At the request of several individuals and the County, the Hearing Examiner determined that it would be appropriate to continue the hearing to allow additional analysis of the proposal and allow for additional comments. The continued hearing was scheduled for May 31, 2018. As explained in detail below, prior to the continued hearing, the Applicant requested that the hearing be postponed to allow the Applicant sufficient time to perform additional environmental analysis and perform government-to-government consultation with the United States Fish and Wildlife Service (USFWS). Accordingly, the hearing was postponed on several occasions until, ultimately, the hearing was recommenced on November 21, 2019.

### Testimony:

The following individuals presented testimony under oath at the initial open record hearing on April 5, 2018:

Greg Ballard, County Senior Planner  
Steve Gray, County Planning Manager  
Ralph Riccio, Applicant Representative  
Elizabeth Tobin, Applicant Representative  
Janet Marx  
Kurt Grinnell  
James Loren  
Matt Heins  
Darlene Schanfald  
Elizabeth Baatz  
Steve Muller  
Hansi Hals  
Jess Christiansen

The following individuals presented testimony under oath at the continued hearing on November 21, 2019:

Greg Ballard, County Senior Planner  
Elizabeth Tobin, Applicant Representative  
Hansi Hals, Applicant Representative  
W.H. Brown  
Steve Muller  
Stanley Hall  
Charles Weller  
Marc Sullivan  
Ralph Riccio

*Findings, Conclusions, and Decision*  
*Clallam County Hearing Examiner*  
*Jamestown S'Klallam Tribe Shoreline Substantial*  
*Development Permit and Shoreline Conditional Use Permit*  
*No. SHR2017-00011*

Arthur Sanchez  
Darlene Schanfald  
Judith White  
Kristine Reed  
Linda McNaughton  
Lyn Muench  
Kurt Grinnell  
Cherri Mann

Exhibits:

The exhibits listed in Attachment A were admitted into the record.

The Hearing Examiner enters the following findings and conclusions based upon the testimony and exhibits admitted at the open record hearing.

**FINDINGS**

Background and Initial Application Materials

1. In December 2017, the Applicant applied for approval of an SSDP and SCUP, to allow commercial farming of pacific oysters using on-bottom culture methods, on up to 34 acres of leased tidelands.<sup>1</sup> Commercial oyster farming has occurred on the site since 1953; the Applicant previously operated a commercial oyster farm on-site between 1990 and 2005, although different production methods were used, as is explained in more detail below. Operations ceased in 2005 because of concerns over water quality, including fecal coliform, in Dungeness Bay. In 2015, after significant clean-up efforts by the Applicant and other stakeholders, who formed the Sequim Dungeness Clean Water District (SDCWD)<sup>2</sup> to address the problem, the Washington State Department of Health (DOH) determined that aquaculture could resume in the portion of Dungeness Bay where the project site is located. The proposed aquaculture would be located waterward of the ordinary high-water mark at the northwest corner of Inner Dungeness Bay, south of the Dungeness Spit, on tidelands leased from the Washington State Department of Natural Resources (DNR). *Exhibit 1, Staff Report (2018), pages 1 and 2; Exhibit 2; Exhibit 4; Exhibit 16.*

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<sup>1</sup> Under the Shoreline Management Act and its regulations, shoreline conditional use permits are reviewed by the local jurisdiction for compliance with its Shoreline Master Program, then transmitted to the Washington Department of Ecology for final approval. *Washington Administrative Code (WAC) 173-27-200(1).*

<sup>2</sup> Revised Code of Washington (RCW) 90.72.030 allows each county having shellfish tidelands within its boundaries to establish a shellfish protection district to “include areas in which nonpoint pollution threatens the water quality upon which the continuation or restoration of shellfish farming or harvesting is dependent.” *Exhibit 20.*

2. The type of aquaculture the Applicant has proposed is known as “on-bottom bag culture,” because oysters are grown within mesh plastic bags that are placed directly on the substrate. Here, the Applicant would grow oysters in 2 ft. x. 3 ft. x 2 in. plastic mesh bags that are secured to a line anchored to the substrate using screw anchors or metal posts. The bags would be located between +1 and the -2 tidal elevation and would only be visible, above water, during minus tides. Approximately 10 feet of separation would be provided between the rows of bags. Oysters would typically grow within the bags for 14 or 15 months before being spread out on to the beach after reaching a larger size. The oysters would then be grown to maturity on the tidal beach before being harvested by hand. This type of aquaculture differs from “longline culture,” which was previously used on the site, whereby oysters are grown in clusters on rope lines suspended approximately three feet off the substrate, between upright stakes made of PVC or metal pipe, that are grown to maturity prior to being harvested through removal of the suspended bags. In its initial application materials, the Applicant sought approval to place approximately 6,000 bags per acre on the leased property, with a maximum number of bags ranging from 75,000 to 150,000 throughout the project site, and approval for manual, on-bottom beach harvesting of mature oysters. The initial proposal did not involve phased development. Of particular importance, the Applicant shares use rights of the project site with the Refuge, a 772-acre refuge, preserve, and breeding ground for native birds that was first established by executive order, in 1915, and is now managed by the USFWS as part of the National Wildlife Refuge System. *Exhibit 1, Staff Report (2018), pages 1 and 2; Exhibit 2; Exhibit 4; Exhibit 16; Exhibit 18.*
3. The Applicant provided a project narrative with its initial application materials. The initial project narrative contended that approval should be granted for the project because:
  - The proposal would involve “aquaculture” as defined by Chapter 5.02 of the County’s Shoreline Master Program (SMP). Section 5.02.B.2 of the SMP encourages a cautious approach to “experimentation” and “new aquaculture methods.” This project, however, would produce oysters by employing the on-bottom bag culture method, which is commonly employed by shellfish growers in Washington State. No experimentation in production methods would occur.
  - The project would be located on a DNR-managed tideland that has historically been leased for aquaculture. Consistent with Sections 5.02.B.4 and -B.6, the Applicant would remain focused on retaining and improving water quality standards and furthering the goals of the SDCWD, including investing significant resources. The Applicant would continue to support DOH’s monthly monitoring of water quality throughout Dungeness Bay.
  - Chapter 5.02.B.7 of the SMP states that projects “should be designed to not significantly degrade unique scenic aspects of the area.” The Applicant recognizes this area is particularly scenic and would employ on-bottom culture

methods, as opposed to longline aquaculture methods, in an effort to minimize visual impacts on the Refuge.

- The Applicant recognizes the critical ecosystem services provided by eelgrass and goals of the Refuge in protecting critical habitat for migratory birds. Farming would not occur within 25 feet of eelgrass observed within the project site. In addition, as noted above, the method of aquaculture would have fewer scenic impacts than previously occurred before operations were halted to address water quality.
- The proposal would be a reasonable and appropriate use of the shoreline because the project site has been leased by the Applicant from DNR for oyster cultivation for 27 years and has historically been used for oyster aquaculture for over 60 years. Accordingly, the proposal would be consistent with prior uses of the shoreline that successfully coexisted with the Refuge since the 1950s.
- The on-bottom bag method that would be employed has low visual impact, and the dark-colored mesh bags blend in with the substrate, resulting in minimal functional or aesthetic impacts to the shoreline.
- The proposal would not limit or reduce the rights of the public to use navigable waters within Dungeness Bay.
- The proposal would promote the public interest, given that shellfish aquaculture is a designated “preferred use” of Washington State waters under Governor Inslee’s Shellfish Initiative. Cultivation of oysters on the lease site would also have the potential to enhance recruitment and growth of oysters for recreational harvest in the area, which would also serve the public interest.
- The proposal would explicitly protect against adverse effects to the public health, the land and its vegetation, and wildlife, by buffering eelgrass from farming activities; employing a low profile, on-bottom bag cultivation method; and ensuring non-interference with the Refuge functions related to migratory birds. Further, oysters are “filter feeders” and are known to have remarkable water filtration capabilities, clearing the water of sediment and nutrient pollution, potentially providing water quality benefits to Dungeness Bay.
- The Applicant recognizes the importance of managing the County’s shorelines in a way that maximizes public interest and preserves the scenic, aesthetic, and ecological qualities of shorelines. The low profile, on-bottom culture method would be used to avoid disrupting public access to, the ecological health of, or the scenic nature of Dungeness Bay.
- The proposal would be restricted to the intertidal DNR-leased parcel and would not interfere with normal public use of the shoreline. The public would still have full access to all recreational activities provided by the Refuge, along Dungeness Spit and in the Bay.
- The proposal would be compatible with other authorized uses in the vicinity; oyster aquaculture has successfully co-existed with the Refuge since the 1950s.



- The proposal would not cause significant adverse impacts to the shoreline environment. All critical eelgrass habitat has been mapped and would be protected. On-bottom bag density would be approximately 6,000 bags per acre, with a maximum number of bags ranging from 75,000 to 150,000 bags throughout the 34-acre project site. Given the low profile of the bags and their dark color, the bags would only be visible from close proximity during negative low tides. The Applicant would access the site by small marine vessel, the number of on-site workers would be limited in number, and work would only occur on-site between 50 and 90 days per year.
- There are no other similar developments proposed in Clallam County, and thus cumulative impacts from this type of development would not occur.

*Exhibit 2.*

4. The Applicant submitted a “Critical Eelgrass Habitat Survey” (Eelgrass Survey) with its initial application materials, dated November 13, 2017, assessing the presence of native eelgrass (*Zostera marina*) within the 50-acre lease area. The Applicant, the USFWS, and members of the Clallam County Marine Resources Committee jointly surveyed the project area to capture basic information about eelgrass on-site in July 2016. This included reviewing the 50-acre lease area for the presence or absence of eelgrass, its spatial distribution, and the approximate total area of any eelgrass beds on the property. The Eelgrass Survey determined that patches of native eelgrass exist throughout the southwestern portion and the lower elevations of the property, as well as in some areas adjacent to the project site. No non-native eelgrass (*Zostera japonica*) was observed on-site. United States Army Corps of Engineers (USACE) conservation measures require that no shellfish activities occur within 16 feet of native eelgrass. The Applicant determined that it would apply a more conservative buffer of 25 feet, resulting in 16 acres of the site being “set aside” for eelgrass protection. Accordingly, the Applicant would limit its aquacultural activities to the remaining 34 acres of the site. *Exhibit 5.*
5. Wessen & Associates, Inc., prepared a “An Archaeological Survey of the Jamestown S’Klallam Dungeness Bay Project Area” (Cultural Resources Report), dated January 2017, that assessed the archaeological potential of the project site and that was included with the initial application materials. The Cultural Resources Report determined that there is “no evidence of the presence of either potentially intact archaeological deposits or re-deposited cultural materials” and, accordingly, the Applicant should be “allowed to proceed with their plan to conduct shellfish aquaculture activities” without additional archaeological research or monitoring. Of note, the Cultural Resources Report explains that the modern Jamestown S’Klallam community includes descendants of those that historically occupied the vicinity of Dungeness Bay, for whom the “bulk of . . . economic activities were oriented towards marine and riverine environments.” This included “features such as duck nets on Dungeness Spit and a wide range of other hunting, fishing,

and collecting activities in the area,” including the collection of shellfish and/or other marine resources. *Exhibit 6.*

6. The Applicant also included a Joint Aquatic Resource Permit Application (JARPA) with the initial application materials, a form that is used when a proposal requires approval from multiple agencies with jurisdiction over a project area, including approvals from USACE. Here, the initial JARPA provided a detailed history of the project site, including the various types of commercial aquaculture that have occurred over the years, and it noted that the Applicant would be seeking an Aquatic Use Authorization from DNR, as well as Section 404 and Section 10 permits from USACE.<sup>3</sup> The JARPA form also noted that the Applicant

must grow shellfish because many shellfish growing areas where the Tribe is accustomed to harvesting wild shellfish are either over harvested or are suffering from poor water quality. The Tribe must farm shellfish in order to exercise their treaty rights, and Dungeness Bay is the location that the Tribe has been growing oysters and leasing this tideland parcel from DNR for 27 years. With recent improvements in water quality, the Tribe will harvest existing product and culture new product on identified areas within the parcel.

*Exhibit 4.*

7. The Applicant’s JARPA noted that the project would comply with all conditions of the Programmatic Biological Assessment (PBA) prepared by USACE, related to approval of a Nationwide Permit 48 (NWP) for aquaculture, issued in October 2015. The Applicant included the PBA with its application materials (Exhibit 18). The Seattle District of the USACE is responsible for regulating shellfish-related activities in the State of Washington, under Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act of 1899. In addition, when the USACE issues permits authorizing shellfish activities, this constitutes a federal action that requires compliance with the Endangered Species Act (ESA). Section 7(a)(2) of the ESA requires federal agencies to complete consultation with the National Marine Fisheries Service (NMFS) and/or the USFWS on any federal action that may affect an ESA-listed species or designated critical habitat. In addition, Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), as amended by the Sustainable Fisheries Act of 1996, requires federal agencies to complete consultation with NMFS on any federal action that may adversely affect essential fish habitat. USACE developed the PBA to

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<sup>3</sup> The proposal would also require a Section 401 Water Quality Certification from the Department of Ecology (DOE). On July 30, 2019, DOE denied water quality certification for the proposal, without prejudice, because it had not yet received necessary information from the Applicant. *Exhibit 144.*

comply with the requirements of the ESA, MSA, and CWA, and to facilitate the regulation of shellfish activities in Washington State. Specifically, the PBA was designed to allow certain aquaculture activities to be authorized under NWP 48 Permits (Commercial Shellfish Aquaculture Activities) in an “efficient and programmatic manner.” Thus, the PBA includes analysis of those shellfish activities that could be authorized by USACE with an NWP 48 Permit that “are the most common, frequently conducted, or considered standard practice.”<sup>4</sup> *Exhibit 18*.

8. The PBA notes that, for an applicant’s proposed shellfish activity to comply with the ESA using the PBA (and be eligible for an NWP 48 Permit), the activities must fall within the scope of activities described in the PBA, must incorporate the relevant “Conservation Measures” dictated by the PBA, and must occur within the geographic area considered by the PBA. Otherwise, an “Individual Assessment” of the shellfish activity is required for Section 10 and Section 404 approval of the activity by USACE. The PBA also notes a distinction between “continuing” commercial activities and “new” activities, defining *continuing activities* as those “that had been granted a permit, license, or lease from a state or local agency specifically authorizing commercial shellfish activities and that were occurring within a defined geographic footprint prior to 18 March 2007.” The PBA identifies the project area as an area with continuing commercial shellfish activity (*see, e.g., Exhibit 18, page D-8*), satisfying the requirement related to geographic area. The PBA also specifically addresses the on-bottom bag method of aquaculture for pacific oysters (satisfying the scope of activity requirement), including: potential alteration to the benthic habitat and community composition, removal of aquatic vegetation, contributing plastic debris to the aquatic environment, and loss of forage fish spawning habitat. *Exhibit 18*.
9. To address potential impacts from aquaculture on the environment and, specifically, on ESA-listed species, the PBA requires that all activities approved, under an NWP 48 or an individual permit, must comply with detailed conservation measures, including the following:
  - Gravel and shell shall be washed prior to use for substrate enhancement and shell material shall be procured from clean sources that do not deplete the existing supply of shell bottom.

