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BEFORE THE HEARING EXAMINER  
FOR THURSTON COUNTY

In the Matter of the Appeal of:	)	Appeal No. 16-106159 VE
	)	Case No. 2014108800
Patrick Townsend, Kathryn Townsend, and Anneke Jensen	)	APPLICANT’S MOTION FOR DISMISSAL AND SUMMARY JUDGMENT
of the May 3, 2016 Mitigated Determination of Non-Significance in the request of ChangMook Sohn for Substantial Shoreline Development Permit for an Intertidal Geoduck Aquaculture Operation	)	

**I. INTRODUCTION AND RELIEF REQUESTED**

Applicant Pacific Northwest Aquaculture, LLC/ChangMook Sohn (“Applicant”) respectfully requests that the Thurston County Hearing Examiner issue an order disposing of the appeal filed by Patrick Townsend, Kathryn Townsend, and Anneke Jensen (“Appellants”) of the Mitigated Determination of Non-Significance (“MDNS”) in this claim. Appellants’ appeal should be dismissed because each of their claims fails to state a claim upon which relief may be granted, or because there is no genuine issue as to any material fact and Applicant is entitled to judgment as a matter of law.

**II. FACTS**

On December 18, 2014, Applicant submitted a shoreline substantial development permit (“SSDP”) application to Thurston County (“County”) to operate a 1.1-acre

1 geoduck aquaculture farm (“Farm”) on private tidelands owned by the Applicant. Notice  
2 of Appeal, Ex. A (MDNS), p. 1. Juvenile geoducks will be planted by hand in nursery  
3 tubes that protrude only a few inches above the substrate. *Id.* The tubes will be covered  
4 with nets that are secured to the substrate and prevent loose tubes from being washed off  
5 site. *Id.* The tubes and nets will protect juvenile geoducks from predators and will be  
6 removed as soon as they are no longer needed (18-24 months after planting). *Id.* The  
7 geoducks will remain in the substrate for several more years until they reach market size,  
8 at which point they will be harvested by hand using low-pressure water pumps. *Id.*

9 On May 3, 2016, after almost 18 months of review, the County issued a MDNS for  
10 the Farm. *Id.* The MDNS imposes 18 mitigating conditions and finds that with these  
11 conditions, in conjunction with conditions related to other permits required by state and  
12 federal agencies, the Farm will not cause significant environmental impacts. *Id.*, pp. 5-6.

13 Appellants filed an appeal of the MDNS on May 24, 2016 (“Appeal”).  
14 Appellants’ sole claim is that “[t]he MDNS does not adequately address” various issues,  
15 including eelgrass, the Thurston County Shoreline Master Plan adopted in 1990 (“1990  
16 Plan”), plastic, recreation, aesthetics, and trespass. Notice of Appeal, pp. 2-4. The  
17 Hearing Examiner held a pre-hearing conference on July 14, 2016 and issued a pre-  
18 hearing order on July 15, 2016. The pre-hearing order authorizes parties to file dispositive  
19 motions through August 11, 2016. Order Setting Hearing Date and Pre-Hearing Schedule,  
20 p. 3. This motion is brought pursuant to that order.

### 21 III. ANALYSIS

#### 22 A. The Appeal Should Be Dismissed Because It Fails to Allege the Farm 23 Will Have Probable and Significant Adverse Environmental Impacts.

24 Dismissal is appropriate if an appellant fails to state a claim upon which relief may  
25 be granted. CR 12(b)(6). An appellant fails to state a claim upon which relief may be

1 granted if, even under his or her proffered facts, the claim is legally insufficient. *Gorman*  
2 *v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005). The claims in Appellants'  
3 Appeal are legally insufficient, even under their proffered facts, because they do not allege  
4 the Farm will have probable and significant adverse environmental impacts.

