BEFORE THE HEARING EXAMINER
FOR THURSTON COUNTY

In the Matter of the Appeal of: Patrick Townsend, Kathryn Townsend, and Anneke Jensen 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	Appeal No. 16-106159 VE Case No. 2014108800 APPLICANT'S REPLY ON MOTION FOR DISMISSAL AND SUMMARY JUDGMENT

I. INTRODUCTION

Appellants' Response to Motion for Dismissal and Summary Judgement ("Response") fails to demonstrate that their Notice of Appeal ("Appeal") states a claim upon which relief may be granted. More strikingly, it fails to establish that there is a genuine issue of material fact with respect to whether the proposed geoduck farm ("Farm") has probable and significant adverse environmental impacts. The Applicant met its initial burden to demonstrate there is an absence of genuine issue of fact, with the support of three expert declarations and additional project-specific documentary evidence. The burden then shifted to Appellants to set forth specific facts showing there is a genuine issue of material fact for hearing. While this is a lower burden than they bear to

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ultimately prevail in this appeal, Appellants were required to produce some affirmative evidence demonstrating the Farm has probable and significant adverse environmental impacts. Appellants failed to do this.

Appellants' Response is not supported by a single declaration, let alone declarations from experts with knowledge on the environmental issues raised in their Appeal. Instead, Appellants make numerous conclusory and unsupported assertions, mischaracterize the Applicant's expert declarations, and attach several documents that fail to provide any indication that the Farm has probable and significant environmental impacts. Accordingly, the Applicant's Motion for Dismissal and Summary Judgment ("Motion") should be granted.

II. AUTHORITY AND ARGUMENT

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

Appellants were required to include a statement in their Appeal setting forth the factual and legal basis for their challenge to the Farm's mitigated determination of non-significance ("MDNS"). TCC 17.09.160.D.3. Section 3 of their Appeal attempts to do this, but it notably fails to allege that the MDNS was improperly issued because the Farm has probable and significant adverse environmental impacts. Appeal, pp. 2-4. This is a fatal failure, given a MDNS can only be reversed if Appellants demonstrate that the Farm has probable and significant adverse environmental impacts. *Anderson v. Pierce County*, 86 Wn. App. 290, 304-305, 936 P.2d 432 (1997); *Boehm v. City of Vancouver*, 111 Wn. App. 711, 713, 719-720, 47 P.3d 137 (2002); Motion, p. 3. The only reference to "significant" in the Appeal is in Appellants' request for relief, but even this merely states Appellants' various complaints combined "indicate" a significant impact. Accordingly, even under the relaxed standard of notice pleading and this administrative setting, the

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Appeal should be dismissed because it fails to mount a proper challenge to the MDNS.

B. All of Appellants' Individual Allegations Fail for Additional Reasons.

1. Appellants' Response Fails to Meaningfully Address the Applicant's Motion and Does Not Even Attempt to Properly Demonstrate There Are Genuine Issues of Material Fact for Hearing.

Appellants' Response also fails to meaningfully respond to the arguments in the Applicant's Motion that all of the issues presented in the appeal either warrant dismissal or entry of summary judgment on additional, independent grounds. As discussed below, Appellants failed to demonstrate that Issues B and F state a claim upon which relief may be granted. Appellants also failed to even attempt to properly demonstrate there are genuine issues of material fact for hearing. As stated in the Motion, the Applicant met its initial burden on summary judgment by both: (1) setting out its own version of the facts and alleging that there is no genuine issue as to the facts set out; or (2) pointing out that Appellants lack sufficient evidence to support their case. Motion, p. 3; *Seybold v. Neu*, 105 Wn. App. 666, 677, 19 P.3d 1068 (2001). At this point, the burden shifted to Appellants, as described by the Supreme Court of Washington:

> If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then the trial court should grant the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *see also T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630–32 (9th Cir.1987) . . .
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> In making this responsive showing, the nonmoving party cannot rely on the allegations made in its pleadings. CR 56(e) states that the response, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989) (footnotes omitted).