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<sup>4</sup> The USFWS later issued a Biological Opinion (BiOp) on August 26, 2016, assessing the PBA and the effects of shellfish operations and activities in coastal bays and the inland marine waters of the state between 2016 and 2036. The BiOp concurred with the PBA in its assessment of impacts on ESA-protected species and the required conservation measures to address such impacts. The BiOp stressed, however, that certain activities would be excluded from programmatic coverage, including the use of any form of chemical application to control undesired species, including non-native eelgrass, ghost shrimp, or mud shrimp. *Exhibit 19*.

- Unsuitable material, including trash or debris, shall not be discharged or used as fill.
- All shellfish gear that is not immediately needed or is not firmly secured to the substrate must be moved to a storage area landward of the mean higher high water mark prior to the next high tide.
- All vehicles operated within 150 feet of any stream, waterbody, or wetland shall be inspected daily for fluid leaks.
- The direct or indirect contact of toxic compounds, including creosote, wood preservatives, and paint, within the marine environment shall be prevented.
- All mesh bags and nest shall be clearly, indelibly, and permanently marked to identify the permittee's name and contact information.
- All equipment shall be tightly secured to prevent it from breaking free.
- At least once every three months, beaches in the project vicinity must be patrolled by crews who will retrieve debris. A record shall be maintained documenting the date of patrol, location of areas patrolled, and the description of the type and amount of retrieved debris and other pertinent information.
- The Applicant shall routinely inspect for and document any fish or wildlife found entangled in nets or other shellfish equipment. In the event that any animals are found entangled, the Applicant must provide immediate notice to WDFW (for all species), USACE (for ESA-listed species), and/or the Marine Mammal Stranding Network (for marine mammals); attempt to release the animal without harm; and provide a written and photographic record of the event.
- Vessels shall not ground or anchor in native eelgrass, and paths through native eelgrass shall not be established.

*Exhibit 18.*

10. The Applicant also submitted an Environmental Checklist with its initial application materials, dated December 29, 2017, as required by the State Environmental Policy Act (SEPA). As stated in its JARPA, the Environmental Checklist noted that the Applicant would seek an Aquatic Use Authorization from DNR, as well as Section 404 and Section 10 Permits from USACE. The Environmental Checklist recognized the presence of several ESA-protected species, including marbled murrelet, Chinook salmon, Puget Sound steelhead, bull trout, and Southern Resident killer whales, but noted that the project would not have adverse impacts on these animals. The Environmental Checklist also stated that the proposal would not have adverse impacts on the Refuge; that less than one boat trip per day would be needed to set-up, maintain, and harvest the oysters; and that trips to the site would be limited based on weather and tides, as well as environmental and biological conditions. *Exhibit 8.*

### Notice of Initial Application

11. Clallam County (County) provided notice of the initial application, as required by the municipal code, and an open record hearing was scheduled before the Hearing Examiner on April 5, 2018. In advance of the hearing, comments from reviewing government departments and agencies, as well as interested organizations/citizen groups and area residents, were received:

- The United States Army Corps of Engineers (USACE) commented on March 26, 2018, that it would need to determine whether the proposal would meet the requirements to receive approval for a Nationwide Permit 48 (NWP 48) under the Programmatic Biological Assessment prepared by the USACE in October 2015.
- Jennifer Brown-Scott, who manages the Refuge, commented that the USFWS would like a one-month extension of the comment period because of its concerns over the potential impacts from the project on a wide variety of wildlife species and important habitats, including the Refuge.
- The Sierra Club North Olympic Group expressed concern over the proposal, specifically noting: it believes the County spent insufficient time reviewing the application and its environmental impacts; there is not enough historical information regarding size, density, and earlier methods of oyster farming to qualify the project as “re-establishing” an earlier operation; the introduction of additional plastics into the ocean is problematic; the use of anchors to install the bags would damage the tidelands; the project would have significant impacts on the Refuge; and the project would have impacts on harbor seals and other wildlife in the area.
- Friends of Dungeness National Wildlife Refuge commented that, while it supports the Applicant and its ongoing work and “respects and honors their rights under the 1855 Point-No-Point Treaty to hunt and fish in all their accustomed places,”<sup>5</sup> the present proposal is for a commercial operation, not subsistence farming as envisioned by the Treaty. The group expressed concern that the proposal would have detrimental impacts on the Refuge, including aesthetic impacts, and that the location has not been ideal, despite oyster operations occurring since the 1950s, because of its proximity to the Refuge.
- The Olympic Environmental Council, Protect the Peninsula’s Future, and Friends of Miller Peninsula State Park also wrote with concerns over the potential impacts of the proposal. Specifically, these groups expressed concern that the plastic bags used in the operation would disintegrate and disperse small particles of plastic (micro-plastic) that would be exposed to wildlife and ingested; that these plastics attract other pollutants, such as polychlorinated biphenyls (PCBs) and polycyclic aromatic hydrocarbons (PAHs), which would also be ingested by wildlife; that the oysters themselves would ingest the micro-plastics and other contaminants,

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<sup>5</sup> Exhibit 34.

passing them up the food chain; that the method of cultivation would smother the Bay's natural marine life/benthic community and create dead zones; that the proposal would replace the natural environment with a foreign one by replacing native species with non-native, mono-cultured pacific oysters; that there is potential for animals to get caught in the mesh bags; that the proposal would have detrimental impacts on the Refuge; that the NWP 48 Permit process promulgated by USACE was developed with very little actual science and with no substantial cumulative impact analysis; that federal, state, tribal, and local governments have spent massive amounts of money to clean up Puget Sound and that this method of aquaculture would contribute to additional pollution; that, in the 2014 matter of *Coalition to Protect Puget Sound Habitat v. Pierce County*, No. SHB 13-016c, the Shorelines Hearing Board reversed approval of an SSDP for a five-acre geoduck farm proposed in Henderson Bay, a shoreline of statewide significance, because no cumulative impacts analysis was performed, and that the present proposal is similar; that oyster wastes may lead to increased nutrient loading in the Bay, potentially creating algae mats that would have detrimental impacts on area wildlife; and that approval of the proposal would set a precedent for allowing aquaculture farming in designated wildlife refuges. Darlene Schanfald, who wrote on behalf of these groups, also submitted information from several scientific studies about the dangers of micro-plastics in the ocean and the impacts such plastics have on zooplankton and animals that ingest zooplankton.

*Exhibit 1, Staff Report (2018), pages 1, 4, and 5; Exhibit 9; Exhibit 10; Exhibit 11; Exhibit 12; Exhibit 16; Exhibit 17; Exhibit 18; Exhibit 21; Exhibit 22; Exhibit 23; Exhibit 24; Exhibit 34.*

#### Initial Hearing

12. The Hearing Examiner reserved ruling on USFWS' request for a continuance. On March 29, 2018, County staff issued a staff report, assessing the proposal and recommending approval of the SSDP and SCUP, with conditions. The open record hearing on the applications commenced on April 5, 2018, as scheduled. At the outset of the hearing, the County submitted several additional exhibits for the record, including several public comments from reviewing government agencies, members of the public, and interested organizations/citizen groups. Of particular note, a letter from USACE was admitted (Exhibit 24) that explained that, based on information provided by the Applicant, USACE determined that the proposal would not be authorized under an NWP 48 Permit but, instead, an individual permit would be required. In addition, Jennifer Brown-Scott submitted additional comments on behalf of USFWS (Exhibit 29), detailing specific concerns over the proposal. Specifically, the letter requested additional information on whether mechanical harrowing and gravelling or frosting would occur because both can have significant impacts on habitat and wildlife species, on the potential impacts to aesthetics, and on the scope of impacts from human disturbance, including more specificity about when workers would access the site. USFWS also expressed other

concerns, including: the size and location of the operation; the lack of information available on wildlife entrapment resulting from aquaculture structures; the potential habitat loss and degradation resulting from changes in deposition of sediment and nutrients; the potential for species that prey on forage fish to indirectly ingest plastics and adsorbed contamination through bioaccumulation in food webs resulting in reproductive disorders or death; the European green crab, an invasive species in the Salish Sea, that might use the bags as habitat; the temporal losses of marine forage fish spawning habitat and production resulting from shellfish aquaculture; and the competition between feeding bivalves and herring larva for plankton. USFWS also provided extensive recommendations to address these concerns. *Exhibit 1, Staff Report (2008), pages 1 through 22; Exhibit 24; Exhibit 29.*

13. County Senior Planner Greg Ballard testified at the initial hearing and provided an overview of the history of the project site and the proposal. He noted that the County supports USACE's decision to require an Individual Assessment of the project as the County itself would like additional information regarding how the proposal would avoid impacts to species that utilize the Refuge. *Testimony of Mr. Ballard.*
14. County Planning Manager Steve Gray testified that the County issued a Determination of Nonsignificance (DNS) for the proposal under SEPA on February 23, 2018, based on the submitted application materials and existing environmental documents. He noted that the County assumed that the proposal would be eligible for an NWP 48 Permit from USACE. Moreover, USFWS had not detailed its concerns in advance of the DNS being issued. Mr. Gray further explained that the County does not provide for an appeal of its SEPA determination at the County level. Instead, any SEPA appeal would be consolidated with an appeal of the Hearing Examiner's decision, following final permit review by the Department of Ecology, and heard by the Shoreline Hearings Board. *Testimony of Mr. Gray.*
15. Applicant Representative Ralph Riccio presented a detailed PowerPoint about the proposal. He noted that the Applicant would be meeting with USACE soon to discuss its determination concerning the NWP 48 Permit and that the Applicant did not have adequate time to address the concerns raised by USFWS. Mr. Riccio stressed that additional review of the proposal would occur at the state and federal levels, and because of this, the local permit process need not be postponed. Following a comment from the Hearing Examiner about how the local permit process ensures that the local community has an opportunity to provide valuable input on proposals, Applicant Representative Elizabeth Tobin noted that additional review of the project at the state and federal level would only result in reductions to project size and impacts, which would not affect local review of the SSDP and SCUP applications. *Testimony of Mr. Riccio; Testimony of Ms. Tobin.*

16. The Hearing Examiner heard testimony from several additional witnesses at the initial hearing. Specifically:
- Area resident Janet Marx expressed concern about the quantity of additional information submitted at the hearing. She requested that a continuance be provided to allow the public time to review the additional materials and submit additional comments.
  - Kurt Grinnell, a Councilmember of the Jamestown S’Klallam Tribe, explained that the Applicant has been working on the proposal for over three years, has spent over two million dollars improving water quality in Dungeness Bay, and has continued to pay DNR to lease the project site while operations have been dormant. Because of this, the Applicant sought to move forward with the hearing. Mr. Grinnell noted, however, that the Applicant is patient and that it strives to be a good steward of the environment.
  - James Loren, Darlene Schanfald, Elizabeth Baatz, Steve Muller, and Jess Christiansen testified in opposition to the proposal. In general, these witnesses expressed concern over impacts to The Refuge and area wildlife, detrimental impacts from micro-plastics, and aesthetic impacts from the proposal.
  - Matt Heins, who manages the largest area of privately operated tidelands on Dungeness Bay (roughly 400 acres), expressed support for the proposal, noting that former Governor Gregoire and current Governor Inslee both created Shellfish Initiatives supporting aquaculture and stressing that the Applicant is a major advocate for the restoration and protection of the environment of Dungeness Bay.
  - Hansi Hals, one of the Applicant’s shellfish biologists, testified that the Applicant has been harvesting shellfish in the project area since time immemorial and that the purpose of the many efforts to restore better water quality to Dungeness Bay was to allow for aquacultural activities again. Ms. Hals stressed that there is significant scientific literature supporting the environmental benefits of aquaculture, especially in relation to other species, such as birds.
- Testimony of Ms. Marx, Mr. Grinnell, Mr. Loren, Ms. Schanfald, Ms. Baatz, Mr. Muller, Ms. Christiansen, Mr. Heins, and Ms. Hals.*
17. After hearing public testimony, Mr. Gray requested that a continuance be granted to allow the Applicant to respond to received comments, including the comments from USFWS and USACE, and the testimony of witnesses. Mr. Gray stated that the County would like to assess the additional information, including the Applicant’s response, and then determine whether its DNS should be withdrawn or revised. *Testimony of Mr. Gray.*
18. Mr. Riccio stated that the Applicant would like to provide a response to the received comments and testimony and, accordingly, would support a continuance. *Testimony of Mr. Riccio.*



19. The Hearing Examiner granted the request for a continuance and issued a post-hearing order memorializing his oral ruling. The post-hearing order noted that the Hearing Examiner determined it would be appropriate to allow for additional time for members of the public and reviewing agencies to evaluate the application and the submitted information, especially in light of the quantity of new information submitted at the hearing, and provided for a comment period through April 27, 2018. The post-hearing order further provided that the Applicant would have the opportunity to submit a response to the received comments by May 18, 2018, and that the hearing would continue on May 31, 2018. *Exhibit 46.*

Following the Initial Hearing

20. After the conclusion of the initial hearing, several additional public comments were received on the proposal, generally expressing opposition. For example, James Loran wrote to the County, noting opposition to the proposal because of the potential harm it would do to the natural environment of the Refuge, as well as to the marine environment of the greater Salish Sea. Specifically, he expressed concern about farming of a concentrated amount of non-native pacific oysters, causing a large amount of detritus in a small area; the introduction of additional plastic and micro-plastics into the environment; the potential for the proposal to detract from the significant resources being spent by government to clean up Puget Sound; and potential visual pollution from aquaculture occurring so close to the Refuge and Graveyard Spit. *Exhibit 38.*
21. Some comments supporting the proposal were also received. For instance, Lyn Muench, a shellfish biologist, wrote that DOH is charged with monitoring and assessing water quality wherever commercial shellfish beds are present. Thus, the Applicant's efforts to reestablish aquaculture in Dungeness Bay has ensured that accurate water-quality data has been continuously collected and analyzed; several local and state partners, including the Applicant, have worked together to remove pollution sources from the area, providing healthier waters for all; and over two million dollars of outside funds have supported clean-up efforts. Ms. Muench stressed that continuation of the Applicant's lease and redevelopment of aquaculture will ensure that DOH maintains rigorous oversight of water quality in Dungeness Bay and the entire watershed. Finally, Ms. Muench noted that commercial shellfish operations successfully operated in Dungeness Bay for over 50 years, prior to the activity ceasing because of water quality concerns, and that it is possible for eelgrass, waterfowl habitat, and recreational opportunities to thrive side-by-side with aquacultural activities. *Exhibit 60.*
22. On May 7, 2018, the Applicant submitted a request to continue the hearing for six months to allow the Applicant time to prepare a site-specific Individual Assessment for approval of federal permits (the Section 404 and Section 10 permits) from the USACE. In addition, the County withdrew its SEPA DNS. The Hearing Examiner issued a second Post-Hearing Order setting a new hearing date of November 15, 2018. Since then, the

Hearing Examiner granted four additional requests for continuances to allow the Applicant and the County adequate time to conduct studies and to assess and evaluate the proposal. On August 7, 2019, the Applicant informed the County that it had completed its government-to-government consultation with USFWS and, as a result, would like to recommence the permitting process. Accordingly, the Applicant submitted new materials, including revised application materials and additional studies, and a continued hearing was set for November 21, 2019.<sup>6</sup> *Exhibit 75; Exhibit 76; Exhibit 77; Exhibit 78, Staff Report (2019), page 1; Exhibits 81 through 83; Exhibits 166 through 174.*

#### Revised Application and Supporting Materials

23. On December 11, 2018, the Applicant submitted revised application materials related to the proposal. In its revised materials, the Applicant requests that development of the commercial oyster operation proceed in three phases: in Phase 1, the Applicant would establish five acres of on-bottom bag cultivation at a maximum commercial bag density of 4,000 bags per acre, as well as on-bottom beach harvest of mature oysters; in Phase 2, the Applicant would increase cultivation to 10 acres; in Phase 3, the Applicant would increase cultivation to up to 20 acres, in rotation, over the 34-acre project site, depending on project outcomes and adaptive management. The revised materials provide for a maximum of 80,000 bags being used throughout the 34-acre farming area, during Phase 3 of operations. *Exhibit 82.*
24. As with its initial application materials, the Applicant submitted a project narrative with its new application materials. In addition to repeating much of the information it initially provided, the Applicant stresses:
  - Consistent with Policy 3.2.1 of the County's as-yet-adopted, updated SMP, aquaculture is of statewide interest and is important to the long-term economic viability, culture heritage, and environmental health of the County. Properly managed, it can result in long-term benefits and can protect the resources and ecology of the shoreline.
  - Mollusk aquaculture is recognized to be one of the most sustainable and least environmentally impacting methods of animal sourced protein because shellfish feed naturally and, comparatively, the operations require low energy and have low emissions.
  - The proposed phased operations will allow any potential unforeseen impacts to be identified and responded to through adaptive management.
  - Over the 50-plus year history of commercial oyster farming that occurred at the project site, USFWS never reported that commercial shellfish operations were incompatible or interfered with Refuge functions, particularly regarding migratory birds. To supplement the lack of documented information on this issue, the

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<sup>6</sup> On October 31, 2019, the Hearing Examiner denied a request from Protect the Peninsula's Future for an additional continuance. *Exhibit 175.*

Applicant acquired a report from Confluence Environmental Group, dated November 2018, entitled “Shellfish Aquaculture and Bird Interactions,” that determined the proposed project is unlikely to have adverse effects on migratory birds.