5 Under the State Environmental Policy Act ("SEPA"), the MDNS is entitled to  
6 substantial weight and can only be overturned if Appellants prove it is clearly erroneous.  
7 RCW 43.21C.090; *Anderson v. Pierce County*, 86 Wn. App. 290, 304, 936 P.2d 432  
8 (1997). In order to be "clearly erroneous" the Hearing Examiner must be "left with the  
9 definite and firm conviction that a mistake has been committed." *Boehm v. City of*  
10 *Vancouver*, 111 Wn. App. 711, 716, 47 P.3d 137 (2002). To meet their burden,  
11 Appellants must prove that the Farm has probable significant adverse environmental  
12 impacts. *Anderson*, 86 Wn. App. at 304-305; *Boehm*, 111 Wn. App. at 713, 719-720.  
13 Appellants cannot meet their burden by expressing skepticism at the effectiveness of the  
14 mitigating measures or raising potential, speculative, or insignificant impacts. *Anderson*,  
15 86 Wn. App. at 305; *Boehm*, 111 Wn. App. at 719-720, n. 7. Nor can the MDNS be  
16 overturned on the basis that it does not discuss, consider, or note certain items. An  
17 MDNS, unlike an environmental impact statement ("EIS"), need not present a detailed  
18 discussion of the proposed project, impacts, alternatives, and mitigation measures.  
19 Compare WAC 197-11-400 and -402 (detailing purpose and requirements for an EIS)  
20 with WAC 197-11-350 (discussing MDNS process and requirements). In fact, an MDNS  
21 is a type of DNS, and a DNS may be issued pursuant to a short form provided in the  
22 Washington Department of Ecology ("Ecology") SEPA rules. WAC 197-11-970.

23 The Appeal fails to state a claim upon which relief may be granted, and therefore  
24 must be dismissed, because it does not allege that the Farm, as mitigated, has probable  
25 significant adverse environmental impacts. CR 12(b)(6). The entire basis for the Appeal

1 appears to be that “[t]he MDNS does not adequately address” various issues, not that the  
2 Farm has probable significant environmental impacts. Notice of Appeal, p. 2. Similarly,  
3 many of the specific claims in the Appeal simply allege the MDNS “does not adequately  
4 consider” or “fails to note” certain items. *Id.* But SEPA does not mandate that a MDNS  
5 describe issues to a particular extent, and notably, the Appeal does not allege that the  
6 MDNS fails to include information that is required by SEPA or its implementing  
7 regulations, such as the information contained in the DNS form. WAC 197-11-350, -790.  
8 To the limited extent the Appeal does actually allege the Farm will have impacts, it fails to  
9 allege these impacts will be probable and significant. *E.g.*, Notice of Appeal, p. 3  
10 (alleging aquaculture gear “will impact tidal action, sand movement, and currents that can  
11 impact neighboring properties . . .”). However, SEPA does not require a MDNS to  
12 eliminate all impacts or mitigate impacts further after they reach a level of insignificance.  
13 WAC 197-11-350; *Boehm*, 111 Wn. App. at 713, 719-720. Therefore, even if the facts in  
14 Appellants’ Appeal were true, their claims are legally insufficient, and the Appeal must be  
15 dismissed. CR 12(b)(6).

16 **B. All of Appellants’ Individual Allegations Fail for Additional Reasons.**

17 Even if the Appeal did include an allegation that the Farm will have probable  
18 significant adverse environmental impacts, which it does not, it should be dismissed  
19 because each issue raised in the Appeal either fails to state a claim upon which relief may  
20 be granted for independent reasons, or because the Applicant is entitled to summary  
21 judgment as a matter of law.

22 1. The Applicant Is Entitled to Summary Judgment On Issue A (Eelgrass).

23 In Issue A,<sup>1</sup> Appellants allege “[t]he MDNS does not adequately consider the  
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25 <sup>1</sup> Appellants’ “Issues” as used herein correspond to the specific subsections included in section 3 of the Notice of Appeal (e.g. “Issue A” refers to section 3.a, “Issue B” refers to section 3.b, etc.).

1 impacts of soil disruption, harvesting and harvest boats, and proximity to an eelgrass  
2 recovery site.” Notice of Appeal, p. 2. Because Appellants do not contend the Farm has  
3 probable significant adverse impacts to eelgrass, Issue A must be dismissed. *Supra*, pp. 2-  
4 4. But even if Appellants made a proper legal allegation, the Applicant is entitled to  
5 summary judgment on Issue A.