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The Applicant provided three expert declarations and site-specific documentary evidence demonstrating the Farm does not have probable and significant adverse impacts to the environment and/or that the Appellants have insufficient evidence to support their claims. Motion, pp. 4-14. Appellants bore the burden to set forth specific facts by affidavit or otherwise showing that there is a genuine issue of material fact. *Young*, 112 Wn.2d at 226; CR 56(e). Appellants failed to do this. They did not include a single declaration with their Response, let alone a declaration from an expert or other individual with knowledge regarding the alleged environmental impacts of the Farm. Instead, Appellants rely upon conclusory and unsupported assertions, mischaracterize the Applicant's expert declarations, and attach several documents that fail to provide any indication that the Farm has probable and significant impacts to the environment. Appellants bear the burden of proof at hearing; if they cannot even make an initial showing that there are at least some facts demonstrating the Farm has significant impacts, summary judgment is appropriate.

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

They key material facts with regard to eelgrass impacts are not in dispute. There is no native eelgrass on the Farm site. The closest native eelgrass that has been recently documented was a test site 330 feet away that complete died-off recently; it is unclear whether supplemental planting efforts will be successful. Motion, p. 6; First Declaration of Philip Bloch ("Bloch Dec."), ¶¶ 6, 7, 13, 14.

Ms. Jessica Côté, an expert in sediment transport with significant experience evaluating geoduck aquaculture, stated "there is no basis for finding that geoduck harvest activities at the Farm site would produce a discernible, let alone significant, amount of suspended sediment and turbidity that would be transported to the eelgrass restoration project 330 feet away. There is also no basis for finding that geoduck harvest activities at

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the Farm site would destabilize adjacent 'soils.'" First Declaration of Jessica Côté ("Côté Dec."), ¶ 14. For these and additional reasons, Mr. Bloch stated "there is no reasonable basis to find that the Farm will have any impacts to native eelgrass." Bloch Dec., ¶ 16.

In response, Appellants summarily state, without any support, that 330 feet is "very close" and that the presence of the geoduck farm "continues to raise unanswered factual questions." Response, p. 5. Appellants completely ignore Mr. Bloch's declaration, and they mischaracterize Ms. Côté's declaration, saying she stated "geoduck aquaculture activities 'might' sometimes be localized." Ms. Côté never uses "might" in her declaration, and she certainly does not say that geoduck aquaculture activities might sometimes be localized. Rather, she provides specific data regarding sediment transport associated with geoduck farming and concludes there is no reasonable basis for finding the Farm will have even a discernible impact to the eelgrass restoration site. Côté Dec., ¶¶ 13-14. Appellants' failure to provide any specific information demonstrating the Farm has probable and significant impacts to eelgrass confirms that there are no such impacts, and the Applicant is entitled to summary judgment with respect to Issue A.

3. Issue B (Protection of Environment) Must Be Dismissed.

Issue B, at best, alleges the Farm fails to comply with permit approval criteria in Thurston County's 1990 Shoreline Master Program ("1990 SMP") and is inconsistent with the shoreline inventory associated with the County's incomplete SMP update. Appeal, pp. 4-5; Motion, pp. 7-8. These are improper challenges in an MDNS appeal, which is focused on whether the Farm has probable and significant adverse environmental impacts. Motion, pp. 4-5, 7-8. Appellants do not meaningfully respond to this argument. Instead, they state "Issue B uses criteria established in the 1990 SMP as a guide that should be used for protection of the local Thurston County environment, not as a challenge more appropriate for SSDP violations." If anything, this statement confirms

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that Appellants are using this appeal to improperly collaterally challenge the Farm's compliance with the County's SMP in this SEPA appeal.

Appellants also discuss at length a paper based on a modeling study performed for Central Puget Sound. Response, pp. 6-7. This is an exercise in misdirection. The Applicant's motion with respect to Issue B is for dismissal, not summary judgment; the Applicant's argument is that, regardless of the factual support, a claim of noncompliance with the County's Shoreline Master Plan is not properly made in a SEPA appeal. Appellants' contentions about the modeling study are simply irrelevant to this legal issue. Issue B fails to state a claim upon which relief may be granted, and it should be dismissed.

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

Appellants' Appeal alleges the Farm could have impacts associated with the use of plastics by two discrete mechanisms: (a) releasing chemicals that have estrogenic activity; and (b) impacting tidal action, sand movement, and currents. Appeal, p. 3. Appellants failed to demonstrate there is a genuine issue of material fact with respect to either of these two claims. Thus, the Applicant is entitled to summary judgment on Issue C.

a. Release of Chemicals that have Estrogenic Activity.