- Any sedimentation effects from the proposal are anticipated to be minimal, highly localized, and will not result in adverse changes to the benthic community (i.e., organisms that live in and on the bottom of a body of water). Scientific studies, along with direct observations from other oyster cultivation areas, have reported abundant, high-diversity infaunal communities (organisms that live in the substrate of a body of water, especially in soft sediments) and meiofaunal communities (organisms that live in both marine and fresh water environments) associated with on-bottom and bag oyster culture.

*Exhibit 82.*

25. As noted above, the Applicant submitted a report from Confluence Environmental Group (Confluence), dated November 2018, with its revised application materials assessing potential impacts from the proposal on birds. The report reviewed existing information and scientific literature on the potential interactions between shellfish aquaculture and marine birds, especially the brant (a species of goose), within the intertidal habitat of Dungeness Bay and determined:

The scientific record does not support a conclusion that shellfish farming negatively impacts bird use of estuaries. Based on anecdotal observations and existing literature, marine shorebirds, seabirds, and raptors are known to occur on (or near) similar aquaculture activities and gear as would be used by the Tribe for the proposed Pacific oyster aquaculture operations without incident. Based on over 100 years of aquaculture in Puget Sound and California and observations in and around aquaculture gear, the potential for negative interactions appears to be an insignificant risk with proper farm management. Based on the potential to increase foraging opportunities, there may be a net benefit or a neutral effect to birds that use Dungeness Bay.

While there is potential to negatively affect behavior and foraging for certain species through disturbance (e.g., noise) related to farm activities . . . these effects are expected to be minimal at this site due to the limited scale of activities, the limited total area where activities will occur, and the lack of eelgrass forage resources on-site for brant. In addition, the frequency of culture activities, best management practices established at farms, and natural timing in relation to seasonal use by birds provide avoidance and minimization measures that protect marine shorebirds,

seabirds, and raptors found on (or near) the proposed farm in inner Dungeness Bay.

*Exhibit 87.*

26. Confluence also prepared an additional report, entitled “Dungeness Bay Field Report” (Field Report), dated November 2018, which the Applicant included in its revised application materials. It notes that the Field Report is intended to support efforts by the Applicant to obtain permits from USACE, and serves as an individual biological assessment for the project. The Field Report states that Confluence performed a site survey on July 14, 2018, and confirmed the accuracy of the Eelgrass Survey previously prepared by the Applicant. The Field Report also documents environmental baseline conditions, including identifying macroalgae species; provides a general shoreline characterization, including identification of substrate material and general beach characteristics; documents benthic epifauna, benthic infauna, and other macrofauna present; assesses the condition and suitability of forage fish spawning habitat; and assesses potential visual impacts from the proposal. It includes a detailed survey of a 180-acre area, including the 50-acres associated with the proposal. The Field Report determined that “the proposed Dungeness Bay project area [is] considered suitable for Pacific oyster aquaculture activities based on substrate, tidal elevations, and ability to avoid sensitive habitat.” *Exhibit 86.*
27. After submitting its initial, revised materials, the Applicant also submitted scientific articles reviewing sources of microplastic pollution in the marine environment, as well as plastic degradation in seawater. Applicant Shellfish Biologist Elizabeth Tobin stressed the following key points from this literature in an email to the County, dated January 28, 2019:
- Although all plastics will ultimately degrade, the rate of degradation in seawater is significantly lower compared to plastic material continuously exposed to air. This retardation of degradation is primarily the result of the lower temperature and oxygen concentration of seawater, biofouling, and reduced UV exposure.
  - Plastic debris that enters the water directly, prior to any significant weather degradation, is unlikely to yield microplastics via standard mechanisms of degradation in seawater.
  - Microplastics in the marine environment are primarily from land-based sources or discarded debris on beaches. Hence, beach cleaning and debris removal are considered to be effective mitigation strategies.
  - Plastic gear used for shellfish aquaculture is specifically designed for use in the marine environment and made of UV and corrosive-resistant materials to further slow degradation.
  - In the Salish Sea, the lowest levels of plastic marine debris were found in beaches of south Puget Sound, including areas with the highest density of aquaculture.

- Although the fishing industry is a source of marine plastics, with a range of reported contribution, by far the largest contributor to marine plastics is land-based sources. Nylon from netting and line are presented as less than three percent of marine plastics globally.
- Degradation timescales for the types of bags that would be used are reported to be on the order of decades.

*Exhibit 88.*

28. On March 1, 2019, the Applicant also submitted a “Monitoring and Mitigation Plan” (Mitigation Plan), addressing conservation measures, site-specific stewardship measures, and monitoring activities, based on concerns raised by USFWS and local citizens.<sup>7</sup> These include:
- Ensuring shellfish activities do not occur within 25 horizontal feet of native eelgrass.
  - Ensuring activities occur at or below a tidal elevation of +3 feet of the mean lower low water (MLLW) line to ensure surf smelt and Pacific sand lance habitat is protected.
  - Ensuring activities only occur during approved work windows related to the Pacific herring spawning season or, if work is necessary during spawning season, ensuring the work area is surveyed for the presence of herring spawn prior to the activity occurring.
  - Ensuring that a spawn survey is completed prior to work occurring in or adjacent to potential spawning habitat for sand lance or surf smelt if work must occur outside approved work windows for these species.
  - Storing all shellfish farming gear off-site.
  - Clearly, indelibly, and permanently marking all gear with the Applicant’s contact information.
  - Ensuring all gear is tightly secured to prevent it from breaking free.
  - Following all patrolling and reporting requirements related to the identification of debris in the project vicinity, including reporting all such debris to staff at the Refuge.
  - Ensuring site access routes avoid paths through, grounding in, or anchoring vessels in native eelgrass.
  - Limiting gear use in starting operations, including limiting on-bottom bag cultivation of oysters to 5 acres during the first two years of operation (Phase 1). Outcomes from monitoring activities will inform the potential for phased expansion beyond Phase 1.
  - Following recommended timeframes from USFWS for work windows that will ensure the fewest impacts on the Refuge.

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<sup>7</sup> Several of these measures incorporate the required Conservation Measures of the PBA.

- Minimizing noise by ensuring vessels use no-wake speeds when approaching the project site.
- Minimizing light and glare through use of personal headlamps (for nighttime activities) with down-casted lights. No other light sources or glare would be used.
- Using monitoring activities to evaluate potential impacts associated with farming activities which may be adjusted, including site area, bag density, and frequency and timing of site visits.
- Conducting eelgrass surveys every two to three years and adjusting farm activities as necessary.
- Recording monthly observations “by a shellfish farm worker, Tribal biologists and/or an Audubon volunteer” on brant and shellfish farm interactions. This would include keeping a log that details observations, tidal height, brant numbers, and a description of the observed interactions. On-site activity would be modified if negative behavioral responses from brant to specific farm activities are observed.
- Performing monthly shorebird counts. This would be conducted by “a shellfish farm worker, Tribal biologists and/or an Audubon volunteer” and document the number and species of shorebirds observed within an area adjacent to the lease parcel.

*Exhibit 89.*

29. The County also requested that the Applicant provide a visual assessment of the proposal, which it provided on February 22, 2019. The visual assessment determined that the on-bottom beach culture method of aquaculture would not have any visual impacts because it does not involve any gear placement or equipment. It also determined that the on-bottom bag culture method would have limited visual impacts, specifically noting that area residents with houses overlooking Dungeness Bay would not be able to see the on-bottom bags even when the tide is out during daylight hours because the distance to the nearest residence is approximately one mile and that recreational users who access Dungeness Spit during a low-tide period when the on-bottom bags are exposed would not be able to travel closer than approximately 430 feet to the bags, and given the low vertical profile of the bags and the fact that they blend with the substrate, even the exposed bags would be difficult to see without binoculars. The visual assessment also provided several photographs of similar operations in the region to show the difficulty of seeing the on-bottom bags, even during low tides. *Exhibit 90.*
30. In addition to the documentation discussed above, the Applicant also submitted a revised JARPA (Exhibit 83), a revised SEPA checklist (Exhibit 84), and a “General Operational Plan” (Exhibit 91) for the proposal, as well as the detailed information it submitted as part of its ongoing efforts to obtain approval of Section 10 and Section 404 permits from USACE, including information about its government-to-government consultation with

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USFWS (Exhibit 92). Of particular note, after reviewing the information provided by the Applicant, including the reports prepared by Confluence, WDFW withdrew previous comments associated with the project that it submitted to the County and USACE. In a new comment letter, dated August 6, 2019, USFWS states:

We recognize there is little site-specific research available on impacts of commercial, on-bottom bag aquaculture to bird species found on the Refuge and note that different parties can derive divergent conclusions from the same studies. Nevertheless, we are concerned about potential impacts to Refuge wildlife habitat based on the proposed location for this activity. We recommend operations and monitoring activities occur outside of the migration and wintering periods for shorebirds and waterfowl, should a permit be provided. . . We are committed to assisting with finding the least resource-disturbing approaches to this potential use.

*Exhibit 92.B.*

31. DNR also submitted a letter to USACE, dated January 10, 2019, as part of the permit review process for the Section 10 and Section 404 permits. It explains that current lease of tidelands on the project site commenced on August 1, 2007, and that the parties are in negotiation for a new lease. The letter further explains that, in 1943, the United States applied for an easement to use the second class tidelands adjacent to Dungeness Spit as part of the Refuge. This easement was granted, with the state retaining fee ownership of the tidelands. In addition, under the 1943 easement, DNR may grant additional authorizations for other uses on the tidelands, so long as those uses do not conflict with the easement granted to the Refuge. DNR has exercised its rights and authorized commercial aquaculture in the tidelands associated with the project site since at least 1963. The DNR letter notes that records do not include any correspondence from USFWS indicating that past or present commercial aquaculture activities have been or are currently in conflict with the easement. The DNR letter also explains why it would be difficult, if not impossible, to move the proposed operations to another location and why DNR prefers continuing to work with the Applicant to reauthorize commercial shellfish production at the proposed (current) location:

The subject tidelands have covered status under the multiparty 2007 Settlement Agreement for Subproceeding No. 89-3 (Shellfish) under the U.S. District Court, Wester District of Washington, in relation to *United States of America, et al vs. State of Washington, et al*, case number C70-9213-RSM. Thus, the lease is one of a finite set of aquatic lands leases that are considered “covered leases” governed under the 2007 Settlement Agreement. The location and extent of covered leases is fixed through the Settlement Agreement. Adjustments to the location and/or extent of a covered lease would presumably require amendment to the Settlement

Agreement, which would necessitate concurrence from all settlement parties, including 17 tribes. In short, proposal that involve relocating the leasehold are counter to the terms of the 2007 Settlement Agreement associated with a key federal court case. DNR would consider such proposal involving covered leases as problematic.

*Exhibit 94.*

#### Notice of Revised Application

32. The County determined that the revised application was complete on September 5, 2019. The County provided notice of the revised application and continued hearing on the proposal, as required by municipal code. This included posting signs at several locations on October 18, 2019; publishing notice in the *Peninsula Daily News* on October 20 and November 6, 2019; publishing notice in the *Sequim Gazette* on October 23, 2019; and mailing or emailing notice to interested parties and reviewing departments and agencies on October 21, 2019. The County received approximately 100 comments on the revised application in response to its notice materials. *Exhibit 81.A. Exhibit 1, Staff Report (2018), page 5; Exhibit 11; Exhibit 21; Exhibit 22; Exhibit 78, Staff Report (2019), page 6; Exhibit 81.*
33. Of particular note, the County received the following comments about the revised application from community organizations interested in the proposal:
- Friends of Dungeness National Wildlife Refuge submitted a letter expressing opposition to the proposal. Specifically, the group expressed concern over allowing commercial aquaculture operations within the Refuge; potential impacts on waterfowl and shorebirds and eelgrass; and the visual impacts that would occur, negatively impacting the 100,000 annual visitors to the Refuge.
  - The Washington State Chapter of the Sierra Club wrote that it “honors and respects the treaties between our state’s First Nations and the United States Government,” that the Club supports the Applicant resuming oyster farming in “the heart of their historic homeland, as ‘usual and accustomed’ a place as the people have, an area where their ancestors gathered shellfish for centuries,” and that the Club “recognizes and applauds the serious steps taken by the Jamestown S’Klallam Tribe to improve the water quality in the bay and to minimize environmental impacts of the project through use of best practices.”<sup>8</sup>
  - The Port of Port Angeles wrote expressing support for the proposal, noting that it would provide an economic benefit to the County. The Port also stressed that the Applicant has a long history of successful resource management that provides both economic benefits and improves the health of the region’s natural resources.