6 A motion for summary judgment must be granted if no genuine issue of material  
7 fact exists, reasonable minds could reach but one conclusion, and the moving party is  
8 entitled to judgment as a matter of law. CR 56(c); *Zorist v. Culp*, 18 Wn. App. 622, 637,  
9 570 P.2d 147 (1977). In a summary judgment motion, the moving party has the initial  
10 burden of demonstrating the absence of a genuine issue of fact. *Young v. Key*  
11 *Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A moving respondent can  
12 meet this initial burden in one of two ways: (1) the moving party can set out its version of  
13 the facts and allege that there is no genuine issue as to the facts as set out; or (2) the  
14 moving party can point out that the nonmoving party lacks sufficient evidence to support  
15 its case. *Seybold v. Neu*, 105 Wn. App. 666, 677, 19 P.3d 1068 (2001). Once the moving  
16 party meets its initial burden, the burden shifts to the nonmoving party to establish the  
17 existence of a material fact regarding an element essential to its case. *Young*, 112 Wn.2d  
18 at 225. The nonmoving party may not rest on the pleadings, but must set forth, by  
19 affidavit or otherwise, “specific facts showing that there is a genuine issue for trial.” *Id.*

20 There is no genuine issue of material fact with regard to eelgrass impacts. The  
21 Farm will not have probable significant adverse impacts to protected eelgrass.<sup>2</sup> There is

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22 <sup>2</sup> While *Zostera japonica* (commonly known as Japanese eelgrass) may be present, it is a Class C  
23 noxious weed throughout Washington State. WAC 16-750-015. It is the policy of the state to  
24 limit economic loss and adverse effects due to the presence of noxious weeds, and Japanese  
25 eelgrass may therefore be controlled throughout the state. RCW 17.10.007. Appropriately,  
Appellants do not contend in the Appeal that the MDNS is in any way inadequate for failure to  
address impacts to this noxious weed.

1 no native eelgrass on the Farm site, and the closest native eelgrass that has been recently  
2 documented is located 330 feet away at a test plot. First Declaration of Philip Bloch  
3 (“Bloch Dec.”), ¶¶ 6, 7. Appellants appear to speculate that the Farm may impact this test  
4 plot somehow through “soil disruption, harvesting and harvest boats . . .” Notice of  
5 Appeal, p. 2. There is no evidence to support this assertion. While Appellants submitted  
6 three documents with their MDNS comment letter dated May 17, 2016 addressing  
7 eelgrass concerns, none of these documents demonstrates or supports a finding that the  
8 Farm would impact the eelgrass test plot. Bloch Dec., ¶¶ 7-11.

9 On the other hand, existing information clearly establishes the Farm will not  
10 impact the eelgrass test plot. *Id.*, ¶ 12. While the eelgrass test plot in Zangle Cove showed  
11 promise after it was initially planted in 2013, it subsequently died off completely. *Id.*, ¶  
12 13. There presently appears to be a total or near total lack of naturally recruiting or native  
13 eelgrass in Zangle Cove, and while supplemental planting efforts may continue, there are  
14 numerous natural environmental stressors that may cause it to disappear again. *Id.*, ¶ 14.  
15 Therefore, any concerns regarding potential impacts to native eelgrass are necessarily  
16 speculative, not probable, and cannot form a basis for overturning the MDNS. WAC 197-  
17 11-060(4)(a) (SEPA “require[s] the consideration of ‘environmental’ impacts ... with  
18 attention to impacts that are likely, not merely speculative.”).