The only support Appellants offer for the claim that the Farm's plastics will release chemicals that have estrogenic activity is an article by Yang et al., "Most Plastic Products Release Estrogenic Chemicals: A Potential Health Problem That Can Be Solved." As demonstrated in the Motion and supporting First Declaration of Rosalind A. Schoof ("First Schoof Dec."), this article does not demonstrate that plastics used in geoduck aquaculture leach chemicals that have estrogenic activity, nor does it demonstrate that any chemicals that might leach would have any adverse environmental impacts. Motion, pp. 9-10; First Schoof Dec., ¶ 12. Appellants do not contend Dr. Schoof's analysis and conclusions are inaccurate or contradicted by opposing information; rather,

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they contend Dr. Schoof did not definitively disprove their claims and speculate there is a "possibility that Applicant's aquaculture gear could still contain such chemicals." Response, p. 10. The legal standard, however, is whether the Farm has probable and significant adverse environmental impacts, not whether there is a possibility of impacts, *Boehm*, 111 Wn. App. at 719-720. The Applicant met its burden by demonstrating that Appellants lack sufficient evidence to support this claim. *Seybold*, 105 Wn. App. at 677. Because Appellants did not set forth specific facts to demonstrate the Farm has probable and significant impacts with respect to this claim, but merely speculated there is a "possibility" of such impacts, the Applicant is entitled to summary judgment.

b. Impacts to Tidal Action, Sand Movement, and Currents.

Appellants set forth no specific facts in their Response showing that the Farm will have any, let alone probable and significant, impacts to tidal action, sand movement, and currents. Response, pp. 10-11. Instead, Appellants summarily assert there is a material issue of fact regarding this claim because the Applicant "only" established that there will "likely" be no impacts. *Id.* This argument misses the mark. Again, the legal standard is whether the Farm has probable and significant impacts, not whether there are any potential impacts, and the Applicant met its burden by demonstrating both that the Appellants lack sufficient evidence to support this claim and by setting out facts demonstrating there are no probable and significant impacts associated with the Farm. Motion, p. 10; Côté Dec., ¶¶ 7-12; *Boehm*, 111 Wn. App. at 719-720; *Seybold*, 105 Wn. App. at 677. Appellants attempt to dismiss the Applicant's analysis as speculation, yet they can point to no flaw in the analysis. Response, p. 10. This is because there is no flaw in the Applicant's analysis; it is supported by a detailed declaration of an expert in sediment transport, tidal action, and currents, with extensive experience analyzing

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geoduck aquaculture. Appellants' Response is supported by no facts, and the Applicant is entitled to summary judgment.

c. New Claims Raised in Appellants' Response.

Appellants improperly attempt to raise new claims in their Response, contending plastics may harm birds due to ingestion and entanglement, and may cause harm by creating microplastics, relying on "Silent spring in the ocean" by Boris Worm. Response, pp. 8-9. These claims are clearly outside of the scope of issues raised in the Appeal, were accordingly not addressed in the Motion, and should be summarily dismissed. Appeal, pp. 2-4; TCC 17.09.160.D.3.; *Kirby v. City of Tacoma*, 124 Wn. App. 454, 472, 98 P.3d 827 (2004) (a plaintiff may not amend its complaint through arguments in its brief opposing a motion for summary judgment). Moreover, even if these claims were included in the Appeal, which they were not, the Applicant would be entitled to summary judgment on them. The Worm article simply provides a broad overview regarding plastic marine debris and microplastics. It does not discuss aquaculture gear, let alone geoduck farming gear, as a source of this problem, and it in fact confirms controlling land-based plastic waste is "the first choice for reducing plastic pollution." Second Declaration of Rosalind A. Schoof, ¶¶ 4. Thus, Appellants lack sufficient evidence to support these claims and the Applicant is entitled to summary judgment.

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

Appellants failed to set forth any specific facts demonstrating the Farm has probable and significant impacts to recreation. Therefore, the Applicant is entitled to summary judgment on Issue D.

Appellants mistakenly rely on a news article from 2006 in which Bill Dewey from Taylor Shellfish Farms states geoduck farmers try to avoid siting farms in front of waterfront homes, but that it is getting harder to find such places. Response, p. 12.