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<sup>8</sup> *Exhibit 122.*



- The National Wildlife Refuge Association wrote that its mission is to conserve America’s wildlife system for future generations through programs that protect, enhance, and expand the National Wildlife Refuge System and the landscapes beyond its boundaries. It stressed that the Refuge has been recognized by BirdLife International as an important area and by the Audubon Society as an Important Birding Area, especially for brant. Moreover, the Refuge provides significant economic benefits to the County: one report produced by USFWS in 2013, for instance, identified nearly \$2 million in expenditures made by the public and \$324,000 in tax revenue generated within the County, all related to the Refuge. Because of these factors, the Association supports finding a culturally appropriate, alternate commercial aquaculture farm location.
- The Coalition to Protect Puget Sound Habitat expressed strong opposition to the proposal and requested its denial. It specifically noted that recent federal litigation that it was involved in resulted in a federal judge ruling that the NWP 48 Permit is unlawful in Washington State (as is discussed in more detail below). The Coalition wrote that it does not believe the Applicant has provided sufficient documentation addressing individualized impacts from the operation and potential mitigation to warrant project approval, such as cumulative impacts and impacts on aquatic vegetation and the benthic community; impacts on fish, birds, and water quality; and impacts on substrate characteristics, as well as potential impacts on the environment from the use of plastics in shellfish operations.
- The Olympic Audubon Society (OPAS) wrote with concerns about the proposal, especially in relation to monitoring. OPAS noted that it has discussed the proposal with the Applicant and is interested in collaborating with the Applicant to “improve scientific knowledge of ways to identify and avoid potential impacts [on shorebirds and waterfowl] resulting from shellfish aquaculture. OPAS is concerned, however, that the mitigation plan does not provide enough detail to judge the nature of the Applicant’s commitment to understanding potential impacts and that it “does not provide any of the specific standards and criteria that [would] be incorporated in any monitoring or design,” “describe how the [Applicant would] adaptively manage the program in view of what is learned from that monitoring program,” or provide a “realistic idea of costs and commitments in support of that effort.”<sup>9</sup> Accordingly, OPAS requests that a more detailed mitigation and monitoring plan be provided to ensure the best available science is used in evaluating impacts from the proposal.
- The Olympic Environmental Council and Protect the Peninsula’s Future (as represented by Darlene Schanfald) also submitted several comments expressing strong opposition to the proposal, as well as additional scientific literature and information supporting its position.

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<sup>9</sup> Exhibit 165.

*Exhibit 119; Exhibit 122; Exhibit 125; Exhibit 140; Exhibit 150; Exhibit 151; Exhibit 160; Exhibit 165; Exhibit 178; Exhibit 188; Exhibit 189.*

34. In addition to comments received from community organizations, the County received over 50 additional comments from interested members of the public, prior to the continued hearing, generally expressing opposition to the proposal. Representative of such comments, area resident Carl Silver wrote the County on November 12, 2019, expressing the following concerns about the proposal:
- Part of the County's mandate is to promote tourism, which is in direct conflict with turning part of a wildlife refuge over to commercial oyster farming activities.
  - The Applicant's premise that they have a history of using the spit for commercial oyster farming does not justify allowing such activity in the future: many things that were legal and seemed right in the past were proven wrong and deleterious to society, such as endangering the environment for a short-term commercial gain accruing to one business organization.
  - The Applicant may have used Dungeness Bay for ancestral shellfish harvesting, but shellfish harvesting for subsistence purposes is a far cry from industrial scale aquaculture, especially aquaculture involving a non-native oyster species that was not present in Dungeness Bay until recently.
  - There appears to be a significant conflict between the easement rights granted to the Refuge and the aquacultural lease granted to the Applicant. Oyster farming will have detrimental impacts on the bird population of the Refuge, and it is well-documented that the bird population has decreased significantly since the 1970s. This decrease can be attributed to the destruction of eelgrass, especially from human activity. Earlier oyster farming activities, in particular, were especially disruptive to eelgrass.
  - Micro-plastic pollution is a serious concern, and it is hard to believe that up to 80,000 bags will not produce micro-plastic contamination that will have detrimental impacts on fish stocks.
  - The Applicant has indicated that it will implement the project in phases. No information, however, has been provided about the evaluation that will occur after each phase. If the permit is approved, an independent evaluator should be selected to evaluate the proposal prior to additional phases moving forward.

*Exhibit 164.*

35. As noted above in the comment submitted by the Coalition to Protect Puget Sound Habitat, the U.S. District Court for the Western District of Washington issued an order on October 10, 2019, shortly before the continued hearing, essentially eviscerating the validity of the NWP 48 Permit in Washington State. Although USACE determined, previously, that the Applicant would not be eligible for an NWP 48 Permit for the proposal, the order was provided as part of the record for this matter (Exhibit 95), and it

warrants discussion. In his order, Judge Robert Lasnik determines that USACE’s decision to reissue the NWP 48 Permit in 2017 (with an expanded scope) without preparation of an EIS violated both the Clean Water Act and the requirements of the National Environmental Policy Act (NEPA). Specifically, he noted that USACE’s decision was “based on little more than (1) selectively chosen statements from the scientific literature, (2) the imposition of general conditions with which all activities under nationwide permits must comply,” and “(3) the hope that regional Corps districts will impose additional conditions and/or require applicants to obtain individual permits if necessary to ensure that the adverse impacts will be minimal.” *Exhibit 95*. More specifically, Judge Lasnik’s order takes issue with USACE’s failure to discuss the impacts of shellfish aquaculture “on other types of aquatic vegetation, on the benthic community, on fish, on birds, on water quality/chemistry/structures, or on substrate characteristics” or to discuss “the impacts of plastic use in shellfish aquaculture.” *Exhibit 95*. In conclusion, Judge Lasnik rules that USACE failed “to adequately consider the impacts of commercial shellfish aquaculture activities authorized by NWP 48, that its conclusory findings of minimal individual and cumulative impacts are not supported by substantial evidence in the record, and that its [Environmental Assessment] does not satisfy the requirements of NEPA and the governing regulations.” *Exhibit 95*.

#### State Environmental Policy Act

36. Clallam County issued a DNS for the initial proposal on February 23, 2018, which was subsequently withdrawn. Following revision of the proposal, the County again acted as lead agency and reviewed the environmental impacts of the proposed project as required by SEPA, Chapter 43.21C Revised Code of Washington (RCW). After reviewing the Applicant’s revised environmental checklist and other information on file, the County determined that, with mitigation, the proposal would not have a probable significant adverse impact on the environment. Accordingly, the County issued a Mitigated Determination of Nonsignificance (MDNS) on October 31, 2019, with a comment deadline of November 14, 2019.<sup>10</sup> Mitigation measures require that the proposal be implemented in substantial conformance with the submitted application materials and reports; that it complies with the submitted Monitoring and Mitigation Plan (Exhibit 89) and with the submitted Operation Plan (Exhibit 91); that the Applicant visits the site at least once a week to remove debris and gear, including broken bags, within the lease facility; and that the Applicant performs a comprehensive beach clean-up on the beaches along the Dungeness Bay and Dungeness Spit a minimum of twice per year. *Exhibit 79*.

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<sup>10</sup> The MDNS states: “Unless the Responsible Official withdraws the threshold determination pursuant to WAC 197-11-340(3)(a), the threshold determination shall be final at the end of the comment period. . . . The Clallam County Hearing Examiner Decision will be forwarded to the WA State Department of Ecology (Ecology) for review. Within 21 days of Ecology’s Final Action determination of the matter, the Shoreline Permit and SEPA Threshold Determination may be appealed to the WA State Shorelines Hearing Board.” *Exhibit 79*.

37. On October 31, 2019, the County emailed the MDNS to reviewing departments and agencies, including USACE, USFWS, the Refuge, DNR, DOE, WDFW, the Jamestown and Elwha Tribes, the Clallam County Road Department, the Clallam County Environmental Health Department, and interested parties. No agency comments specific to the MDNS were received. *Exhibit 78, Staff Report (2019), page 6; Exhibit 80.*

Comprehensive Plan and Zoning

38. The County Comprehensive Plan does not cover open water areas, including Dungeness Bay and the Strait of Juan de Fuca, and the County does not have a zoning designation for the project site. The Comprehensive Plan, however, does recognize that shellfish have “economic benefits for tourism as well as commercial and recreational harvest” and “more importantly, indicate the overall health of our watersheds.” *Clallam County Code (CCC) 31.02.310*. In addition, shellfish “whether harvested or not, perform a valuable function in filtering contaminants from water.” *CCC 31.02.310*. The Comprehensive Plan also recognizes that the County should “protect, maintain and enhance fish and shellfish spawning, rearing, and migration habitat, and work to ensure harvestability of fish and shellfish.” *CCC 31.02.320(7)*. Finally, the Comprehensive Plan also states that the County should “encourage growth of aquaculture and shellfish industries, consistent with regional comprehensive plans, and within the limits of applicable local, state, and federal regulations.” *CCC 31.02.620(1)*. *Exhibit 78, Staff Report (2019), page 7.*

Critical Areas

39. The Clallam County Critical Areas Code, Chapter 27.12 CCC, was adopted to implement the environmental protection policies of the County’s Comprehensive Plan and the critical area protection requirements of the Growth Management Act, Chapter 36.70A RCW, and the Shoreline Management Act, Chapter 90.58 RCW. *CCC 27.12.020(15)*. *Exhibit 78, Staff Report (2019), page 4.*
40. The project site is located within Dungeness Bay, a part of the Strait of Juan de Fuca (Type 1 Water) classified as an Aquatic Habitat Conservation Area (AHCA). *CCC 27.12.310(1)(a)*. The County determined that, based on the proposed in-water use, no AHCA buffers would apply to this proposal. The only applicable AHCA protection standard would be *CCC 27.12.315(3)*, which states that a dock, pier, moorage, float, or launch facility may be permitted subject to the criteria from the SMP. The Applicant, however, does not intend to install any permanent structures within the project site. This policy states that no petroleum-based treatments or preservatives (including creosote, arsenic, or copper) are permitted. The application materials show that none of these prohibited materials would be used as part of the proposal. *Exhibit 78, Staff Report (2019), page 4; Exhibit 83; Exhibit 89; Exhibit 91.*
41. This project site is also located in a Class I Wildlife Habitat Conservation Area (WHCA) (*CCC 27.12.310(1)(b)(1)*) because Dungeness Bay is connected to the Strait of Juan de

Fuca, which contains federal and state endangered, threatened and sensitive species and their critical habitat. The Strait of Juan de Fuca contains the following Endangered Species Act species: Puget Sound Chinook, Hood Canal summer run chum, Puget Sound steelhead, Georgia Basin bocaccio, Georgia Basin yelloweye rockfish, Georgia Basin canary rock fish, Green sturgeon, South resident killer whales, Humpback whales, and Coastal Puget Sound bull trout. The Dungeness Spit is also considered a Class I WHCA because it contains habitat targeted for preservation by federal, state, and/or local government which provide fish and wildlife habitat benefits, such as important waterfowl areas identified by the U.S. Fish and Wildlife Service. CCC 27.12.310(1)(b)(ii). CCC 27.12.320(1)(b) provides that all sites with known locations of Class I wildlife species or sites adjacent to known locations of Class I wildlife species shall require the withholding of all development permits without the filing and approval of a Habitat Management Plan (HMP). The HMP shall consider measures to retain and protect the wildlife habitat and shall consider effects of land use intensity, buffers, setbacks, impervious surfaces, erosion control, and retention of natural vegetation. *Exhibit 78, Staff Report (2019), page 4.*

42. As discussed above, USACE prepared a PBA addressing shellfish activities in Washington State in October 2015. *Exhibit 18.* The PBA addresses the specific impacts of the use of mesh bags in Dungeness Bay, and the PBA would be utilized by USACE in processing the Applicant's Section 10/404 permit application. To avoid or minimize any effects, Section 3.5 of the PBA lists Conservation Measures that apply to all shellfish activities in Washington State. These Conservation Measures would be permit conditions that are tied to individual permits the Applicant would obtain from USACE. In addition, as part of USACE's permit review, the Corps would ensure that the proposal would not impact ESA species or their critical habitat. The County determined that the PBA and BiOp would meet the requirement for a Habitat Management Plan found in CCC 27.12.830. In addition, the Applicant has provided a custom Monitoring and Mitigation Plan (*Exhibit 89*) that establishes Conservation Measures incorporated from the PBA, as well as site-specific stewardship measures and monitoring plans. *Exhibit 78, Staff Report (2019), pages 4 and 5; Exhibit 89.*
43. A Mitigation Plan is required for any alteration within 200 feet of a Class I WHCA, which are areas containing critical habitat for threaten or endangered species. The PBA and BiOp address impacts associated with the farming of oyster in mesh bags in Dungeness Bay. The County determined that the PBA and BiOp prepared for the Army Corp Section 10/404 permit application address the requirements found in CCC 27.12.835, .840, and .850, for a Mitigation Plan, per CCC 27.12.835(3). *Exhibit 78, Staff Report (2019), page 5.*

Shoreline Management Act and County Shoreline Master Program

44. The legislature enacted the State Shoreline Management Act (SMA) with the primary goal of protecting the public interest in the state's shorelines through a coordinated

development process. The legislature also enacted the SMA to protect against adverse effects to the public health, the land, vegetation, wildlife, and waters, and to preserve the public's opportunity to enjoy the physical and aesthetic qualities of the natural shoreline to the greatest extent feasible. Under the SMA, permitted uses in shorelines must be designed and conducted in a manner to minimize damage to the ecology and environment of the shoreline area and to minimize any interference with the public's use of the water. *RCW 90.58.020*. The SMA and the Clallam County Shoreline Master Program (SMP) govern uses within Dungeness Bay. *RCW 90.58.030(2)(f)(iii)*. Accordingly, the project is subject to the County SMP. *Exhibit 78, Staff Report (2019), page 3*.

45. The County's SMP designates Dungeness Spit and Graveyard Spit as "Natural" shoreline environments under the SMP. Because the project site is located waterward of the ordinary high water mark of these shorelines, the Natural shoreline designation is applicable to the project site under the SMP. Under Section 3.02 of the SMP, the Natural shoreline environment is characterized by: the presence of some unique or cultural features considered valuable because of their natural or original conditions; a shoreline that is relatively intolerant of intensive human use; a shoreline that is valuable for historical, cultural, scientific, or educational considerations by virtue of its natural, unaltered original condition; a shoreline that should be maintained or restored in its original condition for the benefit and pleasure of future generations; and/or a shoreline that, based on local citizen opinion and the needs of the people of the rest of the state, should be preserved in its original condition. *County SMP, Section 3.02.A*. The SMP notes that the objective of designating a Natural shoreline is "to preserve, maintain or restore such shoreline as a natural resource relatively free of human influence" and to "discourage or prohibit those activities which might destroy or degrade the natural characteristics which make these shorelines unique and valuable." *County SMP, Section 3.02.B. Exhibit 78, Staff Report (2019), page 8*.
46. The SMP provides several "use" policies associated with the Natural shoreline environment. Specifically:
- Economic Development: Commercial or industrial development should be prohibited. Commercial developments already in place should not be expanded or rebuilt. When such structures become rundown or dilapidated, they should be removed.
  - Public Access Element: Public access to a shoreline of Natural Environment should be provided in a manner that does not change or degrade its natural character. Further, on those shorelines regarded as intolerant of human activity, public access by foot trails should be encouraged in preference to roadways.
  - Circulation Element: Foot trails for public access should be permitted. Roads should not be permitted except for private roads that provide access to single-family dwellings.

- Recreation Element: Recreational opportunities for the public should be encouraged to the extent that they do not alter the natural character of the shoreline, so that future generations may enjoy the scenic vistas and aesthetic qualities of these shorelines.
- Shoreline Use Element: The use of a shoreline of a Natural Environment should be limited to those activities that preserve the natural features unchanged.
- Conservation Element: Activities on shorelines of a Natural Environment should be confined to those that conserve the features and characteristics that are an integral part of this environment. The scenic vistas and aesthetic qualities should be preserved without alteration.
- Historical/Cultural Element: In general, shorelines of historic, cultural, scientific, or educational value should be regarded as belonging in a Natural Environment. As such, any change or alteration that tends to change or degrade this value should be prohibited. The only activities that should be permitted should be those designed to preserve, protect, or restore such features.
- Restoration Element: The Master Plan should encourage efforts toward the restoration of natural shorelines to their original conditions, particularly those that are blighted by abandoned or dilapidated structures, by earthworks and excavations done in the past, and by the results of malicious mischief and other activities that have caused a deterioration of the natural environment.