19 Furthermore, even if eelgrass is successfully replanted at the Zangle Cove test plot,  
20 there is no reasonable basis to find that the Farm would adversely affect it. *Id.*, ¶¶ 15, 16.  
21 The amount of soil that is disturbed through geoduck aquaculture activities is highly  
22 localized and does not have an impact on the surrounding area. First Declaration of  
23 Jessica Côté (“Côté Dec.”), ¶ 13. Similarly, suspended sediments and turbidity associated  
24 with geoduck harvesting is highly localized. Numerical modelling predictions show that  
25 suspended sediments decrease from 100 percent at the site of individual harvests to 10

1 percent at a distance of 13 feet from the harvest point, and physical observations have  
2 shown that the suspended sediment concentrations (turbidity) associated with harvesting  
3 dissipate rapidly and within 50 feet of the harvest site. Côté Dec., ¶ 14. There is no basis  
4 for finding that geoduck harvest activities at the Farm site would produce a discernable,  
5 let alone significant, amount of suspended sediment and turbidity that would be  
6 transported to the eelgrass restoration site 330 feet away. *Id.* Further, Zangle Cove  
7 already experiences significant suspended sediments and turbidity due to natural  
8 disturbances (e.g. wind and wave action, storms, etc.). *Id.*, ¶ 9. Given this, and  
9 considering studies have shown that relatively small buffers are adequate to protect  
10 eelgrass, there is no realistic likelihood that cultivation activities associated with the Farm  
11 will have any adverse impact to the eelgrass at this test site, much less a probable and  
12 significant impact. Bloch Dec., ¶¶ 15, 16.

13 In an apparent recognition that the Farm has no likelihood to impact the existing  
14 eelgrass test plot, Appellants further claim “[t]he ongoing goal of this restoration project is  
15 to expand the eelgrass across the mouth of Zangle Cove.” Notice of Appeal, p. 2. This is  
16 precisely the type of speculation that is insufficient to warrant reversal of a MDNS.  
17 *Boehm*, 111 Wn. App. at 719-720; WAC 197-11-060(4)(a).

18 Because the Farm has no reasonable likelihood to have any impact to protected  
19 eelgrass, let alone a significant impact, the Applicant is entitled to summary judgment on  
20 Issue A.

21 2. Issue B (Protection of Environment) Must Be Dismissed.

22 Issue B must be dismissed. This Issue is titled “Protection of Environment,” yet it  
23 simply lists two regional criteria in the 1990 SMP and states the Inventory and  
24 Characterization Report for the County’s unfinished update to the 1990 SMP “designated  
25 Zangle Cove as an area to be protected . . .” Issue B does not allege the Farm will harm

1 the environment, let alone have probable significant adverse impacts to the environment.  
2 Nor does it allege that the Farm will violate criteria for SSDP approval in the County's  
3 1990 SMP. Moreover, compliance with regional criteria in the 1990 SMP is an issue to be  
4 addressed on the Farm's SSDP application; it is an improper challenge to the MDNS,  
5 where the question is whether the Farm, as mitigated, has probable significant adverse  
6 environmental impacts. *Supra*, pp. 2-4.

7 Appellants' reliance on the Inventory and Characterization Report for the County's  
8 unfinished SMP update is also misplaced, as the County's SMP update has not yet been  
9 completed, and is hence ineffective. The Inventory and Characterization report simply  
10 provides background and baseline information to use in updating the County's SMP; it  
11 does not itself contain or impose substantive policies or regulations on shoreline activities.  
12 RCW 90.58.090 (a SMP update is only effective 14 days after approval by Ecology);  
13 WAC 173-26-201(3)(c),(d) (describing shoreline inventory and characterization process).

14 Issue B fails to state a cognizable claim under SEPA to the MDNS and therefore  
15 must be dismissed.

16 3. The Applicant Is Entitled to Summary Judgment on Issue C (Plastics).

17 Appellants make two discrete claims in Issue C.<sup>3</sup> The first is that most plastics  
18 leach chemicals that have estrogenic activity, which cause adverse health effects in  
19 mammals. The second is that PVC tubes used in geoduck aquaculture will impact tidal  
20 action, sand movement, and currents that can impact other properties in Zangle Cove.  
21 There is no genuine issue of material fact with respect to either of these claims, and thus  
22 the Applicant is entitled to summary judgment on Issue C.

23 \_\_\_\_\_  
24 <sup>3</sup> Appellants, in their Notice of Appeal, state that the amount of PVC used in the Farm would  
25 create a structure requiring a building permit if the Farm were on land. Notice of Appeal, p. 3.  
This statement has no relevance to whether the MDNS is clearly erroneous and need not be  
addressed further in this motion.