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Appellants did not produce a copy of this article. Assuming the quote is accurate and not taken out of context, it in no way establishes that the Farm has probable and significant recreational impacts. The statement was made 10 years ago and neither mentions recreation nor states there are any impacts from geoduck farming. It simply acknowledges geoduck farms can be controversial. But controversy does not equal impacts, and neighborhood opposition itself may not form the basis for land use decisions. "neighborhood opposition alone may not be the basis of a land use decision." *Tugwell v. Kittitas County*, 90 Wn. App. 1, 9, 951 P.2d 272 (1998).

The remainder of Appellants' Response on Issue D primarily consists of quoting or describing certain terms and asserting, without any factual support, that there are genuine issues of material fact with regards to what they mean.[1] Response, pp. 12-14. Appellants also speculate that two years for the presence of gear "seems like a material amount of time to inhibit recreation." *Id.*, p. 12. Yet Appellants have produced no evidence there will be any impacts to recreation, and their statement that two years "seems like a material amount of time" is unsupported conjecture. It is also insufficient to meet their burden of proof that the Farm has probable and significant impacts. Accordingly, the Applicant is entitled to summary judgment on Issue D.

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[1] Appellants also, confusingly, rely on *Washington Shell Fish, Inc. v. Pierce County*, 132 Wn. App. 239, 131 P.3d 326 (2006). *Washington Shell Fish* did not involve a SEPA appeal and the opinion nowhere states that the subject geoduck farm has significant recreational impacts. The question before the court was whether the geoduck farm required a shoreline permit. The Applicant has already agreed to obtain a shoreline permit for the Farm, so *Washington Shell Fish* has no relevance. Moreover, the County in *Washington Shell Fish*, unlike Appellants, introduced evidence to substantiate their claims. *Washington Shell Fish* is also inapplicable, as the farm that was the subject of that case used extensive gear that is not proposed for the Applicant's Farm, including cement cans and several hundred feet of nylon rope. 143 Wn. App. at 247.

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

Appellants failed to set forth any specific facts demonstrating the Farm has probable and significant impacts to aesthetics. Therefore, the Applicant is entitled to summary judgment on Issue E.

Appellants' Response on Issue E fails for many of the same reasons as Issue D. Appellants mistakenly rely on the quote from Mr. Dewey and assert, without any factual support, that there are material questions of fact regarding the Farm's aesthetic impacts and the adequacy of the MDNS conditions. Response, pp. 14-16.

Appellants attempt to demonstrate that there are material issues of fact by asserting the visibility of the Farm's geoduck gear "could be much higher" in reliance on Exhibit E to their Response, which contains data from 2007. This argument fails right out of the gate, since Appellants provide no explanation for who produced Exhibit E, whether it is applicable to the Farm, and how, if at all, it indicates the Farm's gear "could be much higher" than as stated in the Motion and supporting documentation, let alone how the Farm's aesthetic impacts are probable and significant. Response, p. 15, Exhibit E. Regardless, there is no material difference in terms of geoduck gear visibility using the data provided in Exhibit E compared to the Confluence Report. First Declaration of Marlene Meaders ("Meaders Dec."), ¶ 11. Rather, Exhibit E simply paints a skewed picture of geoduck gear visibility, as it fails to report the number of hours each day that gear would be visible, only reports data for the limited period of the year when gear would be most visible, and fails to calculate geoduck gear visibility over the entire culture cycle. Meaders Dec., ¶ 12. Therefore, there is no genuine issue of material fact with respect to whether the Farm has probable and significant aesthetic impacts, and the Applicant is entitled to summary judgment on Issue E.

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7. Issue F (Continuing Trespass) Must Be Dismissed.

Appellants failed to provide any meaningful response to the Applicant's motion to dismiss Issue F. The only legal authority Appellants cite in their Response brief confirms the scope of SEPA does not extend to interests such as property rights or trespass. Response, p. 16, citing RCW 43.21C.010 and WAC 197-11-444. Appellants also fail to respond to the argument that the Hearing Examiner lacks authority to adjudicate trespass claims. Motion, p. 14. Issue F must therefore be dismissed.

8. Issue G (Mitigating Conditions) Must Be Dismissed.

Appellants' Response fails to address the argument that Issue G is duplicative to the above issues. If anything, it confirms this. Because Issues A through F should be dismissed or have summary judgment entered in favor of the Applicant, Issue G should be dismissed as well.

III. CONCLUSION

For the reasons state above and in the Motion, the Applicant respectfully requests that the Hearing Examiner dismiss or enter summary judgment in favor of the Applicant with respect to every Issue raised in the Appeal.

DATED this 26th day of August, 2016.

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