*County SMP, Section 3.02.C.*

47. The SMP also recognizes 13 “natural systems” within the County that warrant additional protection and consideration when development or increased use is considered. *County SMP, Chapter 4.* Accordingly, the SMP provides regulations specific to each of these 13 natural systems. Here, the proposal would involve reauthorization of aquacultural activities in an area involving three such natural environments: Marine Beaches, Spits and Bars, and Subtidal Shorelines. County staff determined that the following regulations from Section 4.01, 4.02, and, 4.12 of the SMP would be applicable to the proposal:

- Any activity that could convert a Natural Environment to an irreversible condition or detrimentally alter the natural conditions is prohibited. (Natural Environment – Marine Beach Regulation 12)
- Those marine beaches that contain a unique or fragile natural resource should remain undeveloped. (Natural Environment – Marine Beach Regulation 13)
- Regulations applicable to marine beaches should apply to spits and bars. (Natural Environment – Spits and Bars Regulation 1)
- The area inland from a spit or bar is protected from wave action, allowing such forms as shellfish to reproduce and live protected from the violence of the open coast. No activity that would jeopardize the ecology of this area is permitted. (Natural Environment – Spits and Bars Regulation 2)

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- Prime consideration must be given to the preservation of subtidal shorelines for future generations. (Natural Environment – Subtidal Shorelines Regulation 1)
- Any activity that could convert a subtidal shoreline to an irreversible condition or detrimentally alter the natural conditions is prohibited. (Natural Environment – Subtidal Shorelines Regulation 2)
- Aesthetic considerations should be of prime importance in such shoreline decisions. (Natural Environment – Subtidal Shorelines Regulation 3)
- No new development or redevelopment should be permitted unless it provides for the general enhancement of the natural shoreline. (Natural Environment – Subtidal Shorelines Regulation 4)
- Those subtidal shorelines that contain a unique or fragile natural resource should remain undeveloped. (Natural Environment – Subtidal Shorelines Regulation 5)
- While wishing to maintain broad public access to the shoreline areas, it is possible that, if certain fragile areas in the natural environment are overly accessible, the resource will be destroyed. Therefore, the volume of access should be only that which the waters and shoreline can withstand. (Natural Environment – Subtidal Shorelines Regulation 5)

*Exhibit 78, Staff Report (2019), pages 9 through 11.*

48. The SMP provides the following policies specific to aquaculture:

- Aquaculture activities and structures should be located in areas where vessel navigation is not severely restricted.
- Potential locations for aquaculture enterprises and practices are relatively restricted, due to specific biophysical requirements, such as water quality, temperatures, substrate, dissolved oxygen, and, in coastal waters, salinity. Therefore, special emphasis and consideration should be given to these factors when considering other water-dependent uses in those areas having high potential for aquaculture.
- Due to the formative and experimental nature of aquaculture technology and practices, attention should be given to encouraging the introduction of, and experimentation with, new aquaculture methods, devices, and practices in designated areas only.
- Particular attention should be addressed toward the possible effects that aquaculture practices may have on the long-term ecological stability of the aquatic ecosystem and any secondary detrimental effects that could arise as a result of various aquacultural practices.
- Development ancillary to aquaculture should be located inland, off the shorelines, unless clearly dependent upon a shoreline or overwater location.
- The enhancement or rehabilitation of water bodies and their adjacent habitat by public or private entities for purposes of increasing yields or production of fisheries resources should be encouraged.

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- Aquaculture structures and facilities should be located and designed to not significantly degrade unique scenic aspects of the area.

*County SMP, Section 5.02.B.*

49. County staff analyzed the aquaculture policies and determined: the proposal would not impact navigation; the proposal would involve use of approximately 4.4 percent of Dungeness Bay, a sheltered area that has been recognized as a location for aquaculture based on the creation of a shellfish protection district for the area; the proposal would not use experimental technology; the mesh bags proposed for use would be located at least 25 feet from all eelgrass, and the Applicant's Mitigation and Monitoring Report addresses conservation measures, site-specific stewardship measures, and monitoring of the site; the proposal would not involve any ancillary activities; the SDCWD, of which the Applicant is a member, has improved the water quality in Dungeness Bay significantly to the extent that DOH has now determined that most areas in Dungeness Bay are approved for shellfish activity; and the Applicant provided a Visual Assessment (Exhibit 90), which indicates that the mesh bags would only be visible during extreme low tides and only from a very close distance. *Exhibit 78, Staff Report (2019), pages 11 through 13.*
50. Chapter 5.02.C of the SMP also provides regulations applicable to aquaculture. Of particular note, an SSDP is required when structures are fixed to the shoreline environment, as would occur here with the mesh oyster bags. *County SMP, Section 5.02.C.1.b.* In addition, under Section 5.02.C.4.a, aquacultural uses in the Natural shoreline environment are limited to those involving the "propagation, enhancement, or rehabilitation of naturally occurring stocks." Aquacultural developments that involve mechanical/hydraulic dredge harvesting are allowed, as a conditional use, but those involving shore-based structures are prohibited. *County SMP, Section 5.02.C.4.* The County determined that, because the use of subtidal oyster bags is not a specific use that is either permitted or prohibited in the Natural shoreline environment, an SCUP is also required for the proposal. *Exhibit 78, Staff Report (2019), pages 14 and 15.*

#### *Shoreline Substantial Development Permit*

51. Any "substantial development" within the SMA jurisdiction requires approval of a shoreline substantial development permit (SSDP). *Substantial development* is any development in which the total cost or fair market value exceeds \$7,047, or any development that materially interferes with the normal public use of the water or shorelines of the state.<sup>11</sup> *RCW 90.58.030(3)(e).* The Applicant has estimated that the fair market value of the project would exceed the monetary threshold, requiring approval of an SSDP. In addition, as noted above, an SSDP is required because the proposal would

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<sup>11</sup> The initial threshold listed in RCW 90.58.030(3)(e) is \$5,000. The statute, however, provides that the threshold should be adjusted every five years.

involve affixing mesh bags (a structure) to the shoreline environment. *Exhibit 78, Staff Report (2019), page 23; Exhibit 83.*

52. The County has adopted the review criteria for an SSDP provided in WAC 173-27-150. County staff reviewed the proposal and determined that it would be consistent with the policies and procedures of the SMA, the permit and enforcement procedures of Chapter 173-27 WAC, and the County's own SMP. *Exhibit 78, Staff Report (2019), pages 23 and 24.*

*Shoreline Conditional Use Permit*

53. Under the County's SMP, uses that are not specifically classified as permitted or prohibited may be authorized as conditional uses so long as: the use would be consistent with the policies of RCW 90.58.020 and the SMP; the use would not interfere with the normal public use of the shoreline; the use of the site and design of the project would be compatible with other permitted uses in the area; the use would cause no unreasonable adverse effects to the shoreline environment in which it would be located; and the public interest would suffer no substantial detrimental effect from the use. *County SMP, Appendix B.* In addition, the cumulative impacts of additional requests for like actions in the area should be considered when evaluating a request for an SCUP. *County SMP, Appendix B.*
54. County staff analyzed whether the proposal would comply with the applicable criteria for approval of an SCUP and determined:
- If the Applicant had proposed reestablishing aquaculture on-site using the "longline culture" method with mechanical dredge harvesting, as previously occurred, the proposal could have been reviewed as a modification to a preexisting, non-conforming use. Because the Applicant has not operated commercially in the lease area for over 14 years, however, and is using the on-bottom bag culture method, the County believes the proposal would not involve a preexisting non-conforming use under WAC 173-27-280(3) and, accordingly, it is being reviewed as a new use.
  - The Refuge (in which the project site is located) includes public shorelines that are enjoyed by approximately 75,000 visitors annually. The proposed use would be located on the interior portion of the Dungeness Spit, in an area that is (generally) not accessible to the public. The impacts of an average of 6,250 visitors per month to the Refuge, as compared to the 6 to 36 visits that the Applicant's employees would make to the site are noteworthy. If bird or wildlife use of the Refuge is diminished by the proposal, however, this could reduce the public's desire to visit the Refuge.
  - The proposed use would occupy 34 acres of the approximately 768 acres of Dungeness Bay, or approximately four percent of the Bay. Oyster bags would

only be 0.5 feet high and would not impact navigation. Because the Applicant leases this area, it is not available for recreational shellfish activity. The remaining 23,000 linear feet (or approximately 4.3 miles) of the tidelands inside Dungeness and Graveyard Spit, however, is still available for recreational shellfish activities.

- In 2011, under Governor Gregoire, Washington State became the first state in the nation to launch a shellfish initiative. Currently, Governor Inslee's Shellfish Initiative promotes clean-water commerce, elevates the role shellfish play in keeping marine waters healthy, and creates family-wage jobs. In addition, the legislature has found that shellfish harvesting is important to the state's economy and way of life (RCW 90 72.030; Exhibit 20).
- The County formed a Shellfish Protection District (Chapter 27.16 CCC) to address the closure of shellfish areas in Dungeness Bay due to water quality issues. In addition, the SDCWD was formed by interested stakeholders, including the Applicant, to improve water quality in Dungeness Bay to allow for future shellfish activity.
- Oysters are filter feeders that improve water quality, which is in the public's interest. In addition, oysters are an efficient source of protein that does not require feeding and does not promote greenhouse gas emissions, as compared to the production of chicken, pork, or beef.
- It was beyond the Applicant's control to cease its oyster operations because of water quality concerns within Dungeness Bay. The Applicant's desire to reestablish its commercial oyster operation is evident from its efforts to clean up the waters of Dungeness Bay, through participation in the SDCWD, and through maintaining its lease. Because the Applicant ceased operations for over 14 years, however, the County believes the operation would not be considered a preexisting, non-conforming use.
- Potential impacts to the shoreline environment from the proposed use have been addressed in the PBA and the BiOp. In addition, the Applicant must obtain Section 10 and 404 permits through USACE, which would ensure that the proposal would not impact any ESA-protected species of their critical habitats.
- A commercial oyster farm had operated on-site for over 50 years, and no adverse impacts were documented.
- The County issued an MDNS, which determined that, with mitigation, the proposal would not have probable significant adverse impacts on the environment.
- The Applicant must demonstrate how the cultivation of oysters in up to 80,000 on-bottom bags, requiring year-round maintenance of up to six people visiting the site up to six times a month within the migration and wintering periods for shorebirds and waterfowl is an appropriate use in the Natural shoreline environment.

- Based on the density of birds that visit the Refuge and their sensitivity to disturbances while migrating and foraging, even small impacts could result in substantial detrimental effects to the public interest.
- Based on rights outlined in the Point-No-Point Treaty of 1855, DNR has different considerations for leasing property it controls to area tribes versus non-tribal entities. Because of this, it is unlikely that the proposal would result in a proliferation of additional shellfish proposals in Dungeness Bay. The proposal would not result in cumulative impacts on the area.

*Exhibit 78, Staff Report (2019), pages 15 through 23.*

55. Despite County staff's analysis indicating that the proposal would, in general, meet the criteria for approval of an SCUP—and contrary to staff's earlier recommendation of approval of an SCUP for the initial version of the proposal that involved nearly twice as much activity—staff determined that the proposal would not be consistent with the Natural shoreline environment and would negatively impact wildlife at the Refuge. Accordingly, County staff determined the proposal would not meet the criteria for approval of an SCUP. *Exhibit 78, Staff Report (2019), page 25.*
56. The Applicant reviewed the revised staff report and, on November 20, 2019, provided a response, noting:
  - Staff determined that the proposal would not qualify as a preexisting, non-conforming use because operations had ceased for over 14 years. The Shellfish Settlement Litigation (*United States, et al. v. State of Washington, et al.*, No. C70-9213) and WAC 173-27-080 both clearly define fallow oyster cultivation as active. The Settlement Litigation, for instance, provided that commercial oyster cultivation “includes allowing the land to lie idle when done with the intent of using those tidelands for commercial purposes in the future.” Here, the Applicant managed the lease area from 1990 until 2005 and only suspended its operations because DOH downgraded the area because of declining water quality. The Applicant never abandoned its lease or the use. In addition, WAC 173-27-080(3)(c) provides that “water-dependent uses should not be considered discontinued when they are inactive due to dormancy.”
  - In its conclusions, County staff determined that the proposal would have negative impacts to the Refuge. The County, however, issued an MDNS for the proposal and, earlier in its report, noted that there are no documented adverse impacts from the 50 years that the use was active.
  - County staff emphasized the fact that recent litigation invalidated the NWP 48 Permit process. Here, however, the Applicant is in the process of seeking individual, site-specific permits (Section 10 and 404 permits) from USACE.