1 With respect to the first claim, Appellants do not allege that the plastic chemicals  
2 that will be used for this Farm will leach chemicals that have estrogenic activity, nor do  
3 they allege that any adverse health effects that would result from such a release would be  
4 significant. For this reason alone, Issue C should be dismissed. *Supra*, pp. 2-4.

5 Furthermore, Appellants have provided no supporting evidence linking the specific  
6 plastics used in geoduck aquaculture to leaching of estrogenic chemicals, nor have they  
7 explained how such chemicals might contact and affect mammals if they were released.  
8 First Declaration of Dr. Rosalind A. Schoof (“Schoof Dec.”), ¶ 7. Geoduck farms may  
9 use either rigid PVC tubes or high density polyethylene (HDPE) for the first two years of  
10 the cultivation cycle to protect baby geoducks from predators. *Id.*, ¶ 8. While flexible  
11 PVC products may include phthalates, many of which show estrogenic activity in  
12 laboratory settings, these chemicals are not generally used in rigid PVC products such as  
13 the tubes used in geoduck aquaculture. *Id.* In addition, while Appellants submitted an  
14 article with their MDNS comments titled “Most Plastic Products Release Estrogenic  
15 Chemicals: A Potential Health Problem that Can Be Solved,” this article is not applicable  
16 to the plastics used in the Farm. *Id.*, ¶¶ 9,10. No products other than food packaging were  
17 tested in this study. *Id.*, ¶ 9. No PVC was tested, and the HDPE products tested are not  
18 similar to the HDPE products used in geoduck aquaculture. *Id.*, ¶¶ 9, 10. Finally,  
19 Appellants have failed to provide any information on potential risks of adverse effects to  
20 mammals that could be caused by leaching chemicals, and their argument also ignores that  
21 estrogenic chemicals are found in wastewater and stormwater runoff in urban areas, and  
22 these sources are far more prevalent than any chemicals that might leach from plastic  
23 aquaculture gear. *Id.*, ¶ 11. Thus, Appellants have provided no information  
24 demonstrating plastics as used in geoduck aquaculture leach chemicals that have  
25 estrogenic activity, nor have they shown that any chemicals that might leach would have

1 any adverse environmental impacts. *Id.*, ¶ 12. There is no genuine issue of material fact  
2 with respect to this claim, and the Applicant is entitled to summary judgment.

3 There is also no genuine issue of material fact with respect to the Farm's likely  
4 impacts on tidal action, sand movement, and currents. Only a very minor amount of  
5 sediment will accumulate around the geoduck gear; this sediment will be redistributed  
6 when it is removed after 18-24 months after planting; and this redistribution of sediment  
7 will likely cause no impact, much less a significant impact, to other properties. *Côté Dec.*,  
8 ¶¶ 9-12. This is particularly true given that Zangle Cove experiences high amounts of  
9 natural sediment distribution and turbidity, and the amount of sediment that will be  
10 available for redistribution after removal of the gear is minor in comparison to background  
11 conditions. *Id.* Similarly, the geoduck gear will likely cause no impacts to tidal action  
12 and currents, given it protrudes only a few inches above the substrate and is only present  
13 for a minor portion of the culture cycle. *Côté Dec.*, ¶¶ 7-8.

14 There is no genuine issue of material fact with respect to the specific claims raised  
15 by Appellants in Issue C, and the Applicant is therefore entitled to summary judgment on  
16 this issue.

17 4. The Applicant Is Entitled to Summary Judgment on Issue D (Recreation).

18 Appellants make two claims in Issue D.<sup>4</sup> The first claim is that the MDNS does  
19 not adequately address impacts on recreation. The second claim is that a geoduck farm  
20 will bring noise and commercial boat traffic into a rural, recreation area. The first claim  
21 must be dismissed because it fails as a matter of law. *Supra*, pp. 2-4. The second claim  
22 also fails as a matter of law because it does not allege the Farm will have probable

23 <sup>4</sup> Appellants, in their Notice of Appeal, provide figures that purportedly relate to the relative  
24 economic benefits of beaches and estuaries compared to geoduck aquaculture. The relevance of  
25 these figures to Issue D is not clear, and courts have made it clear that such economic interests are  
not within the zone of interests protected by SEPA. *Kucera v. Washington*, 140 Wn.2d 200, 212,  
995 P.2d 63 (2000).