*Exhibit 190.*

### Continued Hearing

57. County Senior Planner Greg Ballard testified at the continued hearing on November 21, 2019, and provided an overview of the revised proposal, the additional materials submitted by the Applicant in support of the application, and the approximately 140 additional exhibits submitted since the initial hearing on April 5, 2018. Mr. Ballard stated that the Applicant has improved the project by reducing the intensity of the proposed use, and he highlighted the fact that the Applicant submitted additional information addressing concerns raised by interested parties and the public at the initial hearing, including information on potential impacts from the proposal on shorebirds and waterfowl, aesthetic impacts, and impacts from the introduction of additional plastic (mesh bags) to the environment. He also noted that the Applicant altered its operational plans to ensure that the most intensive activities on-site would occur at times that would be least impactful to wildlife at the Refuge. Mr. Ballard testified that, in comparison to the longline aquacultural method that was previously used on-site, the proposed on-bottom methods would involve far less intensive shoreline use. He also noted that the Applicant is a “proven operator” because they have successfully operated commercial oyster farms in the region. Mr. Ballard emphasized, however, that the Applicant did not cease operations at the current site merely because of concerns over water quality but, instead, because of economic concerns as well. Mr. Ballard testified that, ultimately, the County is concerned that the proposed use would not be compatible with the Natural shoreline environment, which should be relatively free of human activity. Because of this, the County changed its recommendation and now recommends denial of the proposal. *Testimony of Mr. Ballard.*
58. Applicant Representative Elizabeth Tobin, who also serves as one of the Applicant’s shellfish biologists, explained the plan revisions that have occurred since April 2018 and the Applicant’s ongoing efforts to obtain individual Section 10 and 404 permits from USACE. She noted that, during this time, the Applicant hired an independent third-party consultant (Confluence) to assess the proposal and project site and, in addition, to review the existing scientific literature concerning the interplay between birds and aquaculture. Ms. Tobin testified that, in addition, the Applicant reviewed existing scientific literature concerning microplastics, provided a visual assessment of the proposal, and refined its operational plan to reduce potential impacts on wildlife at the Refuge. She stressed that, following government-to-government consultation, USFWS rescinded its previous letters expressing concern over the proposal and that the Applicant continues to work with USACE to navigate the “individual” (as opposed to the NWP 48) permitting process. Currently, for instance, the Applicant is performing an alternatives analysis under Section 404(b)(1) of the CWA. Ms. Tobin stressed that there is very little site-specific scientific information available for the project site. Because of this, the Applicant has sought to avoid detrimental impacts on the environment, including the Refuge, specifically, as much as possible. To that end, the Applicant has proposed site-specific stewardship measures, including performing ongoing eelgrass surveys and monitoring and forage fish

and spawning surveys. In addition, the Applicant seeks to work with the local chapter of the Audubon Society (OPAS) to develop survey protocols and monitoring for shorebirds and waterfowl in the project vicinity. Ms. Tobin testified that the Applicant is not seeking to immediately place 80,000 bags on-site. Instead, through phased operations, the Applicant would monitor and assess the project to determine the best path forward after each phase. Finally, Ms. Tobin disagreed with several assertions in the County's staff report that were testified to by Mr. Ballard. Specifically, she noted that the mesh bags would not have the same impacts as permanent structures because they would be rotated approximately every 14 months. In addition, Ms. Tobin stressed that the Applicant believes its operation of commercial aquaculture on the site would constitute a preexisting non-conforming use based on guidance provided in the Shellfish Litigation and the WACs themselves. *Testimony of Ms. Tobin.*

59. Applicant Representative Hansi Hals, who is also one of the Applicant's shellfish biologists, testified that Pacific oysters are not native to Washington but were introduced for commercial cultivation in the late 1890s. Because of this, Pacific oysters are considered "naturalized" in Washington State. Ms. Hals also testified that the Applicant believes the Point-No-Point Treaty of 1855 protects its right to cultivate and harvest shellfish, commercially, in Dungeness Bay because this area is part of the Jamestown S'Klallam Tribe's usual and accustomed fishing grounds. *Testimony of Ms. Hals.*
60. Mr. Ballard responded to the testimony of Ms. Tobin and Ms. Hals. Of particular note, he stated that the issue of whether the Applicant has an established, nonconforming use on the site is difficult because the use was allowed to go fallow for so long. In response to questions from the Hearing Examiner, Mr. Ballard stated that switching from the higher-intensity longline cultivation method to the lower-intensity on-bottom bag method is not the issue. Instead, the length of time in which the Applicant did not operate on-site was the primary reason he determined the nonconforming use was abandoned. In response, Ms. Hals stressed that the Applicant has never let its lease expire and that the lease is currently in holdover status while project permits are pending. She noted that, when production was not feasible because of water quality issues, the Applicant scaled back its active use of the lease. The Applicant, however, always intended to resume commercial aquaculture once water quality in Dungeness Bay improved. *Testimony of Mr. Ballard; Testimony of Ms. Hals.*
61. The Hearing Examiner heard testimony from several additional witnesses at the initial hearing. Specifically:
- Area resident W.H. Brown expressed concern over the impacts of cultivating a single species at the project site in light of the detrimental impacts monoculture can have on the environment.

- Steve Muller testified that he is concerned that the County lacks the ability to enforce its own regulations. In addition, he noted concerns over the potential impacts from introducing large quantities of additional plastic to the marine environment.
- Stanley Hall stated that it was unclear from the Applicant's submitted materials whether certain estimates on the amount of time and number of workers that would be on-site were based on a phased approach. He also inquired as to whether the "Natural" shoreline environment pre-dated use of the site for commercial aquaculture.
- Charles Weller testified that the proposed use of plastic mesh bags is a serious concern, because there is the potential for significant quantities of plastic debris and potential catastrophic impacts to wildlife in the Refuge.
- Marc Sullivan testified that the Sierra Club's Washington State Chapter supports the proposal.
- Ralph Riccio, another of the Applicant's shellfish biologists, testified that it is important to strike a balance between environmental sustainability and the health of coastal communities. Oyster cultivation is vital for this. Mr. Riccio stated that the project would likely benefit eelgrass restoration in the area and that, in addition, there is a significant body of scientific research supporting the notion that oyster cultivation benefits local bird populations.
- Arthur Sanchez testified that he is concerned that the on-bottom bag cultivation method will disrupt the natural shoreline environment, essentially creating armoring.
- Darlene Schanfald testified that she strongly opposes the proposal and stressed that the scientific information provided by members of the public should be given the same weight as the information submitted by the Applicant.
- Judith White, President of the Olympic Peninsula Audubon Society, expressed concern about the Applicant's proposed monitoring and mitigation plans in relation to waterfowl and shorebirds. She stressed that more scientific monitoring and data collection is necessary to determine whether the proposal will have detrimental impacts, especially, on the Refuge.
- Area resident Kristine Reed testified that she is a member of the Sierra Club and does not agree with the comments submitted on behalf of the Washington State chapter. She stated that she does not believe the proposal should be approved in light of its potential impacts on the Refuge.
- Linda McNaughton repeated several of the concerns raised by other area residents and, in addition, stressed that the proposal would have serious impacts on the aesthetics of the area.
- Lyn Muench testified that she previously managed the Applicant's shellfish operation and that it was a success. The Applicant ceased operations because of deteriorating water quality beyond its control. Ms. Muench stressed that the

Applicant and several other stakeholders cleaned up water quality in Dungeness Bay precisely so that oyster cultivation could resume.

- Kurt Grinnell, a Councilmember of the Jamestown S’Klallam Tribe, testified that the Applicant believes use of Dungeness Bay for aquaculture is better for the environment than using the area for short-term tourist rentals. He stressed that the Applicant has worked for many years, with several other stakeholders, to clean the environment to allow oyster harvesting. This has benefited the entire community. Mr. Grinnell stressed that the Jamestown S’Klallam Tribe has harvested shellfish in this area for over 1,000 years and believes it has the right to continue to do so. He also noted that it is difficult for tribe members to hunt and fish, as they historically did, because of diminishing resources, but projects like this still allow them to work in industries that are traditional to their culture.
- Cherri Mann testified that, although she generally supports the Applicant’s activities in the region, she does not support the proposal because of its proximity to the Refuge.

*Testimony of Mr. Brown, Mr. Muller, Mr. Hall, Mr. Weller, Mr. Sullivan, Mr. Riccio, Mr. Sanchez, Ms. Schanfald, Ms. White, Ms. Reed, Ms. McNaughton, Ms. Muench, Mr. Grinnell, and Ms. Mann.*

62. In response to public testimony, Ms. Hals noted that the Applicant would like to work with OPAS to establish a realistic monitoring plan. In addition, she noted that the County’s SMP was not adopted until 1976 and that commercial aquaculture existed on-site prior to adoption of the “Natural” shoreline environment. *Testimony of Ms. Hals.*
63. Mr. Riccio, who served as an Applicant Representative at the initial hearing, testified that it is highly unlikely that the Applicant would ever have 80,000 bags within the lease area at any one time. He stressed that much of the oyster cultivation that would occur would be with the on-bottom method whereby oysters are allowed to mature naturally on the tidelands prior to cultivation, outside of the oyster bags. *Testimony of Mr. Riccio.*
64. Ms. Tobin provided further details about the Applicant’s operational plan and stressed that the Applicant has sought to minimize the amount of time that workers would be on-site. She also discussed micro-plastics and stressed that much of the scientific information concerning aquaculture is inconclusive. *Testimony of Ms. Tobin.*
65. Mr. Ballard testified that it is unlikely that the Applicant’s 36 or so employees would have greater impacts on the area than the 75,000 people visiting the Refuge. He also testified that, if the project is approved, it can be limited to a certain timeframe (e.g., five years). *Testimony of Mr. Ballard.*



66. At the conclusion of the hearing, Ms. Schanfald requested a continuance to allow members of the public to submit additional information. She noted that she has an outstanding request under the Freedom of Information Act that could shed additional light on the proposal. The Hearing Examiner denied the request, noting that the public has had approximately 18 months to comment on the proposal already and that, if necessary, members of the public may request reconsideration or appeal the decision. *Testimony of Ms. Schanfald; Oral Ruling of the Hearing Examiner.*

#### Staff Recommendation

67. As noted above, County staff reviewed the proposal and determined that it is not consistent with the Natural Shoreline Designation, does not meet the Shoreline CUP criteria, and would negatively impact wildlife at the Dungeness National Wildlife Refuge. Accordingly, the County has recommended that the Hearing Examiner deny the SSDP and SCUP applications. *Exhibit 78, Staff Report (page 2019), page 25.*

### **CONCLUSIONS**

#### Jurisdiction

The Hearing Examiner has authority to hear and approve, approve with conditions, or deny requests for shoreline substantial development and shoreline conditional use permits as a Type III permit. CCC 26.10.220(2); CCC 35.01.040(2).

#### Criteria for Review

##### Shoreline Management Act

##### *Shoreline Substantial Development Permit*

A request for a substantial development permit must be reviewed under the state Shoreline Management Act. The Shoreline Management Act is codified at RCW 90.58.020. In promulgating the Shoreline Management Act of 1971, the legislature recognized that “ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development” of the state’s shorelines. *RCW 90.58.020.* The legislature also determined that “unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest.” *RCW 90.58.020.* Accordingly, the Shoreline Management Act requires local governments to develop a master program to regulate shoreline uses consistent with its guidelines. *RCW 90.58.080(1).*

The Department of Ecology adopted regulations to implement the Act. Chapter 173-27 of the Washington Administrative Code (WAC) establishes criteria for shoreline permit review. The Hearing Examiner may approve a substantial development permit for the proposed staircase only if the development proposed is consistent with:

- (a) The policies and procedures of the [Shoreline Management Act];
- (b) The provisions of [the applicable WACs]; and

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(c) The applicable master program adopted or approved for the area.  
*WAC 173-27-150(1).*

The Hearing Examiner may attach conditions to the approval of permits as necessary to ensure consistency of the project with the Act and the local master program. *WAC 173-27-150(2).*

*Shoreline Master Program SSDP*

The County staff identified the site as within the SMP Natural environment (SMP Sec. 3.02) with the following SMP policies and regulations as relevant to the proposal: Use Element Policies; Marine Beaches (SMA Sec. 4.01); Spits and Bars (SMA Sec. 4.02); Subtidal Shorelines (SMA Sec. 4.12); and Aquaculture (SMA Sec. 5.02).

*Shoreline Conditional Use Permit*

Applicable Department of Ecology shoreline regulations are located in Chapter 173-27 of the Washington Administrative Code (WAC). WAC 173-27-160 sets forth permitting procedures and permit criteria for shoreline conditional use permits. The Hearing Examiner reviews the application under the following criteria:

- (1) Uses which are classified or set forth in the applicable master program as conditional uses may be authorized provided that the applicant demonstrates:
  - (a) That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;
  - (b) That the proposed use will not interfere with the normal public use of public shorelines;
  - (c) That the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program;
  - (d) That the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located; and
  - (e) That the public interest suffers no substantial detrimental effect.
- (2) In the granting of all conditional use permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example, if conditional use permits were granted for other developments in the area where similar circumstances exist, the total of the conditional uses shall also remain consistent with the policies of RCW 90.58.020 and shall not produce substantial adverse effects to the shoreline environment.
- (3) Other uses which are not classified or set forth in the applicable master program may be authorized as conditional uses provided the applicant can

demonstrate consistency with the requirements of this section and the requirements for conditional uses contained in the master program.

- (4) Uses which are specifically prohibited by the master program may not be authorized pursuant to either subsection (1) or (2) of this section.

WAC 173-27-160.

*Clallam County Shoreline Master Program Policies and Regulations*

The Hearing Examiner must also review the relevant Clallam County Shoreline Master Program (SMP) goals and policies and general regulations when reviewing a shoreline conditional use permit application. The County's SMP mandates as follows.

- (a) All developments proposed on the shorelines of the County shall be consistent with the policies of the Shoreline Management Act of 1971, Chapter 90.58 RCW and the Clallam County Shoreline Master Program.
- (b) All developments proposed on the shorelines of the County shall be consistent with the Chapter 27.12, Critical Areas Code as it applies, as amended.
- (c) All developments proposed on the shorelines of the County shall be consistent with the Chapter 32.01, Floodplain Management Code as it applies, as amended.
- (d) All developments proposed on the shorelines of the County shall be consistent with the Title 31 Clallam County Comprehensive Plan as it applies, as amended.
- (e) All developments proposed on the shorelines of the County shall be consistent with Title 33, Clallam County Zoning Code as it applies, as amended.
- (f) All developments proposed on the shorelines of the County shall be consistent with Chapter 27.01, Clallam County Environmental Code as it applies, as amended.
- (g) All development proposed on the shorelines of the County shall be consistent with adopted watershed plans, flood management or reduction plans as they apply.

CCC 35.01.040(3).

The criteria for review adopted by the Clallam County Board of County Commissioners are designed to implement the requirement of Chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with County development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

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### Conclusions Based on Findings

1. **With conditions, Phase 1 of the proposal would be consistent with the requirements for approval of a Shoreline Substantial Development Permit.** The Applicant has requested approval to allow the resumption of commercial oyster aquaculture within Dungeness Bay, a part of the Strait of Juan de Fuca designated as a “Natural” shoreline environment under the County’s Shoreline Master Program (SMP). That the Applicant would be *resuming* commercial oyster farming cannot be stressed enough. Were the Applicant proposing a new activity or a new location for this activity within the Natural shoreline environment, denial would be mandated, given the policies that govern the Natural shoreline environment. Commercial shellfish operations have existed on this particular site, however, since the 1950s—prior to the County adopting its SMP—and the Applicant ran its own commercial shellfish operation on the site between 1990 and 2005. Such operations ceased primarily because the Washington State Department of Health (DOH) prohibited/limited aquacultural uses in Dungeness Bay, beginning around 2001, due to concerns over water quality. Since ceasing operations, the Applicant has spent over two million dollars in efforts to improve water quality precisely so that it could resume its aquacultural activities. Although County staff determined that the proposal should not be considered as a preexisting, nonconforming use, the Department of Ecology has provided guidance on this issue. Specifically, WAC 173-27-080(3)(c) provides that water-dependent uses “should not be considered discontinued when they are inactive due to dormancy.” In Chapter 16 of its SMP Handbook, Ecology further explains that abandonment provisions should not apply to ongoing, dormant aquaculture operations; that periods of dormancy may last for many years; and that dormancy may result from state water quality closures. Ecology stresses that periods of aquaculture dormancy “should not be considered abandonment – the ending of a nonconforming use.”<sup>12</sup> Here, although the project is not consistent with several provisions of the Natural shoreline environment, the Applicant has established a legal, nonconforming use that it has a right to continue. That said, the Applicant would be using a different cultivation method than it previously used. Evidence in the record clearly establishes that the on-bottom methods proposed would have fewer impacts, especially aesthetically, than the longline cultivation method the Applicant previously employed on-site.

The County gave reasonable notice and opportunity to comment on the proposal. As is detailed at length in the above decision, over 100 public comments on the proposal were received. Generally speaking, the public expressed opposition to the proposal because of concerns over aesthetic impacts from development, potential impacts on the Refuge and its wildlife, and potential impacts from introducing significant quantities of plastic into the marine environment. In the 18 months since the initial hearing on the proposal commenced, the Applicant submitted additional information, reports, and/or studies addressing each of these concerns, including an additional field report assessing the

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<sup>12</sup> Exhibit 198.

ecological conditions of the site and the potential impacts from the proposal; an analysis of existing, scientific literature on shellfish aquaculture and bird interactions; a visual assessment; and analysis on existing, scientific literature concerning microplastics and the aquaculture industry. In addition, the Applicant submitted a more detailed operational plan detailing how the most intensive site operations would occur at times that would have the least impact on area wildlife, including shorebirds and waterfowl, and the Applicant submitted a monitoring and mitigation plan, with conservation measures, site-specific stewardship measures, and monitoring measures to ensure the proposal does not have detrimental environmental impacts. Tellingly, USFWS (who manages the Refuge) withdrew comment letters it previously submitted that expressed opposition to the proposal after the Applicant provided this additional information during government-to-government consultation. Ultimately, USFWS determined that “there is little site-specific research available on impacts of commercial, on-bottom bag aquaculture to bird species found on the Refuge.”<sup>13</sup>

That said, several members of the public submitted additional scientific information that the Hearing Examiner reviewed, especially information on the potential dangers of introducing additional microplastics to the marine environment and the detrimental impacts aquacultural activity may have on waterfowl and shorebirds. Ultimately, the Hearing Examiner is left with the impression that more site-specific research would be beneficial, both for this specific project and for all aquacultural projects throughout the state, especially given the potential for the invalidation of all NWP 48 Permits, in light of Judge Lasnik’s recent ruling. Here, the Applicant has proposed a monitoring and mitigation plan that includes conservation measures, as well as site-specific stewardship measures that would allow precisely this type of information to be accumulated. More specificity about monitoring and data collection, however, is needed. Accordingly, the Applicant shall enter into a Memorandum of Understanding (MOU) prior to commencing operations with the Olympic Peninsula Audubon Society and USFWS concerning the monitoring of shorebirds and waterfowl and the scientific approach that will be taken toward monitoring impacts of the proposal on the Refuge.

The Applicant must demonstrate that no detrimental impacts are occurring prior to proceeding with additional phases of development. The Hearing Examiner would retain jurisdiction over this matter and, after the Applicant has completed Phase 1, would reopen this public hearing to assess this information, as well as to collect any additional information provided by the public.<sup>14</sup> This will ensure that the Applicant carefully

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<sup>13</sup> *Exhibit 92.B.*

<sup>14</sup> To be clear, the Applicant would not need to reapply or apply for additional permits in advance of the hearing being reopened and all the exhibits admitted, to date, would continue to be applicable.

monitors its operations and, in addition, will incentivize the public to maintain a watchful eye over the shoreline environment.

In addition to conditions related to monitoring the site, conditions are necessary to ensure the Applicant obtains all other necessary permits prior to commencing operation of Phase 1; adheres to all submitted plans; ensures all aquaculture waste materials and by-products are appropriately disposed of; avoids predator-control measures intended to kill or injure wildlife; and complies with the mitigation measures required by the MDNS. *Findings 1 – 67.*

2. **With conditions, Phase 1 of the proposal would comply with the requirements for approval of a Shoreline Conditional Use Permit.** Although aquaculture is allowed (and even encouraged) under the County's SMP, County staff determined that a Shoreline Conditional Use Permit (SCUP) would be necessary because the use of subtidal oyster bags is not a specific use that is either permitted or prohibited in the Natural shoreline environment. County staff analyzed the proposal and determined that it would be consistent with the majority of criteria that must be met for approval of an SCUP, including the general policies of the Shoreline Management Act and the County's SMP; would not interfere with the normal public use of the shoreline; would not cause the public interest to suffer substantial detrimental effects; and that it is unlikely that similar, additional requests would occur such that cumulative impacts in the area would cause additional environmental impacts. The Hearing Examiner concurs with this assessment.

Both County staff and dozens of members of the public, however, expressed concern that the proposal would not be compatible with the Refuge and would potentially cause unreasonable impacts on the Natural shoreline environment, warranting denial of the SCUP application. As a preliminary matter, it must be stressed again that the Applicant is seeking to recommence a use that previously existed on-site—apparently without serious complaint or concern—for over 50 years. Moreover, the Applicant has treaty rights protecting this particular use of the shoreline, as recognized by the Department of Natural Resources in the comments it submitted. In addition, USFWS has expertise on these issues and, presumably, a vested interest in ensuring this proposal would not have detrimental impacts on the Refuge. Following government-to-government consultation with the Applicant, USFWS withdrew the majority of concerns it initially raised about the proposal over 18 months ago. The additional concerns USFWS has would be addressed through appropriate monitoring of the project site.

As detailed above, with scientific monitoring and data collection, it is appropriate to allow Phase 1 of the proposal to proceed. Again, the Applicant must demonstrate that no detrimental impacts are occurring prior to proceeding with additional phases of development. The Hearing Examiner would retain jurisdiction over this matter and, after

the Applicant has completed Phase 1, would reopen this public hearing to assess this information as well as to collect any additional information provided by the public.

Also, in addition to conditions related to monitoring the site, conditions are necessary to ensure the Applicant obtains all other necessary permits prior to commencing operation of Phase 1; adheres to all submitted plans; ensures all aquaculture waste materials and by-products are appropriately disposed of; avoids predator-control measures intended to kill or injure wildlife; and complies with the mitigation measures required by the MDNS.

*Findings 1 – 67.*

3. **With conditions, the proposed project would comply with the requirements of CCC 35.01.040(3), including the County's critical areas ordinances.** The County analyzed the potential environmental impacts from the proposal under the State Environmental Policy Act and determined that, with mitigation measures, the proposal would not have a probable significant adverse impact on the environment. The project area is within Dungeness Bay, which is part of the Strait of Juan de Fuca, a Class I Wildlife Habitat Conservation Area subject to the protection standards of CCC 27.12.320, and a Type 1 Aquatic Habitat Conservation Area subject to the protection standards of CCC 27.12.315(1). Typically, an applicant would be required to submit a Habitat Management Plan addressing and mitigating potential ecological impacts as part of any proposal involving an AHCA or WHCA. The County, however, determined that, because the Applicant must ensure that the proposal would not impact any Endangered Species Act species or their critical habitats, as part of further project review by the United States Army Corps of Engineers, the additional permit review conducted through consultation with other agencies would satisfy the HMP requirement. County staff also determined that, under the AHCA protection standards, no petroleum-based treatments or preservatives, including creosote, arsenic, or copper, would be permitted on any moorage or float facilities used during research. As detailed above in Conclusion 1, conditions are necessary to ensure that the proposal meets all criteria required for permit approval.

*Findings 1, 39 – 43.*

## **DECISION**

Based on the preceding findings and conclusions, the request for a Shoreline Substantial Development Permit and Shoreline Conditional Use Permit to allow phased development of the commercial farming of pacific oysters, using on-bottom culture methods, on up to 34 acres of tidelands at the northwest corner of Inner Dungeness Bay, just south of the Dungeness Spit, is **APPROVED**, in part. Because the Applicant has presented sufficient information to satisfy the criteria for re-establishing a preexisting, nonconforming use (aquaculture) on-site with an SSDP and SCUP, it is appropriate to allow the first phase of the proposal to move forward. There is insufficient current data, however, to fully assess long-term impacts from this type of operation, especially in relation to the Refuge. Thus, limiting approval to Phase 1 alone, at this time, is warranted. Prior to expanding operations through Phase 2 of development, this hearing shall be

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reopened to evaluate Phase 1 and its impacts on the environment, with particular emphasis on determining whether detrimental impacts have occurred to the Refuge in conjunction with Phase 1, whether additional conditions are necessary, and whether it is appropriate to approve additional phases of the proposal. The following conditions are necessary to mitigate specific impacts of Phase 1 of the proposal, including conditions ensuring that ongoing monitoring of impacts of the proposal, especially in relation to the Refuge, occur:

1. The proposed use shall be in substantial conformance with the site plans submitted with the application, and as modified herein.
2. Prior to commencing development activity, the Applicant shall obtain an individual Section 10/404 permit from the U.S. Army Corp of Engineers.
3. The Applicant shall obtain an Aquatic Lease from the WA State Department of Natural Resources; an Aquatic Farm Registration and Shellfish Import and Transfer Permit from the WA State Department of Fish & Wildlife; a Shellfish Operation License from the WA State Department of Health; and any other permits, approvals, or licenses required by local, state, or federal law to ensure compliance with established water quality standards and regulations relating to the introduction or transfer of aquatic organisms into or within the County's salt or fresh waters.
4. In addition to removal of material from the operation, as outlined in the Conservation Measures, the Applicant shall conduct twice annual beach clean-ups of marine debris along Dungeness, Graveyard and Cline Spit area, as detailed in its Mitigation and Monitoring Plan. The Applicant shall coordinate clean-ups with the Clallam County Marine Resources Committee and other local annual beach clean-up events to the extent feasible. The Applicant shall also remove the old rebar and steel post from the previous oyster production (lease) areas.
5. The Applicant shall submit an annual monitoring report of the eelgrass areas to DCD for review and approval. If existing eelgrass areas are impacted by the operation, adaptive management measures should be implemented immediately to avoid impacts to eelgrass areas. If new eelgrass areas are established, the 25-foot buffer may restrict areas previously proposed for the placement of oyster bags. In addition, the Applicant shall comply with the Monitoring and Mitigation Plan and Operational Plans it submitted to the County.
6. Mesh bags shall be attached to the bed or bottomlands with anchors, such as helical anchors or other methods that minimize disturbance to substrate. Aquaculture waste materials and by-products shall be disposed of in a manner that will ensure strict compliance with all applicable 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).

7. Predator control measures used in aquaculture shall not include those intended to kill or injure wildlife. Predator control methods shall comply with federal and state regulations, as determined by applicable state and federal agencies.
8. The Applicant shall comply with the MDNS mitigation measures.
9. The Applicant shall enter into a Memorandum of Understanding (MOU) with the Olympic Peninsula Audubon Society and USFWS concerning the monitoring of shorebirds and waterfowl. The MOU should address the scientific approach that will be taken toward monitoring impacts of the proposal on the Refuge.
10. Aquaculture is an on-going development activity. To ensure that this proposal is not impacting the shoreline environment, eelgrass beds, or the adjacent Dungeness National Wildlife refuge Area, this proposal shall be reviewed before the Hearing Examiner prior to commencement of Phase 2 of operations, or within 5 years from the commencement of Phase 1 of the operation. If it is determined this proposal is impacting these areas, then the Hearing Examiner may require additional conditions of approval or declare this proposal void and require a new shoreline application permit be obtained.

DECIDED this 10<sup>th</sup> day of January 2020.



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ANDREW M. REEVES  
Hearing Examiner  
Sound Law Center

## ATTACHMENT A

Exhibits admitted into the record at or before the initial hearing on April 5, 2018:

1. Staff Report dated March 29, 2018
2. Shoreline Application (SSDP/SCUP), received December 29, 2017
3. Project Drawings for Shellfish Aquaculture Location and Methods in Dungeness Bay, dated December 28, 2017
4. Joint Aquatic Resources Permit Application (JARPA) Form, received December 29, 2017
5. Critical Eelgrass Habitat Survey, Ralph Riccio, dated November 13, 2017
6. Cultural Resources Report: An Archaeological Survey of the Jamestown S'Klallam Dungeness Bay Project Area, Wessen & Associates, Inc., dated January 2017
7. DNR Lease Renewal, Lease No. 20-A13012 (No. 2015-1327056), dated October 16, 2015
8. SEPA Determination of Nonsignificance, issued February 23, 2018; Environmental Checklist Application, received December 29, 2017, with SEPA Environmental Checklist, dated December 29, 2017
9. Email from Greg Ballard to Reviewing Departments and Agencies, dated January 2, 2018
10. Email from Greg Ballard to Reviewing Departments and Agencies, dated February 23, 2018, with email string; Email from Greg Ballard to Chris Waldbillig, dated February 27, 2018, with email string; Email from Greg Ballard to Jennifer Garcelon, dated March 1, 2018, with email string
11. Declaration of Posting, dated February 26, 2018; Notice of Application/Public Hearing, undated
12. Affidavit of Publication: Notice of Application and Public Hearing, *Peninsula Daily News*, dated February 21, 2018; Affidavit of Publication: Revised Notice of Application and Public Hearing, *Peninsula Daily News*, dated February 26, 2018
13. Clallam County Critical Area Map, printed March 28, 2018; 2015 Aerial Photo; Three Dungeness Spit Maps, printed March 28, 2018
14. Ecology Coastal Atlas Aerial Photo
15. Eight Aerial Photos from 1977 to 2016
16. Email from Pamela Sanguinetti to Greg Ballard, dated March 23, 2018; USFWS Dungeness National Wildlife Refuge Information, including Planning Update 1, dated October 2011, and Planning Update 4, dated September 2013
17. Email from Pamela Sanguinetti to Greg Ballard, dated March 26, 2018, with email string
18. Programmatic Biological Assessment, Shellfish Activities in Washington State Inland Marine Waters, U.S. Army Corps of Engineers, dated October 15, 2015
19. Letter from Eric Rickerson, USFWS, to Michelle Walker, U.S. Army Corps of Engineers, dated August 26, 2016; Biological Opinion, Programmatic Consultation for Shellfish Activities in Washington State Inland Marine Waters, dated August 26, 2016
20. RCW 90.72.030; Governor Inslee's Shellfish Initiative, printed March 26, 2018

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21. Public Comments from Darlene Schanfald, the Olympia Environmental Council, Protect the Peninsula's Future, and Friends of Miller Peninsula State Park, dated March 23, 2018, with Attachments
22. Public Comments from the Sierra Club North Olympic Group, dated March 28, 2018
23. Email from Jennifer Brown-Scott, USFWS Refuge Manager, to Steven Gray, dated March 29, 2018
24. Email from Matthew Bennet, U.S. Army Corps of Engineers, to Jennifer Brown-Scott, dated March 29, 2018; Letter from Mark Geraldi, U.S. Army Corps of Engineers, dated March 29, 2018.
25. Public Comment from Janet Marx, dated March 29, 2018
26. Email from Ralph Riccio to Greg Ballard, dated March 30, 2018, with email string
27. Public Comment from John Cuny, dated April 1, 2018
28. Public Comment from Sally Kincaid, dated April 2, 2018
29. Letter from Jennifer Brown-Scott, USFWS, to Steve Gray, dated April 4, 2018
30. Public Comment from Celia Barton, dated April 4, 2018
31. Public Comment from Catherine Sue Christensen, dated April 4, 2018
32. Public Comment from Linda Mellon, dated April 4, 2018
33. Public Comment from Jason West, dated April 4, 2018
34. Public Comment Letter from Friends of Dungeness National Wildlife Refuge, received April 5, 2018.
35. Public Comments from Darlene Schanfald, the Olympic Environmental Council, Protect the Peninsula's Future, and Friends of Miller Peninsula State Park, dated April 5, 2018
36. Applicant PowerPoint Presentation, dated April 5, 2018
37. Public Comment from Janet Marx, dated April 5, 2018

Exhibits admitted after the initial hearing:

38. Public Comment from James Loran, dated April 6, 2018
39. Public Comment from Matt Heins, received April 5, 2018
40. Additional Submittals from Darlene Schanfald, received April 5, 2018
41. Public Comment from Tom Backe, dated April 5, 2018
42. *Peninsula Daily News* Article, "Input on oyster farm is open," dated April 9, 2018
43. Public Comment from Stephen Norton, dated April 8, 2018
44. Public Comment from Diane Whitmore, dated April 9, 2018
45. Public Comment from Warren Meccas, dated April 7, 2018
46. Hearing Examiner's Post-Hearing Order, dated April 6, 2018
47. Public Comment from C. Jessie Christiansen, dated April 9, 2018
48. Hearing Examiner's Post-Hearing Order, revised April 11, 2018
49. Public Comment from Wendy Feltham, dated April 11, 2018
50. Public Comment from Russ Mellon, dated April 11, 2018
51. Public Comment from A. Dunne, dated April 11, 2018
52. Public Comment from Grant Rollins, dated April 11, 2018

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53. Public Comment from Carl Silver, dated April 12, 2018
54. Public Comment from Katherine Jensen, dated April 12, 2018
55. Public Comment from Nancy Hahn, dated April 14, 2018
56. Public Comment from Michael Barry, dated April 15, 2018
57. Public Comment from Janet Bruening, dated April 15, 2018
58. Public Comment from Cheryl Loran, dated April 15, 2018
59. Public Comment from Jill, Russel, Chantal, Anna, and Marcus DeGroote, dated April 18, 2018
60. Public Comment from Lyn Muench, dated April 16, 2018
61. Public Comment from Marilyn Walsh, dated April 19, 2018
62. Public Comment from Jules Michel, dated April 23, 2018
63. Public Comment from John McDonell, dated April 24, 2018
64. Public Comment from Heather McFarlane, dated April 23, 2018
65. Public Comment from Estella Mixson, dated April 25, 2018
66. Public Comment from Walter Selden and San Juan Farms Association, dated April 25, 2018
67. Public Comments from Darlene Schanfald, the Olympic Environmental Council, Protect the Peninsula's Future, and Friends of Miller Peninsula State Park, dated April 26, 2018, with Attachments
68. Public Comment from Norman Baker, dated April 26, 2018
69. Public Comment from Heather McFarlane, dated April 27, 2018
70. Public Comment from Ross Barkhurst, dated April 27, 2018
71. Public Comment from Lorrie Peterson, dated April 27, 2018
72. Public Comment from Maradel Gale, dated April 27, 2018
73. Public Comment from Steve Muller, dated April 27, 2018
74. Email from Steve Gray to Elizabeth Tobin, dated May 2, 2018
75. Email from Elizabeth Tobin to Steve Gray, dated May 7, 2018, with email string
76. Hearing Examiner's Order on Request for Continuance, dated May 9, 2018
77. Withdrawal of Determination of Nonsignificance, dated May 10, 2018; SEPA Memorandum from Greg Ballard, dated May 9, 2018

Exhibits admitted at or before the continued hearing on November 21, 2019:

78. Revised Staff Report, dated November 14, 2019
79. Mitigated Determination of Nonsignificance, issued October 31, 2019; SEPA Memorandum from Greg Ballard, dated October 30, 2019; SEPA Environmental Checklist, dated December 7, 2018; Environmental Checklist Application, dated December 6, 2018
80. Email from Greg Ballard to Reviewing Departments and Agencies, dated October 31, 2019
81. Notice Materials:

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- a. Email from Greg Ballard to Reviewing Departments and Agencies and Interested Parties; Email from Greg Ballard to Reviewing Departments and Agencies and Interested Parties, dated September 27, 2019
- b. Declaration of Posting, dated October 21, 2019; Notice of Application/Public Hearing
- c. Affidavit of Publication, dated October 21, 2019; Legal Invoice, *Peninsula Daily News*, No. PDN877892, dated October 20, 2019; Affidavit of Publication, dated October 23, 2019; Legal Invoice, *Peninsula Daily News*, No. SEQ877895, dated October 23, 2019; Classified Proof, No. 880498, published November 10, 2019
- 82. Shoreline Substantial Development and Shoreline Conditional Use Permit Application, received December 11, 2018.
- 83. Joint Aquatic Resources Permit Application (JARPA) Form, dated December 7, 2018
- 84. SEPA Environmental Checklist, dated December 7, 2018; Environmental Checklist Application, dated December 7, 2018
- 85. Project Drawing for Shellfish Aquaculture Location and Methods in Dungeness Bay, dated December 4, 2018
- 86. Dungeness Bay Field Report, Confluence Environmental Company, dated November 2018
- 87. Shellfish Aquaculture and Bird Interactions, Confluence Environmental Company, dated November 2018
- 88. Email from Elizabeth Tobin to Steve Gray, dated January 28, 2019, with Attachments
- 89. Email from Elizabeth Tobin to Greg Ballard, dated March 1, 2019, with email string; Monitoring and Mitigation Plan
- 90. Email from Elizabeth Tobin to Greg Ballard, dated February 22, 2019, with email string and Attachments
- 91. Dungeness Bay Oyster Farm General Operation Plan, undated
- 92. Email from Elizabeth Tobin to Greg Ballard, dated August 7, 2019, with Attachments:
  - a. Letter from Hansi Hals to Pamela Sanguinetti, dated June 28, 2019, with attachment
  - b. Appendix A: Jamestown S’Klallam Tribe Technical Memorandum - DNWR Bird Survey Data, undated; Appendix B: Jamestown S’Klallam Tribe Dungeness Shellfish Farm Monitoring and Mitigation Plan, undated; Appendix C: Jamestown S’Klallam Tribe Dungeness Shellfish Farm Operational Plan, undated; Appendix D: Jamestown S’Klallam Tribe Shellfish Aquaculture and Bird Interactions, Confluence Environmental Company, dated November 2018; Letter from Robyn Thorson, USFWS Regional Director, to Colonel Mark A. Gerald, USACE, dated August 6, 2019
  - c. Jamestown S’Klallam Tribe’s Response to Public Comments, undated
- 93. Email from Elizabeth Tobin to Greg Ballard, dated February 20, 2019, with email string and Attachments
- 94. Email from Elizabeth Tobin to Steve Gray, dated January 22, 2019; Letter from Josh D. Peters, DNR, to Pamela Sanguinetti, USACE, dated January 10, 2019

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95. *Coalition to Protect Puget Sound Habitat v. U.S. Army Corps of Engineers and Taylor Shellfish Company, Inc.*, No. C16-0950RSL and *Center for Food Safety v. U.S. Army Corps of Engineers and Pacific Coast Shellfish Growers Association*, No. 17-1209RSL, Order Holding NWP 48 Unlawful in the State of Washington and Requesting Additional Briefing (U.S. District Court, Western District of Washington, October 10, 2019)
96. NOAA Fisheries - Importance of Eelgrass, dated Fall 2014
97. Exhibit "B" Plan of Operations, Jamestown S'Klallam Tribe, dated July 14, 2007
98. Letter from Robyn Thorson, USFWS Regional Director to Colonel Mark A. Gerald, dated August 6, 2019, with previous USFWS letters, dated May 22, 2019, and February 27, 2019
99. USFWS DNWR Comprehensive Conservation Plan, dated October 2013
100. Two (2) aerial photos, dated May 31, 2002
101. Public Comment from Michael Sullivan, dated May 3, 2018
102. Public Comment from Darlene Schanfald, dated June 29, 2018, with Attachment
103. Public Comment from Joe Gaydos, dated February 27, 2019
104. Letter from Jennifer Brown-Scott, USFWS, to Greg Ballard, dated March 5, 2019
105. Email from Steve Gray to Greg Ballard, dated March 5, 2019; Aquatic Lands Oyster and Geoduck Aquaculture Lease, dated October 24, 2007, with Plan of Operation, dated July 14, 2007
106. Public Comment from Leslie Aickin, dated March 6, 2019
107. Public Comment from Grant Rollins, dated March 7, 2019
108. Public Comment from Wendy Feltham, dated March 7, 2019
109. Public Comment from Marc Sullivan, dated March 8, 2019
110. Email from Richard Hynes to Greg Ballard, dated March 11, 2019
111. Public Comment from Pat Schoen, dated March 11, 2019
112. Public Comment from Michael Barry, dated March 8, 2019
113. Public Comment from Elisabeth Duval, dated March 13, 2019
114. Public Comment from Peter McCallum, dated March 14, 2019
115. Public Comment from Margaret Brede, dated March 14, 2019
116. Public Comment from John Gussman, dated March 16, 2019
117. Public Comment from Steven and Kathleen McPherson, dated March 21, 2019
118. Public Comment from Cheryl Loran, dated March 23, 2019
119. Letter from Friends of Dungeness National Wildlife Refuge, dated March 31, 2019
120. Public Comment from Cindy Corrigan, dated April 2, 2019
121. Public Comment from Susan Savage, dated April 3, 2019
122. Email from Jesse Piedfort to Greg Ballard, dated April 5, 2019, with Public Comment from the Sierra Club, Washington State Chapter
123. Public Comment from Terri Tyler, dated April 8, 2019
124. Public Comment from Mylee Khristoforov, dated April 18, 2019
125. Letter from Port of Port Angeles, dated April 9, 2019
126. Public Comment from Terry Martin, dated April 28, 2019
127. Email from Linda Lenore to Greg Ballard, dated May 1, 2019

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128. Public Comment from John and Renee Jones, dated May 9, 2019
129. Public Comment from Craig Miller, dated May 14, 2019
130. Letter from Jennifer Brown-Scott, USFWS, to Pamela Sanguinetti, dated May 22, 2019
131. Public Comment from Susan Macomson, dated June 6, 2019
132. Public Comment from Jeni Woock, dated June 6, 2019
133. Public Comment from Teri Pieper, dated June 6, 2019
134. Public Comment from Ann Prezyna, dated June 6, 2019
135. Public Comment from Kathleen Bentley, dated June 7, 2019
136. Public Comment from Neil and Lisa Koseff, dated June 8, 2019
137. Public Comment from Shana Kelly, dated June 20, 2019
138. Public Comment from Marilyn Showalter, dated June 12, 2019
139. Email from Jennifer Brown-Scott to Hals Hansi, dated June 17, 2019, with email string
140. Email from Darlene Schanfald to Greg Ballard, dated August 1, 2019
141. Letter from Perry Lund, DOE Shorelands and Environmental Assistance Program, dated July 30, 2019
142. Public Comment from Judith White, dated August 11, 2019
143. Public Comment from Neil and Lisa Koseff, dated August 19, 2019
144. Public Comment from Kathy Trainor, dated August 19, 2019
145. Public Comment from Terri DiMartino, dated August 19, 2019
146. Email from Elizabeth Tobin to Greg Ballard, dated August 7, 2019
147. Email from Elizabeth Tobin to Greg Ballard, dated September 9, 2019, with email string
148. Email from Elizabeth Tobin to Greg Ballard, dated September 20, 2019, with email string
149. Public Comment from Neil and Lisa Koseff, dated September 27, 2019
150. Email from Darlene Schanfald, dated October 11, 2019, with attachment (same as Exhibit 95)
151. Email from Darlene Schanfald, dated October 22, 2019, with article by Rachel Sapin, "The largest shellfish company in the U.S. could be shut down by a permitting issue," dated October 21, 2019
152. Email from Janet Marx to Greg Ballard, dated October 25, 2019
153. Letter from Janet Marx to Robyn Thorson, USFWS Regional Director, dated October 24, 2019
154. Public Comment from Karl Pohold, dated October 26, 2019
155. Public Comment from Neil Koseff, dated October 31, 2019
156. Email from Tami Breitbach to the Hearing Examiner, dated October 31, 2019; Request for Continuance from Protect the Peninsula's Future, dated October 28, 2019
157. Email from Darlene Schanfald to Mary Ellen Winborn, dated October 31, 2019, with email string; Hearing Examiner's Order on 6th Request for Continuance, dated October 31, 2019
158. Public Comment from Terri DiMartino, dated November 5, 2019
159. Public Comment from Sarah Schmidt, dated June 6, 2019
160. Letter from Darlene Schanfald, Protect the Peninsula's Future and the Olympic

- Environmental Council, dated November 7, 2019; *Toxic Pearl, A True Story*, by M. Perle (2018)
161. Public Comment from John Gussman, dated November 7, 2019
  162. Public Comment from Robert and Enid Phreaner, dated November 12, 2019
  163. Public Comment from Julia Spencer, dated November 7, 2019
  164. Public Comment from Carl Silver, dated November 12, 2019
  165. Letter from Judith White, Olympic Peninsula Audubon Society, dated November 8, 2019
  166. Hearing Examiner's Post-Hearing Order, dated April 6, 2018
  167. Hearing Examiner's Revised Post-Hearing Order, dated April 11, 2018
  168. Hearing Examiner's Order on Request for Continuance, dated May 9, 2018
  169. Hearing Examiner's 2nd Post-Hearing Order, dated May 11, 2018
  170. Hearing Examiner's 2nd Post-Hearing Order, corrected May 15, 2018
  171. Hearing Examiner's Order on 2nd Request for Continuance, dated October 10, 2018; Letter from Elizabeth Tobin to Steve Gray, dated September 27, 2018
  172. Hearing Examiner's Order on 3rd Request for Continuance, dated December 13, 2018
  173. Hearing Examiner's Order on 4th Request for Continuance, dated February 22, 2019; Email from Greg Ballard to Tami Breitbach, dated February 20, 2019
  174. Hearing Examiner's Order on 5th Request for Continuance, dated March 18, 2019; Letter from Steve Gray, dated March 14, 2019; Letter from Elizabeth Tobin, dated March 13, 2019; Letter from Jennifer Brown-Scott, USFWS, dated March 5, 2019
  175. Hearing Examiner's Order on 6th Request for Continuance, dated October 31, 2019; Email from Darlene Schanfald, dated October 28, 2019
  176. Public Comment from Gil and Deb Avila, dated November 14, 2019
  177. USFWS "Dungeness National Wildlife Refuge" brochure, dated July 2014
  178. Public Comment from Mark Musaus, National Wildlife Refuge Association, dated November 14, 2019
  179. Public Comment from Vincent Larson, dated November 15, 2019
  180. Public Comment from Michael Dagg, dated November 16, 2019
  181. Public Comment from John Earhart, dated November 18, 2019
  182. Public Comment from Carrie Kalina, dated November 18, 2019
  183. Public Comment from Janet Marx, dated November 19, 2019
  184. Additional Public Comment from Janet Marx, dated November 19, 2019
  185. Public Comment from Annie Humiston, dated November 19, 2019
  186. Email from Elizabeth Tobin to Greg Ballard, dated November 20, 2019, with email string
  187. Public Comment from Jules Michel, dated November 20, 2019
  188. Public Comment from the Coalition to Protect Puget Sound Habitat, dated November 20, 2019, with Attachments
  189. Public Comment from Darlene Schanfald, Protect the Peninsula's Future and the Olympic Environmental Council, dated November 21, 2019, with Attachments
  190. Email from Elizabeth Tobin to Greg Ballard, dated November 20, 2019
  191. Public Comment from Richard Spencer, dated November 15, 2019

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- 192. Public Comment from Cherri Mann, dated November 21, 2019
- 193. Public Comment from W. Brown, dated November 21, 2019, with Attachments
- 194. Public Comment from Linda McNaughton, received November 21, 2019, with Attachments
- 195. Applicant PowerPoint Presentation, dated November 21, 2019
- 196. Public Comment from Sandy Wolf, dated November 20, 2019
- 197. Public Comment from Lee Fuller, dated November 20, 2019

Exhibits admitted after the continued hearing on November 21, 2019:

- 198. Letter from Elizabeth Tobin and Hansi Hals, dated November 22, 2019, with Attachments