1 significant adverse impacts to recreation; it simply alleges the Farm will bring noise and  
2 commercial boat traffic into the area. *Supra*, pp. 2-4. Furthermore, even if Appellants did  
3 allege the Farm has probable significant recreational impacts, the Applicant is entitled to  
4 summary judgment.

5 The Applicant submitted information to the County demonstrating the Farm does  
6 not have probable significant impacts to recreation. As stated in the November 20, 2015  
7 report from Confluence Environmental Company in response to public comments for the  
8 Farm:

9 The culture area is located entirely on passive-use, privately-owned  
10 tidelands from the tidal range of +3 MLLW to -4.5 MLLW. As described in  
11 Section 2.3 below, the culture area is exposed for a short period of daylight  
12 hours. The Project will not significantly impair recreation or navigation.  
13 Culture gear is present for a small portion of the entire culture cycle (18-24  
14 months). Even when present, tubes protrude up to 5 inches above the  
15 sediment surface, which allows for use of the overlying water. Commercial  
16 navigation is limited in the action area, and the Project would have no  
17 impact on navigation. Boston Harbor Marina lies within one mile of the  
18 project location; however, the Project area is located around a point and is  
19 outside of frequently-used navigation channels.

20 According to testimony by Vicki Wilson (Arcadia Point Seafood) in front  
21 of the Thurston County Hearing Examiner (AE1-10, SD22-06, page 89),  
22 kayakers often use the waters above their farm in south Puget Sound due to  
23 the increased biodiversity when gear is present. Based on the information  
24 presented above, and additional data in Section 2.3, the project will not have  
25 significant effects to typical recreation opportunities.

26 Bloch Dec., Ex. A (Confluence Report), p. 3.

27 The Confluence Report further indicates that the Farm's noise impacts will be  
28 minimal, as the Farm will comply with all applicable ordinances and regulations. *Id.*, p.  
29 10. The MDNS appropriately relies on compliance with applicable regulatory codes to  
30 help ensure the Farm's impacts are not significant. MDNS, p. 2; WAC 197-11-158. The

1 Farm's potential noise impacts will be further minimized "by using fully-enclosed and  
2 insulated motors with approved, muffled exhaust systems. Sound levels produced by  
3 vessels and other equipment used in geoduck aquaculture are similar to noise produced by  
4 recreational vessels such as those that frequent the area in route to and from the nearby  
5 marina." *Id.*, p. 10.

6 The Shorelines Hearings Board has cited many of these same considerations in  
7 affirming recent challenges to SSDPs and SEPA determinations for geoduck farms,  
8 including four farms in Thurston County and an 11-acre farm in Pierce County. *See*  
9 *Coalition to Protect Puget Sound Habitat v. Thurston County*, SHB No. 13-006c (October  
10 11, 2013) (Findings of Fact ("FF") 43-45 and Conclusions of Law ("COL") 17-20  
11 (affirming four SSDPs and MDNSs for geoduck farms in Thurston County); *Coalition to*  
12 *Protect Puget Sound Habitat v. Pierce County*, SHB No. 14-024 (May 15, 2015) (FF 6,  
13 50-51 and COL 13, 22) (affirming SSDP and MDNS for an 11-acre geoduck farm in  
14 Pierce County).

15 Geoduck farms in general do not have significant recreational impacts, and the  
16 Farm's MDNS contains appropriate conditions to ensure this particular proposal's impacts  
17 will not be significant. There is no genuine issue of material fact with respect to the  
18 Farm's likely impacts on recreation, and the Applicant is entitled to summary judgment on  
19 Issue D.

20 5. The Applicant Is Entitled to Summary Judgment on Issue E (Aesthetics).

21 Appellants claim in Issue E that the MDNS fails to address impacts to aesthetics  
22 and alleges the Farm will "bring noise, pollution and litter from plastics and other sources,  
23 and impairment of views." Because the MDNS need not "address" aesthetic impacts  
24 other than imposing appropriate conditions to mitigate impacts below the level of  
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1 significance, and Appellants fail to allege the Farm has probable significant aesthetic  
2 impacts, Issue E should be dismissed. *Supra*, pp. 2-4.

3           Furthermore, even if Appellants did allege the Farm has probable significant  
4 aesthetic impacts, the Applicant is entitled to summary judgment on this issue because  
5 there is no genuine issue of material fact. The Farm does not have probable significant  
6 adverse aesthetic impacts. The Applicant submitted information to the County  
7 demonstrating as such. As detailed in the Confluence Report, the Farm's predator  
8 protection gear will be completely submerged for the majority of the relatively short time  
9 that it is in place (the gear would only be visible for approximately five percent of the  
10 culture cycle and 13 percent of the year in which it is present), and area nets would  
11 provide a camouflage layer over the tubes. Confluence Report, pp. 15-16.

12           In addition, the MDNS contains numerous conditions to ensure the Farm is  
13 properly managed, further mitigating potential aesthetic impacts, including: compliance  
14 with the Washington State Geoduck Growers Environmental Codes of Practice for Pacific  
15 Coast Shellfish Aquaculture; signage containing contact information for a person  
16 designated to immediately address problems associated with the aquaculture bed; marking  
17 for all tubes, mesh bags, and nets that includes contact information; routine inspection of  
18 aquaculture gear; removal of aquaculture gear within two years after installation; routine  
19 patrols and debris collection; maintaining gear use information; using gear that blends into  
20 the surrounding environment; no use of permanent lighting; minimizing off-site glare  
21 from temporary lighting; and minimizing noise impacts. MDNS, pp. 6-7.

22           Appellants failed to allege the Farm has probable significant aesthetic impacts in  
23 Issue E. There is also no genuine dispute of material fact; the Farm is designed to have  
24 insignificant aesthetic impacts, and the MDNS contains extensive conditions to ensure the  
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1 Farm does not have probable and significant impacts. Therefore, the Applicant is entitled  
2 to summary judgment on Issue E.

3 6. Issue F (Continuing Trespass) Must Be Dismissed.

4 Issue F must be dismissed. It does not allege the Farm has probable significant  
5 adverse environmental impacts, but rather alleges certain mitigating conditions allow the  
6 Applicant to trespass on neighboring property. SEPA is an environmental statute, and  
7 interests such as property rights or trespass are not included within the elements of the  
8 environment under SEPA. RCW 43.21C.010; WAC 197-11-444. Claims regarding  
9 trespass or violation of Appellants' constitutional rights can be adjudicated only in court;  
10 the Hearing Examiner lacks jurisdiction to hear such claims. TCC 2.06.010; *Properties*  
11 *Four, Inc. v. State*, 125 Wn. App. 108, 117, 105 P.3d 416 (2005) (a legislatively-created  
12 tribunal can only exercise those powers explicitly granted or necessarily implied).  
13 Finally, it is simply incorrect to say that the MDNS's conditions authorize trespass.  
14 Nowhere do they state that the Applicant is authorized to enter another person's property  
15 without permission, and the MDNS in fact recognizes that the Applicant must comply  
16 with all applicable state and federal legal requirements. MDNS, pp. 2, 3, 7-8. Therefore,  
17 Issue F must be dismissed.

18 7. Issue G (Mitigating Conditions) Must Be Dismissed.

19 Issue G must be dismissed. It merely alleges "[t]he Mitigating Conditions are  
20 inadequate to address the above issues" and provides terse comments pertaining to several  
21 of the conditions. It is duplicative of the Issues addressed above, fails to allege the MDNS  
22 violates SEPA, and therefore must be dismissed.

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**IV. CONCLUSION**

Appellants' Appeal fails to mount a cognizable challenge to the MDNS, and it must be dismissed outright on this basis alone. In addition, there are independent grounds for dismissing or entering summary judgment in favor of the Applicant with respect to every Issue raised in the Appeal.

DATED this 11th day of August, 2016.

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